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**Code of Civil Procedure, 1908 -** Order XXXVII Rule 3(5) – Summary suit - Leave to defend – Grant of - Plaintiff society filing recovery suit on basis of cheque issued by defendant - Criminal proceedings qua dishonour of aforesaid cheque also pending before Judicial Magistrate - Defendant seeking leave to defend on ground that cheque was given towards security and writings on it are forged – Held - Court may grant unconditional leave to defend suit when defendant is able to establish that he has good triable defence – In appropriate cases, Court may grant leave to defend subject to defendant making payment in Court or otherwise securing plaintiff's claim – However, where defence put forth by defendant is illusory or moonshine then by granting leave to defendant, statutory holistic purpose of Order XXXVII Rule 3(5) would rather be defeated – On facts, defendant not found having taken plea of 'security cheque' or of 'forgery' before criminal court – Application for leave to defend declined. (Paras 20 to 23) Title: M/S Himachal Co-operative Non Agriculture Thrift and Credits Society Limited Vs. Raj Kumar Mittal and another, OMP No. 178 of 2018, Page-839.

**Code of Civil Procedure, 1908 -** Order XXXVII Rule 3(5) – Summary suit - Leave to defend – Grant of - Plaintiff society filing recovery suit on basis of cheque issued by defendant - Criminal proceedings qua dishonour of aforesaid cheque also pending before Judicial Magistrate - Defendant seeking leave to defend on ground that cheque was given towards security and writings on it are forged – Held - Court may grant unconditional leave to defend suit when defendant is able to establish that he has good triable defence – In appropriate cases, Court may grant leave to defend subject to defendant making payment in Court or otherwise securing plaintiff's claim – However, where defence put forth by defendant is illusory or moonshine then by granting leave to defendant, statutory holistic purpose of Order XXXVII Rule 3(5) would rather be defeated – On facts, defendant not found having taken plea of 'security cheque' or of 'forgery' before criminal court – Application for leave to defend declined. (Paras 20 to 23) Title: M/S Himachal Co-operative Non Agriculture Thrift and Credits Society Limited Vs. Raj Kumar Mittal and another, OMP No. 179 of 2018, Page-845.

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**Code of Criminal Procedure, 1908**- Section 227- Discharge- Validity-Additional Sessions Judge discharging accused of offence under Section 306 read with Section 34 of IPC- Revision against by complainant- Complainant submitting that suicide note opined by expert, FSL, to have been authored by the deceased clearly accusing accused of having instigated accused to commit suicide- Statements of "V" and brother of deceased recorded during investigation also corroborating allegations of instigation by accused- However, allegations averred in suicide note attributing accused employers of deceased taking prompt action against him and "H" in scuffle taking place between them and not initiating any action in similar matters happening between other employees- Held, material on record does not indicate that accused had requisite mens rea of their goading or instigating deceased to commit suicide or they intentionally aided in commission of such act- Ingredients of offence abatement totally lacking- Deceased only ventilating his grievances against disciplinary authorities through suicide note- Statements of "V" and brother of deceased inconsequential- No illegality in order of discharge- Revision dismissed. (Paras 4 to 7) Title: Pradeep Kumar Vs. State of H.P. & others, Page- 1093.

**Code of Criminal Procedure, 1973 –** Section 258 –Negotiable Instruments Act, 1881, (Act) - Section 138 – Dishonour of Cheque –Complaint – Discharge of accused – Whether permissible ? Held, provisions regarding stoppage of proceedings and discharge of accused contained in Section 258 of Code attracted only in cases instituted on chargesheet – In complaint case for offence under section 138 of Act, Section 258 of Code would not apply save and except to extent spelt out in Meters and Instruments Private Limited and another vs. Kanchan Mehta 2018 (1) SSC 560. (Para 4) Title: Gulabjeet Singh & Ors. vs. Ravel Singh, Page- 268.

**Code of Criminal Procedure, 1973** – Section 258 –Negotiable Instruments Act, 1881, (Act)- Sections 138 and 143 – Dishonour of Cheque – Complaint – Stoppage of proceedings – Scope – Held, stoppage of proceedings and discharge of accused can be ordered only if accused has paid cheque amount together with interest and costs – In other eventualities there is no scope of applicability of section 143 of Act, read with section 258 of Code. (Paras 8 & 9) Title: Gulabjeet Singh & Ors. vs. Ravel Singh, Page- 268.

**Code of Criminal Procedure,1973-** Sections 306(4) &306(5)(a)(i)- Grant of pardon- Procedure thereafter, when case not triable exclusively by Special Judge/Session Court – Whether case still requires to be committed to Court of Session ? – Held - No - Special Judicial Magistrate (Designated Magistrate for CBI Cases) since authorized to conduct trial

for offences involved, not required to commit case to any other Court for trial as specified in Section 306(5)(a)(i) of Code – Contention of accused that Special Judicial Magistrate after granting pardon ought to have committed case to Court of Session for trial and for want of compliance of these provisions accused entitled for acquittal, rejected – Order of Special Judicial Magistrate rejecting application of accused praying for their acquittal upheld. (Paras 7 & 12) Title: Rajesh Thakur vs. Central Bureau of Investigation & others, Page- 98.

**Code of Criminal Procedure, 1973**- Sections 328 & 329- Insanity- Plea of - Adjudication- Procedure- Accused allegedly murdered his mother for not acceding to his demand of car- During trial accused filing application and raising plea of insanity and consequential incapacity to defend trial- Sessions Judge dismissing application as not pressed- Accused convicted by Sessions Judge - Appeal- Accused raising plea of non-compliance with provisions of Sections 328 & 329 and vitiated trial- Held, averments in application itself were sufficient for trial Court to have recorded its satisfaction qua necessity of seeking expert opinion whether accused was of unsound mind and incapable to defend himself particularly when prosecution had not opted to file reply to said application before proceeding further with trial- Genesis of occurrence involving assault on mother with darat prima-facie sufficient to hold enquiry as envisaged under Sections 328 & 329 of Code- For non-compliance thereof trial vitiated- Appeal allowed- Conviction set aside- Matter remanded for retrial from stage of holding enquiry into plea of insanity of accused. (Paras 16, 19, 28 29) Title: Ajay Kumar Vs. State of Himachal Pradesh, Page- 734.

**Code of Criminal Procedure, 1973 -** Section 357(1) and (3)- **Negotiable Instruments Act, 1881 -** Section 138- Whether court is competent to grant compensation to complainant without first assessing amount of fine? – Held – Yes - Power of court to award compensation is not ancillary to other sentences but in addition thereto – If fine is imposed then Magistrate can award compensation out of fine imposed by him under Section 357(1) of Code – Where fine is not imposed, it is permissible to award compensation under Section 357(3) of Code. (Paras 22 & 31) Title: Dhir Singh Vs. Jagmohan Mehta Page-2.

**Code of Criminal Procedure, 1973-** Section 357(3)- **Negotiable Instruments Act, 1881-** Section 138- Compensation – Sentence in default, whether can be imposed? – Held – Yes- It is permissible for court to impose imprisonment in default of payment of compensation. (Para 26) Title: Dhir Singh Vs. Jagmohan Mehta, Page-2.

**Code of Criminal Procedure, 1973** - Section 377- **Narcotic Drugs and Psychotropic Substances Act, 1985** - Section 20 - Inadequacy of sentence- Special Judge convicting accused for possessing intermediate quantity (798 gms.) of charas on his confession and sentencing him to imprisonment for period already undergone and fine- Appeal - Held, while determining quantum of sentence discretion lies with Court, but it not to be exercised according to whims and caprice- It is duty of Court to impose adequate sentence - Purpose of imposition of requisite sentence is protection of society and legitimate response to collective conscience- Reasons assigned by Trial Court while imposing sentence, that accused is first offender, he is sole bread earner of family and honest admissions of guilt, alone cannot be parameters for deciding quantum of sentence -No discussion of circumstance as to why accused sentenced for period already undergone. Appeal allowed – Sentence set aside Matter remanded for fresh consideration. (Paras 11 & 12) (D.B.) Title: State of Himachal Pradesh vs. Jindu Ram, Page- 143.

**Code of Criminal Procedure, 1973** – Sections 378 and 386 – Appeal – Powers of Appellate Court – Held, Appellate Court has power to review and reappreciate evidence adduced before Trial Court – But It must give proper weight and consideration to findings of Trial Court - And should interfere with acquittal if based on total misappreciation of facts or erroneous view of law or entire approach in dealing with evidence patently illegal. (Para 6). Title: State of H.P. vs. Amar Nath, Page- 466.

**Code of Criminal Procedure, 1973 -** Sections 397 & 401- Revisional jurisdiction- Scope – Held - Revisional jurisdiction should normally be exercised in exceptional cases where there is glaring defect in proceedings or there is manifest error on point of law and consequent miscarriage of justice. (Para 5) Title: Dhir Singh Vs. Jagmohan Mehta, Page- 2.

**Code of Criminal Procedure, 1973** – Sections 407 and 482 – Transfer of case – Grounds – Held, power to transfer case is to be exercised cautiously and in exceptional situation where it becomes necessary to provide credibility to trial – Order not to be passed as matter of routine or merely because interested party has expressed some apprehension about proper conduct of trial. (Para 6) Title: Ramesh Kumar and others vs. State of H.P. and another, Page- 406.

**Code of Criminal Procedure, 1973** – Sections 407 and 482 – Transfer of case – Grounds- Apprehension – Held, apprehension of party must be real – Petitioners seeking transfer of trial on ground that Bar Association of District having passed resolution not to defend them – Copy of resolution of Bar not annexed nor names of Advocates whom petitioners contacted and they refused to defend them, mentioned in petition – Apprehension mercurial and not reasonable – Petition dismissed. (Para 8) Title: Ramesh Kumar and others vs. State of H.P. and another, Page- 406.

**Code of Criminal Procedure, 1973-** - Regular bail – Grant of- Applicant booked as co-accused for offences under Sections 302, 201, read with Section 120-B of Penal code seeking regular bail- Earlier bail application of applicant dismissed by Sessions court when case was under investigation- Applicant filing fresh application after presentation of chargesheet- On facts, applicant already enabled recovery of burnt clothes of deceased- No material suggesting her direct participation in commission of murder- She cooperated during investigation- Application allowed with conditions. (Paras 5 & 6) Title: Shakuntla Devi Vs. State of H.P., Page-679.

**Code of Criminal Procedure, 1973-** Section 438 **-** Pre-arrest bail - Grant-Antecedents of accused- Relevancy - Application of accused seeking pre-arrest bail rejected on finding him a previous convict and many others FIRs registered against applicant including two FIRs in that very year- Mere fact that nothing to be recovered from him in present case, irrelevant. (Paras 4 to 6) Title: Hanish Mohammed Vs. State of Himachal Pradesh, Page-726.

**Code of Criminal Procedure, 1973-** Section 439 **-** Regular bail- Grant- Accused, religious preacher (Guru), going to house of devotee and committing rape on her- Petitioner seeking regular bail after rejection of same by Session Court- Held, offence committed by person pretending himself a pious and spiritual person more serious that committed by impious person- Commission of offence by such person shakes trust of society at large- Address given by accused found incorrect- He had no permanent address – Not entitled for bail - Petition rejected. (Paras 10 to 12) Title: Anand Gopal Vs. State of Himachal Pradesh Page-147.

**Code of Criminal Procedure, 1973** – Section 439 – Regular Bail – Grant of – Accused involved in offence under section 302 Indian Penal Code, 1860, jumping bail and not making himself available before Court – Surety as well as father of Accused showing inability to trace him out and produce accuse before Court – Police arresting accused pursuant to Non-Bailable warrants by tracking his phone – Held, in circumstances, accused not entitled for Bail – Petition dismissed. (Paras 6 to 10) Title: Vishwajeet Kumar vs. State of H.P., Page-389.

**Code of Criminal Procedure, 1973**- Section 439- **Indian Penal Code, 1860**- Sections 363, 376 & 506- **Protection of Children from Sexual Offences Act, 2012**- Section 4- Regular bail- Grant of- Prosecutrix and her mother during trial, resiling from statements given during investigation- Prosecutrix also feigning ignorance of incriminatory articles sent for DNA examination having been recovered at her behest- Accused in lock up for last two years- No likelihood of his escape- Conditional bail granted. (Paras 2 & 3) Title: Gaurav Vs. State of H.P., Page- 771.

**Code of Criminal Procedure, 1973**- Section 439 - **Narcotic Drugs and Psychotropic Substances Act, 1985** – Section 37 – Bail – Grant of – Applicability of rigors – Police recovering huge quantity of banned drugs from Chemist shop of accused – Accused not having licence to posses them - Accused seeking bail and same resisted by prosecution on ground that rigors of section 37 of Act do not permit same – On facts, accused old and behind bars since long – Also remained hospitalized at IGMC, Shimla and PGI, Chandigarh, where he was operated upon – Fluctuating high blood sugar of accused requiring continuous monitoring – Medical facilities not available in Judicial lockup to deal emergent situations – Almost bed ridden conditions making it unlikely that he would indulge in illicit trade of drugs if released on bail – Conditional bail granted but purely on medical grounds. (Paras 8, 9, 13 & 15) Title: Subhash Chand vs. State of Himachal Pradesh, Page- 300.

**Code of Criminal Procedure, 1973**- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985** (Act)- Section 20-Regular bail- Grant of- Held, principles that bail is a general rule and person should not be put in jail during trial, are not attracted in cases where there is reverse onus or statutory presumption with regard to commission of offence provided by Statute- Many other cases, including one under Act, pending against accused- Bail denied though recovered substance falling in intermediate category- Application dismissed. (Paras 4 to 6) Title: Prem Raj Vs. State of H.P., Page-784.

**Code of Criminal Procedure, 1973-** Section 439**- Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 21 & 37- Regular bail- Grant of- Applicant accused of possessing 9 grams of Heroin, seeking regular bail- Prosecution contesting bail on ground of his being an habitual offender since another case under Act already pending against him- Held- Case does not fall in category of Commercial quantity- No likelyhood of accused fleeing away from justice or his tampering with prosecution evidence- Apprehension of prosecution can be met by imposing stringent conditions- Application allowed- Accused ordered to be released on bail subject to conditions- Prosecution given liberty to approach Court for cancellation of bail if accused found involved in another case. (Paras 5 to 7) Title: Mayur Verma Vs. State of Himachal Pradesh, Page-636.

**Code of Criminal Procedure, 1973**- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Sections 21, 35, 37 & 54- Bail- Grant of- Recovery of

contraband from room- Accused seeking bail on ground that contraband was not in his actual possession- And his involvement in case not forthcoming- Held, provisions of Act put reverse onus on accused by raising certain presumptions against him and said provisions cannot be ignored - In such cases, parameters for considering bail are different- House from where recovery effected taken on rent by wife of accused- Other accused his close relatives- Applicant cannot take plea that room was not in his possession- Accused involved in another case under Act- Principle of parity also not applicable- Application dismissed. (Paras 9 to 14) Title: Ajay Kumar Vs. State of H.P., Page- 786.

**Code of Criminal Procedure, 1973-** Sections 470(3), 482**- Factories Act, 1948 –** Section 106- Cognizance- Limitation- Computation- Petitioner filing petition for quashing of complaint filed by Labour Inspector for offences under Act on ground of its being barred by limitation- Held- Section 106 of Act though stipulates that no court shall take cognizance of offences under Act after expiry of three months from date of commission of alleged offence, but time taken for obtaining prosecution sanction from government has to be excluded by virtue of S.470(3) of Code for computation of period of limitation- Labour inspector conducting inspection on 3-2-17 sending records for sanction on 13-2-17 and obtaining prosecution sanction on 11-5-17- Complaint filed on 22-5-17 not barred by limitation- Petition dismissed. (Paras 9 & 10) Title: M/S Changer Vidut Kranti Pvt. Ltd. and another Vs. State of Himachal Pradesh and others, Page- 522.

**Code of Criminal Procedure, 1973-** Section 482 **-** Complaint u/s S 406, 409 and 420 IPC against bank officials for forcible repossession of vehicle in default of loan. Petition for quashing of summoning order and consequential proceedings. In complaint no allegation, specific in nature against bank officials, there is not even a whisper that what role was actually played by officials i.e. accused. Held- test to be applied by court is as to whether uncontroverted allegations as made prima facie establish offence. Court to take into consideration any special features which appear in case to consider whether it is in interest of justice to permit a prosecution to continue. Petition allowed and summoning order of trial court quashed. (Paras 12 to 19) Title: ICICI Bank Ltd. and others Vs. State of Himachal Pradesh and another, Page-510.

**Code of Criminal Procedure, 1973-** Section 482- **Himachal Pradesh Panchayati Raj Act,1994 (Act) –** Section 32 –Transfer of case- After investigating FIR lodged by petitioner, Investigating officer holding commission of offences punishable under sections 323, 341 and 504 of Indian Penal Code, 1860 and sending record to Panchayat since offences exclusively triable by it under Act- Petitioner filing petition in High Court for direction for registration of case against respondents under sections 307, 326, 341, 504, 506 and 34 Indian Penal Code, 1860. Also praying for cancelling summons issued by Gram Panchayat. Facts revealing that investigating officer had obtained medical opinion about nature of injuries suffered by petitioner- Injuries found simple in nature and not dangerous to life- Petition dismissed. (Paras 4 to 6) Title: Shankar Dass Vs. State of Himachal Pradesh and others, Page-533.

**Code of Criminal Procedure 1973-** Section 482**- Protection of Women from Domestic Violence Act, 2005 (Act)**- Section 12 – Inherent Powers- Exercise of- Quashing of complaint- Husband and his relatives filing petition for quashing of complaint filed against them under Section 12 of Act on ground that respondent (Wife) is adamant and despite settlement effected between parties before Gurudwara sabha, she left along with her father and also took away her clothes, ornaments and vehicle- There is no domestic violence to her

as she is residing with her parents of her own volition - Held- Wife found having already led her evidence in complaint- Petitioners to prove their defense only during trial of that complaint before Trial Court- Petition dismissed. (Paras 5 to 7) Title: Kanwaldeep Singh Monga & ors. Vs. Simranpreet Kaur, Page-667.

**Constitution of India, 1950-** Articles 14 and 15**- Rights of Persons with Disabilities Act, 2016 (New Act) -** Section 32- Reservation in higher educational institutions - University denying admission to letter petitioner in Post -graduation course on ground that its Ordinance based on Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (old Act) speaks of providing only 3% reservation and no seat available for her against that category-Petitioner contending that as per New Act, reservation ought to be to extent of 5% instead of 3% - Inter regnum, University issuing notification and enhancing percentage of reservation for disabled students from 3% to 5%- Held, statutory provision mandates that all government institutions of higher education and other higher education institutions receiving aid from State Government shall reserve not less than 5% seats for persons with benchmark disabilities- This 5% reservation of seats has to be provided each time when process of filling up seats is initiated by above mentioned Institutions - Petition disposed of. (Para 29) (D.B.) Court on its own motion vs. State of H.P. and others, Page- 167.

**Constitution of India, 1950-** Articles 14 and 15**- Rights of Persons with Disabilities Act, 2016 (New Act) -** Section 32- Reservation in higher educational institutions - University denying admission to letter petitioner in Post -graduation course on ground that its Ordinance based on Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (old Act) speaks of providing only 3% reservation and no seat available for her against that category-Petitioner contending that as per New Act, reservation ought to be to extent of 5% instead of 3% - Inter regnum, University issuing notification and enhancing percentage of reservation for disabled students from 3% to 5%- Held, statutory provision mandates that all government institutions of higher education and other higher education institutions receiving aid from State Government shall reserve not less than 5% seats for persons with benchmark disabilities- This 5% reservation of seats has to be provided each time when process of filling up seats is initiated by above mentioned Institutions - Petition disposed of. (Para 29) (D.B.) Title: Court on its own motion vs. State of H.P. and others, Page- 167.

**Constitution of India, 1950-** Articles 14 and 16- **Baba Balak Nath Temple Trust Deothsidh Employees Service Rules, 2000-** Clause 6- Clause providing for appointment to post of electrician by direct recruitment from persons possessing two years diploma from institutions recognized by H.P. Government – Petitioner initially joined as Assistant electrician on daily wage basis in 1989 by Temple Trust, but absorbed as Assistant Electrician and granted ACP – Petitioner not fulfilling requisite qualifications for post of Electrician - Challenging validity of Clause 6 and claiming appointment through promotion - Held, it is for Rule making Authority or Competent Authority to prescribe source of recruitment – It may invite Court's interference only if it does not meet with test of reasonableness - Competent Authority deciding to fill up post of Electrician by direct recruitment and also suitably compensated cadre of Assistant Electricians by providing benefit of ACP – No stagnation in service career of petitioner – No case of interference in Rules made out – Petition dismissed. (Paras 8 to 10) Title: Parma Nand Vs. State of Himachal Pradesh and others (D.B.) Page- 152.

**Constitution of India, 1950-** Articles14 and 16- **The Himachal Pradesh Youth Services & Sports, Youth Organizer Class-III (Non-Gazetted), Recruitment and Promotion Rules, 1997'-** Common Cadre Posts- Differential treatment- Permissibility- District sports officers(DSOs) and Coaches constituting common cadre with same pay scale- R & P rules making these posts interchangeable and coordinate- Revision in pay however enhancing pay scale of DSOs and placing Coaches in lower pay scale - Challenge thereto- Held- These were Coordinate posts in same pay scale under R&P Rules- No justification in making provision of two different scales for these posts later on- No intelligible differentia justifying different pay scale to same cadre posts- Coaches could not have been discriminated vis a vis DSOs -Order of Administrative Tribunal directing State to treat Coaches at par with DSOs with all consequential benefits upheld (Paras 13 to 15) Title: The State of Himachal Pradesh & anr. Vs. Ishwar Chaudhary & ors., Page-686.

**Constitution of India, 1950-** Articles14 and 16- **The Himachal Pradesh Youth Services & Sports, Youth Organizer Class-III (Non-Gazetted), Recruitment and Promotion Rules, 1997'-** Different Cadre posts- Similar treatment- Permissibility- Youth organizers in lower pay band vis a vis Coaches- Coaches in higher pay scale- Rule placing them and Youth organizers in feeder cadre for promotional posts of DSOs- Held- Coaches and DSOs being in Common Cadre and Coordinate posts, Coaches cannot be in feeder category for promotion to posts of District Sports Officers- Writ petition dismissed. (Paras 16 and 17) Title: The State of Himachal Pradesh & anr.Vs. Ishwar Chaudhary & ors., Page-686.

**Constitution of India, 1950 -** Articles 14 and 16- Notification dated 25.8.1994- Clause 10 - Government taking over Private Colleges along with staff - Denial of absorption to petitioners who were on the teaching staff - Hon'ble Single Bench directing State to absorb petitioners from date of taking over with all consequential benefits – Letter Patent Appeal– State opposing taking over of services on ground that petitioners stood appointed under "Self Financing Scheme" and not from grant-in-aid released by Department of Education- Held, Notification of Government dated 25.8.1994 clearly lays down terms and conditions of taking over of privately managed colleges including staff – Clause 10 empowers Government to impose any other condition for taking over - But for absorption of regularly appointed teachers, source of payment of salary immaterial and inconsequential – What is relevant is that teacher concerned possessed requisite qualification at time of appointment and recruited through transparent mode of recruitment – It is beyond reach of teacher to ascertain whether salary being paid to him coming from grant-in-aid or from funds generated by Management – Condition imposed by to this effect by State has no rational – Absorption order upheld. (Paras 17, 18 & 20) Title: State of H.P and others vs. Kamlesh Kumar and others, Page- 177.

**Constitution of India, 1950-** Articles 14 & 16- Appointment as Lecturer – Requisite qualification – Date relevant for determination- Held, question of eligibility to be seen on date when post advertised or Selection Committee constituted – Subsequent change in qualification, if any, cannot work to disadvantage of person as it would amount to introducing such revised and amended qualification with retrospective effect. (Para-18) Title: State of H.P and others vs. Kamlesh Kumar and others, Page- 177.

**Constitution of India, 1950-** Articles 14 & 226- Tender – Acceptance– Challenge thereto – Held, evaluating tenders and awarding contracts are essentially commercial functions – Principles of equity and natural justice stay at distance –If 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 Government - On facts, deviation in accepted tender of respondent No.2 alleged to be critical and making it to be non-responsive, not proved – Petition dismissed. (Paras 29 to 31, 42 & 43) Title: M/s Andritz Hydro Pvt. Ltd. vs. SJVN Ltd. through its General Manager (ECD) & another, Page- 154.

**Constitution of India, 1950**- Articles 14 and 226- **Reserve Bank of India Act, 1934**- Section 58(4)- **Reserve Bank of India Pension Regulations 1990**- Regulations- 2 (2) and 28 – Fixation of pension- 'Full Pay' and 'Average pay' formulae- Anomaly- Writ Jurisdiction- Petitioner retiring in January 2013 and Department granting pensionary benefits on basis of half of his last basic pay drawn as per regulations- Subsequently Department revising pay with retrospective effect from 01-11-2012- Department though granting benefit of upward pay revision to petitioner for three months but revising his pensionary benefits on basis of average last basic pay drawn in ten months relying on Regulation 2(2)- Refixation lowering petitioner's pensionary benefits and department also effecting recoveries of excess amount- Interregnum, on finding anomaly, Department sending proposal for amending Regulations - Regulations stood amended by notification dated 28-08-2017 and making provision of half of last basic pay drawn also for fixation of pensionary benefits- But by administrative order Department enforcing amendment with prospective date from 6-10-2017- Challenge thereto- Held- Proposal of Bank to effect amendment in Regulations accepted as such by Government of India without any modification- Benefit of amended regulations could not have been further amended or altered by administrative circular- RBI did not seek approval of Central Government before deciding to implement Pension Regulations from prospective date or particular date- Action of respondents illegal- Writ Petition allowed- Respondents directed to refix basic pensionary benefits of petitioner on basis of last pay drawn with effect from 01-02-2013 (Paras 20 to 23) Title: Shadi Lal Sharma Vs. Reserve Bank of India and others, Page-701.

**Constitution of India, 1950-** Articles 14 & 226 **- CCS (CCA) Rules, 1964-** Rule 2(h)- Expression "Government Servant"- Who is? Held, such servant must hold civil post under Union or State Government or under any Local or other Authority - Mid-day meal work not holding any civil post and engaged under Scheme on payment of honorarium is not Government Servant. (Para 5) Title: Gaurav Thakur Vs. Prem Singh and Others, Page-718.

**Constitution of India, 1950-** Articles 14 & 226- Part-time Water Carrier - Engagement- Scheme providing grant of additional marks to person whose no member of family is in Government Service - Private Respondent (R6) engaged by Department by giving additional marks though his mother was working as mid-day meal worker in same school- Engagement of (R6) upheld by justifying grant of additional marks to him by holding that his mother not being in Government Service - LPA allowed. (Paras 4 to 8) Title: Gaurav Thakur Vs. Prem Singh and Others, Page-718.

**Constitution of India,1950 –** Articles 21 and 226 **–**Construction of Dam – Apprehension of danger to life and property – Directions – Petitioners apprehending danger to life and property on account of sinking of land their land– Allegedly sinking of land taking place because of reservoir built behind Kol Dam – Petitioners seeking directions to state to acquire their lands also – Apprehensions of petitioners found correct on basis of report furnished by Court appointed Joint Inspection Committee comprising of SDO (C) and State Geologist – Writ petitions disposed of with directions to Deputy Commissioner to convene meeting all Stakeholders including petitioners and Authorized representatives of NTPC and make

endeavor for amicable settlement between parties or pass orders qua acquisition of lands or resettlement of persons in some other areas. (Paras 2 to 9) Title: Man Mohan vs. State of Himachal Pradesh and others, Page- 288.

**Constitution of India, 1950-** Article 226- Writ Petition- Exercise of jurisdiction- Petitioner Company, engaged in manufacturing cement seeking directions to State to ensure free egress and ingress to its unit with police assistance if required- And also permit it to engage trucks or multi axle truck from other sources- Respondent truck union (R5) short of trucks- Petitioner praying for necessary directions to office bearers and members of truck union (R5) not to cause obstruction in transportation of raw material or furnished products to and from unit- On finding paucity of trucks with Truck Union (R5), High Court permitted Union to replace one multi axle trucks against too old trucks expeditiously within period of two months- Option also given to members of Union to replace another old truck with multi axle truck to maintain equal distribution- Petition disposed of. (Paras 2 & 7 to 10) Title: ACC Limited Vs. The State of Himachal Pradesh and others, Page- 525.

**Constitution of India, 1950-** Article 226**-** Public interest litigation- Shifting of site of proposed Industrial Training Institute (ITI)- Government shifting site of proposed ITI from place T to place K – Petitioner challenging shifting of site on ground that land was donated by petitioner and others at place T only for construction of Degree college and ITI- Petitioner also contending that site at place K though owned by government but being 'forest land' cannot be put to non forestry use without permission from Ministry of Environment and Forest- Held - Selection of site for establishment of public institution essentially entails policy decision - Unless there is some violation of statute or any other binding law in force, Writ Court would be reluctant to interfere with such policy decision-Petition disposed of with directions that in case new site has been notified in forest area, it shall not be used for non-forestry purpose unless prior permission of competent authority obtained. (Paras 15 to 17) Title: Rahul Vs. State of Himachal Pradesh and others, Page-595.

**Constitution of India, 1950** -Article 226- Public Interest Litigation- Maintainability- Writ petitioner challenging appointment of lady as Craft Teacher on ground of her being overage on date of appointment- Held, in matter pertaining to appointment in Government service on a basic level post, writ petition in purported public interest, not maintainable-Private respondent found having requisite qualification as prescribed by Rules at time of appointment- Relaxation in age given to her as per Government policy- She also having retired after attaining age of superannuation- Petition dismissed. (Para 5) Title: Kuldeep Dogra Vs. State of H.P. and others, Page-773.

**Constitution of India, 1950-** Articles 226 & 310 **- Administrative Law-Doctrine of Pleasure**- Applicability- Government appointing petitioner as Non-official member of Himachal Pradesh State Commission for Backward Classes for three years- By subsequent notification Government removing him from membership before expiry of three years – Challenge thereto- Petitioner contending that once appointed, he could not have been removed before expiry of three years- Held- Person appointed without following any selection process, cannot claim right to be heard before removal – Person who is appointed at pleasure of Government and who came to removed by same pleasure cannot claim that order of removal has been passed in breach of principles of natural justice- Such person can be removed at any time by exercising power of Doctrine of Pleasure. (Para 5) Title: Dharam Singh Chaudhary and others Vs. State of Himachal Pradesh and another, Page-646.

**Constitution of India, 1950-** Article 227- **Code of Civil Procedure, 1908-** Section 151- Order VI Rule 17- Trial Court dismissing plaintiff's application for summoning retired Patwari/translator for translating mutation from Urdu to Hindi – Petition against – On facts, no pleadings raised qua mutation in question by plaintiff in plaint – Application filed under Order VI Rule 17 of Code for incorporating such pleadings in plaint already stood dismissed – Order had become final – Held, evidence beyond pleadings cannot be permitted to be adduced – Petition dismissed. (Paras 2 & 3) Title: Durga Singh Vs. State of H.P. & others Page-22.

**Constitution of India, 1950,-** Article 227 – Supervisory powers – **Code of Civil Procedure, 1908** - Sections 102 & 115 – Revision- Maintainability, when second appeal against decree is barred – In view of conflicting judgments on point whether aggrieved party can avail supervisory powers of High Court under Article 227 of Constitution or in alternative, can seek revision against decree when regular second appeal against it specifically barred under section 102 of Code, Hon'ble Single Bench referring matter to Larger Bench – Held, finality sought to be attained to decree by virtue of section 102 of Code can not be permitted to be taken away by allowing party to agitate it by way of revision under section of 115 of Code – This provision can also not be permitted to be circumvented in guise of invoking supervisory jurisdiction under article 227 of Constitution except under exceptional circumstances where there is perversity on face of impugned judgment for which there is no need to reappreciate evidence on record. (Paras 20, 21 & 38) Title: Sarwan Singh & others vs. Mohar Singh, Page-305.

**Constitution of India, 1950,-** Article 227 **–** Supervisory powers- Scope – Held, power of superintendence to be exercised more sparingly and with circumspection in order to keep subordinates courts within bounds of their authority and not for correcting mere errors. (Paras 23 & 34) Title: Sarwan Singh & others vs. Mohar Singh, Page- 305.

**Constitution of India, 1950-** Article 227**- Code of Civil Procedure, 1908-** Order XXXIX Rules 1 and 2 – Temporary injunction- Grant of- Plaintiff seeking temporary injunction against defendant for stopping from raising construction over suit land- Trial Court directing parties to maintain status quo but District judge allowing appeal and vacating Trial Court's order- Petition against- Plaintiff and other co sharers also found making construction over suit land- Held- Once, plaintiff himself raising construction over portion of suit land, he cannot raise objection, if any, qua construction of defendants over same land when admittedly they are co-owners to the extent of half share– Plaintiff not approaching court with clean hands and thus not entitled for equitable relief of injunction- Order modified to extent that no cosharer would raise construction over path situated on suit land. (Paras 6 and 7) Title: Chanchal Kumar Vs. Prem Parkash and another, Page-546.

**Constitution of India, 1950 -** Article 227**- Civil Procedure Code, 1908-** Section 151 – Police assistance- Availability – Defendants seeking police assistance in enforcing award passed by Lok Adalat which directed parties to maintain status quo qua suit property- Defendants praying such assistance for removal of lock put by plaintiff on a room- Trial Court dismissing application by holding that defendants not producing material qua their possession on date of award- Petition against- High Court remanded matter to Trial Court to decide application under S.151 of Code afresh after ascertaining factum of possession of parties. (Paras 3 to 5) Title: Keshwanand Vs. Lalman and others, Page-558.

**Constitution of India, 1950-** Article 227- **Himachal Pradesh Panchayati Raj Act, 1994 (Act) -** Sections 11, 12, 13, 41, 71, 180 and 228 – Encroachment over private land- Removal of- Whether Panchayat has jurisdiction to order its removal? Gram Panchayat taking cognizance on complaint, getting lands demarcated and finding respondent having encroached land- Panchayat directing respondent to remove construction- Order attaining finality- In execution Panchayat asking respondent to remove construction with in specific time- Petition against- Held- Gram Panchayat had no authority or jurisdiction to determine private dispute *inter se* parties with regard to immovable property. Petition allowed-Order set aside. (Paras 22 & 23) Title: Parkash Chand Vs. State of Himachal Pradesh and others, Page-535.

**Constitution of India, 1950-** Article 227**- Indian Evidence Act, 1872-** Section 73- Plaintiffs challenging will executed by father in favor of defendants- Plaintiffs filing application for sending will for comparison of signatures of testator to handwriting expert- Trial court dismissing application- Petition against- Held- For carrying out comparison of disputed signatures, there has to be admitted or proved signatures on record- Section 73 authorizes court to compare disputed signatures with admitted or proved signatures and arrive at its own conclusion regarding genuineness of signatures- However plaintiffs in pleadings not disputing signatures of testator on will- No admitted signatures of testator on record- Signatures on bank account opening application not proved to be of testator- Trial court justified in dismissing application of plaintiffs- Petition dismissed. (Paras 18 & 19). Title: Hem Chand and others Vs. Dharam Parkash and others, Page-505.

**Constitution of India, 1950-** Article 227- **Indian Telegraph Act, 1885 (Act)**- Sections 16(1) & 16(3)- Grant of Damages- Jurisdiction- Claimant filing application for damages before District Magistrate for loss caused to his property while laying transmission lines over his land- District Magistrate granting damages- Claimant filing petition for enhancement before District judge- District judge dismissing petition of claimant- Petition against by Licenser- Held- Under Section 16 (3) of Act jurisdiction to award compensation lies only with District Judge – District Magistrate has no jurisdiction whatsoever to grant compensation- Order of District Magistrate granting compensation being without jurisdiction is null and void- Order of District Judge upholding order of District Magistrate also set aside- Petition allowed- (Paras 10 to 13) M/s A.D. Hydro Power Ltd. Vs. Juglu Ram, Page-647.

**Constitution of India, 1950-** Article 227**- Code of Civil Procedure, 1908-** Section 151- Interim directions – Entitlement - In suit pending before it, High Court directing Deputy Commissioner to formulate Scheme and disburse amounts payable to Pujaris of Temple in accordance with it subject to final adjudication of suit - Also directing him to keep proper records of Pujaris who act in temple on specified period - Deputy Commissioner preparing Scheme and also mentioning that Scheme would be applicable only for 15 years - Period of 15 years elapsing but Scheme continued without any orders of Court - Meanwhile suit filed in High Court dismissed in default - In another suit pending before Civil Judge (Junior Division), Pujaris filing application and seeking implementation of old Scheme - Civil Judge allowing application and directing Temple Trust to implement Scheme – Petition against - Held, after lapse of 15 years period, Scheme as formulated on orders of High Court was not binding inter-se parties - It could not have been enforced by them - Civil Judge ought to have taken fresh Scheme prepared by parties with mutual consent – Petition allowed – Order of Civil Judge set aside. (Paras 4 & 5) Title: Prabhat Sharma Vs. Ashutosh Sharma & others, Page-860.

**Constitution of India, 1950** - Article 256 – Motor Vehicles Act, 1988 - Held State under obligation to give effect to laws made by Parliament as also directions issued by Central Government from time to time –Therefore, State of H.P. is obliged to give effect to Motor vehicles Act and Rules framed thereunder. (Paras 22 and 23) Title: Virender Singh and another vs. State of HP and others, Page- 391.

**Constitution of India, 1950**- Article 299 – Government Contract – Liability of Government - Held – Government acts on basis of written instructions – Oral understanding between individual and officials of Government if any has no significance. (Paras 10 & 11) Title: M/s Ambuja Cements Ltd. vs. State of Himachal Pradesh and others, Page- 274.

**Co-sharers** – Joint land – Sale of specific portion of land from joint Khata – Nature – Held, sale of specific portion of land from joint Khata amounts to sale of undivided share – Vendee becomes co-sharer with all corresponding rights and liabilities vis-a- vis other co- sharers. (Para 8) Title: Bala Ram (since deceased) through his legal heirs vs. Smt. Dassi Devi, Page- 371.

**Contempt of Courts Act, 1972** –Sections 11 & 12 – Non –Compliance of Court orders - Contempt – Circumstances – High Court directing Deputy Commissioner to prepare scheme and disburse amount payable to Pujaris of temple in accordance with that – Also directing him to keep proper record of Pujaris who act in temple on specified period – Petitioners filing contempt by alleging non-compliance of said directions- On facts, Deputy Commissioner preparing scheme and directing it to be operative for 15 years only - Period of fifteen years elapsing but scheme continued without court orders- Meanwhile suit filed in High court dismissed in default- Held, during period falling between dismissal of suit (4.7.2011) and its restoration (19.5.2015), direction of High Court directing distribution of amount as per formulated scheme was not in force – It was not binding on contesting parties – There was no deliberate intentional or willful disobedience on part of respondents - Petition dismissed. (Paras 3 to 5) Title: Ashutosh Sharma Vs. Mansi Sahai and other, Page- 883.

**'D'**

**Doctrine of Legitimate Expectation** – Applicability – Limitation - Held – Principle of legitimate expectation cannot be invoked against statutory provisions – Expectation based on sporadic, casual or random acts cannot be legitimate – State if not claiming interest on delayed payments of royalty in past cannot be compelled to do so in future also. (Paras 12 & 20) Title: M/s Ambuja Cements Ltd. vs. State of Himachal Pradesh and others, Page- 274.

**'E'**

**Employees Compensation Act, 1923-** Section 4-A(3)(a)- Compensation- Interest on amount assessed, whether can be denied? – Held– No - In case of fault on part of employer in paying compensation within one month from date it became due, Commissioner shall direct that in addition of amount of arrears, employer shall pay interest @ 12% P.A. or at such higher rate not exceeding maximum of lending rates of any Scheduled Bank – And arrears become due after one month of accident- Accident taking place on 30.8.2013 and arrears of compensation as calculated by Department and accepted by claimants deposited on 23.9.2016, therefore, Commissioner could not have denied interest on arrears of compensation. (Paras 6 & 7) Title: Bimla Devi and others vs. HPSEB and others, Page- 176.

**Employees Compensation Act, 1925** - Section 4(1) (a) & (b) (as amended vide Amendment Act, 2009 effective from 18.1.2010) - Notification dated 31.05.2010 - Motor accident- Claim-Assessment- Deceased dying on 31.4.2010 after amended provisions had come into effect - Compensation to be calculated at rate of amount equal to 50% of monthly wages of deceased multiplied by relevant factor or Rs.1,20,000/- whichever is higher - Notification dated 31.5.2010 under Section 4 fixing wages at Rs.8000/- for purpose of compensation not applicable in given case - On date of accident/ death i.e. 21.04.2010, there was no ceiling on monthly wages for purpose of compensation or on date, compensation became due - Order of Commissioner applying Ex.P-II, which stood omitted vide Amendment Act, set aside - Compensation awarded by taking 50% of monthly wages and multiplying with relevant factor. (Para 12) Title: Vidya Devi and another vs. The Executive Engineer Electrical, Page- 284.

**Employees Compensation Act, 1925** - Section 4(1) (a) & (b) (as amended vide Amendment Act, 2009 effective from 18.1.2010) - Notification dated 31.05.2010 - Motor accident- Claim-Assessment- Deceased dying on 31.4.2010 after amended provisions had come into effect - Compensation to be calculated at rate of amount equal to 50% of monthly wages of deceased multiplied by relevant factor or Rs.1,20,000/- whichever is higher - Notification dated 31.5.2010 under Section 4 fixing wages at Rs.8000/- for purpose of compensation not applicable in given case - On date of accident/ death i.e. 21.04.2010, there was no ceiling on monthly wages for purpose of compensation or on date, compensation became due - Order of Commissioner applying Ex.P-II, which stood omitted vide Amendment Act, set aside - Compensation awarded by taking 50% of monthly wages and multiplying with relevant factor. (Para 12) Title: Vidya Devi and another vs. The Executive Engineer Electrical, Page- 284.

**Employees Compensation Act, 1923-** Appeal by insurer against award by learned Commissioner under Employees Compensation Act, 1923. Compensation of sum of Rs.2,36,950 along with interest with effect from 3.3.2002 to 25.4.2017 amounting to Rs.4,30,405/- assessed to successors-in-interest of deceased. Substantial question of Law-Whether the owner/insured was entitled to claim indemnification of award amount from insurer when insured vehicle at time of accident was plied by driver without a valid driving licence and insured vehicle which was registered and insured for agricultural purposes was being plied for non agricultural purposes? Held-Under section 4-A of the Act, mandatory injunction is cast upon the employer to pay compensation within one month when it became due. Appeal dismissed accordingly. (Paras 5 & 6) Title: United India Insurance Company ltd. Vs. Jasbir Kaur and others, Page-590.

**Expression "Munshi" -** What it means?- Held, Munshi is a Persian word, originally used for a contractor, writer or Secretary and later on during Mughal Empire and British India, it was used for teachers, Secretaries and translators but never for an agent. (Para 27) Title: Uttam Ram Vs. Devinder Singh Hudan and another, Page-710.

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**Guardian & Wards Act, 1890 (Act)-** Section 9**- Code of Civil Procedure, 1908 -** Order VII Rule 11- Custody of Minor- Grant of- Territorial jurisdiction- Relevancy- Held- Only that Court has jurisdiction to pass order regarding custody of minor within whose local jurisdiction child is ordinarily residing- Trial Court ordering transfer of custody in favor of mother without first deciding objection of father whether child was ordinarily residing within its jurisdiction- Petition against- Petition allowed- Order set aside- Matter remanded with

direction to Trial Court to first decide application of father filed under Order VII Rule 11 and then proceed further. (Paras 2 & 3) Title: Rajbir Yadav Vs. Poonam Kumari, Page-628.

**'H'**

**Himachal Pradesh Co-operative Societies Act, 1968 -** Sections 67 & 93- Dismissal from service for misconduct – Sustainability- Managing Committee of Society ordering dismissal of respondent no. 5 (R-5) for misconduct on basis of enquiry report of Assistant Registrar - Appellate Authority setting aside order on ground of non observance of principles of natural justice and further directing Managing Committee to impose any other penalty other than dismissal in consonance with misconduct proved on record – Petition against – On facts, due notice found to have been issued to delinquent by Managing Committee before ordering dismissal – Held, Society had lost trust and confidence in delinquent - Appellate Authority had no jurisdiction to direct Managing Committee to impose any other penalty other than dismissal from service ( Para 3) Title: Jallan Cooperative Agriculture Service Society Ltd. Vs. State of H.P. & Others, page- 1089.

**Himachal Pradesh Co-operative Societies Act, 1968 -** Himachal Pradesh Co-operative Societies Rules, 1971 - Rule 45(3) - Approval of Registrar, when required ? - Held, Rule 45(3) requiring approval of Registrar is attracted when delinquent is removed from service by Society - It has no applicability when official is dismissed from service after due enquiry. (Para 5) Title: Jallan Cooperative Agriculture Service Society Ltd. Vs. State of H.P. & Others, page- 1089.

**Himachal Pradesh Cooperative Societies Act, 1968** - Section 76 – Filing of suit - Notice - Requirement- Held, statutory notice is required only when suit intended to be filed against Society or its officers in respect of any act touching Constitution, Management or business of Society . (Para 10) Title: Hill View Co-operative Housing Society Ltd. vs. Varinder Kumar, Page- 48.

**Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 –**Section 57 – Bar of Jurisdiction of Civil Court – Appellate arguing that suit challenging order of Director – Consolidation is barred by virtue of section 57 of Act – Held, purpose of Act is to do consolidation of land and prevention of fragmentation of agricultural holdings – Deletion of entries of ownership and substitution thereof is beyond domain of purpose embodied in Act – Illegal order of Director, Consolidation can be challenged in Civil Court. (Para 10) Title: Jagan Nath and others vs. Des Raj and others, Page- 40.

**H.P Land Records Manual** - Para 8.36-B - **Hindu Law** -Relinquishment of undivided share in coparcenery -Effect- Whether a legal heir can relinquish his share in inherited property in favour of other legal heir by excluding remaining coparceners ? Held -Yes -Plaintiff filing suit and challenging relinquishment of undivided share by defendant no.2 in favour of defendant no.1 - Trial court dismissing suit – First appellate court dismissing plaintiff's appeal -RSA - Further held, in Himachal Pradesh a coparcener can validly relinquish his share in coparcenary in favour of one or more coparceners to the exclusion of other coparceners - Relinquishment will not operate for benefit of other excluded coparceners -Appeal dismissed.(Paras 1,2,5,7,9 & 12) Title: Dila Ram Vs. Milkhi Ram & Anr., Page- 1013.

**Himachal Pradesh Land Revenue Act, 1954 -** Section 45 – Entries in Periodical records – Conflict between new and old entries - Held, new entries in periodical records if without

basis do not have any presumption of truth – In that eventuality, old entries are to be taken as correct. (Para 9) Title: Paras Ram vs. Smt. Pushpa & anr., Page- 359.

**Himachal Pradesh Land Revenue Act, 1954** – Sections 46 & 171 – Wrong revenue entries – Jurisdiction of civil court – Held, party aggrieved by wrong revenue entries recorded in periodical records, entitled to file declaratory suit before civil court – Jurisdiction of civil court not barred. (Para 11) Title: Vipin Kumar & others Vs. Roshan Lal, Page-993.

**Himachal Pradesh Land Revenue Act, 1954 -** Section 163 – **Limitation Act, 1963** - Articles 64 & 65 - Adverse possession – Whether person is entitled to seek declaration of having become owner by way of adverse possession ? - Held, adverse possession can be used only as shield - Person is not entitled to seek declaration of having become owner of land by way of adverse possession. **Gurdwara Sahib Versus Gram Panchayat Sirthala and another (2014) 1 SCC 669** relied upon. (Para 3) Title: Lala Ludarmal Dharamshala Trust Vs. State of H.P., Page- 803.

**Himachal Pradesh Land Revenue Act, 1954 -** Section 163 - Encroachment over government land - Claim of adverse possession - Essential requirements - Held, person seeking declaration before AC-I Grade of having become owner of government land by adverse possession, is required to file regular suit and pay requisite court fee. (Para 3) Title: Lala Ludarmal Dharamshala Trust Vs. State of H.P., Page-803.

**Himachal Pradesh Panchayati Raj Act,1994-** Sections 19, 37 & 41- Code of Criminal Procedure, 1973 – Sections 197 & 482– Judicial functions of Panchayat- Jurisdiction- In dispute between landlord and tenant regarding possession and arrears of rent, panchayat visiting spot, breaking open locks and handing over possession to landlord- Tenant filing FIR for house trespass- Police filing cancellation report on ground that Panchayat acted under provisions of Act- Magistrate declining cancellation report and taking cognizance of offences- Challenge thereto on ground that members of Panchayat being public servants, cognizance could not have been taken for want of prosecution sanction- Held- Panchayat had no jurisdiction whatsoever in disputes relating to immovable property- Their act had no nexus with official duty- Prosecution sanction not required- Petition dismissed. (Paras 6 to 9) Title: Naveen Kumar & Ors. Vs. State of Himachal Pradesh & anr., Page-696.

**Himachal Pradesh Tenancy & Land Reforms Act, 1972 (Act) -** Sections 104 - Conferment of proprietary rights - When cannot be availed - In previous suit, trial court holding defendant (present plaintiff) as 'non-occupancy' tenant over disputed land - In appeal, Additional District Judge modifying decree and holding defendant (present plaintiff) as lessee in possession under lease deed - Judgement attaining finality – Collector passing order for resumption of land in terms of lease deed - Plaintiff filing suit challenging order of Collector and claiming to have become owner of land under provisions of Act – Trial court dismissing suit - Decree upheld by first appeallate court – RSA - Held, decree of Additional District Judge categorically held plaintiff as lessee under lease deed - Terms of lease empowering State to resume land leased to plaintiff – Plaintiff being evicted in accordance with law from disputed land – RSA dismissed. (Paras 7-9) Title: Sanjay Saini Vs. State of H.P., Page-812.

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Section 104**- Specific Relief Act, 1963**- Sections 34 and 38- Conferment of proprietary rights- Whether automatic ?- Plaintiffs filing suit for declaration of their title and injunction on basis of sale deed executed by 'D' in 1981 in their favour- Also challenging revenue entries showing 'RS' as Kabiz in

suit land as wrong- Defendant though disputing entries of Kabiz but claiming himself to have been non occupancy tenant in it under D -Trial court dismissing plaintiffs suit- First appellate court dismissing their appeal also- RSA- Held- 'RS' recorded as non occupancy tenant in suit land since before 1974 under D - He became its owner by way of conferment of proprietary rights- Conferment is automatic from appointed day- 'D' had no title in suit land which he could transfer to plaintiffs in 1981- RSA dismissed- Judgments and decrees of lower courts upheld. (Paras 8, 10 & 11) Title: Kunj Lal & others Vs. Ram Swaroop, Page-939.

**H.P. Tenancy and Land Reforms Act** -S.118- Bar of jurisdiction - Held- when matter regarding resumption of land is pending before revenue court, civil court will have no jurisdiction to embark upon legality of such proceedings. (Para 11) Title: Anil Kumar & others Vs. Y.P. Verma, Page- **Himachal Pradesh Urban Rent Control Act, 1987-** Section-5 - Statutory enhancement on contractual rent-- Principles – Applicability- Held, principles contained in Act regarding enhancement in rental permissible on contractual rent being based on reasonableness and good conscience can be extended to premises located in non-urban areas - Landlord can not seek exorbitant enhancement in rent even if there is no stipulation prohibiting such increase in rent deed ( Para 11) Title: The Director, Technical Education and others Vs. Lekh Ram (since deceased) through his legal heirs, Page-1033.

**Himachal Pradesh Urban Rent Control Act, 1987**- Section 14- Eviction suit by one co-owner- Maintainability-Held- Eviction suit filed by one co-owner without impleading other owners is maintainable unless tenant able to show conflict of interest amongst co-owners (Para 10) Title: Rakesh Vs. Raj Kumari, Page-681.

**Himachal Pradesh Urban Rent Control Act, 1987** – Section 14(1) – Eviction of tenant-Rebuilding and reconstruction- Proof- Landlord, a co-sharer in building seeking eviction of tenant from part of building on ground of its bonafidely required for rebuilding which is not possible without evicting tenant. Rent Controller passing eviction order and Appellate Authority upholding order in appeal –Revision against- Held- No evidence to show that building in dilapidated condition requiring reconstruction- No cogent and reliable evidence regarding exact age of building. No evidence either whether eviction petitions filed against tenants possessing other parts of building. Petition allowed. – Eviction order set aside- Rent suit dismissed. (Paras 12 to 15) Title: Sat Pal (since deceased through LRs) Vs. Dayawant Singh, Page-484.

**Himachal Pradesh Urban Rent Control Act, 1987-** Section 14(2) (i) – Eviction of tenant-Arrears of rent- Non payment- Effect- Rent controller determining "amount due" and ordering tenant's eviction from suit premises on ground of his being in arrears of rent-However eviction order passed subject to condition that if tenant deposited amount due he was not to be evicted- Appellate Authority allowing appeal of tenant and dismissing rent suit- Revision- Held- On failure of tenant to deposit amount due within statutory period, he is liable to be evicted from premises- Revision allowed. Order of Appellate Authority set aside. (Para 11) Title: Sumeeta Sood (since deceased) through her legal heirs Vs. Naresh Kumar Sood, Page-574.

**Himachal Pradesh Urban Rent Control Act, 1987-** Section 14(2)(v) Eviction of tenant-ceased to occupy- meaning- Landlord alleging that tenant ceased to occupy premises from July, 2008 upto November, 2010- Evidence revealing consumption of electricity during this period-Held- Landlord failed to prove that tenant ceased to occupy premises for continuous

period of twelve months before filing of petition. (Para 11 & 14) Title: Sumeeta Sood (since deceased) through her legal heirs Vs. Naresh Kumar Sood, Page-574.

**Himachal Pradesh Urban Rent Control Act, 1987**- Section 14(3)(c)- Eviction suit- Ground of- Building unfit and unsafe for human habitation- Held- Eviction of tenant from rented premises on ground of its having become unfit and unsafe for human habitation cannot be made subject to Landlord filing duly sanctioned building plans at Execution stage- Court cannot take any responsibility by passing an order that even though building is unfit and unsafe for human habitation, yet same should not be demolished (Para 14) Title: Rakesh Vs. Raj Kumari, Page-681.

**Himachal Pradesh Urban Rent Control Act, 1987**- Section 14(3)(c)- Eviction Suit- Rebuilding and Reconstruction- Necessity of sanctioned building plans- Rent controller passing eviction order on ground of bonafide requirement of Landlord of doing reconstruction of building but subject to his producing duly sanctioned building plans at Execution stage- Appellate Authority modifying order and setting aside this condition- Revision- Held- Existence of sanctioned building plans is just a fact to determine bonafides of Landlord- It not condition precedent or sine qua non for passing eviction order- Order of Appellate Authority upheld- Hari Dass Sharma vs. Vikas Sood and others (2013) 5 SCC 243 relied upon. ( Para 13) Title: Rakesh Vs. Raj Kumari, Page-681.

**Himachal Pradesh Urban Rent Control Act, 1987 -** Section 24 - Appeal - Notification of State Government dated 10th December, 2006 - Whether appeal against order of Rent Controller dismissing application for restoration of dismissed rent suit, maintainable before Appellate Authority ? Held, yes – Rent Controller dismissing application of land lord seeking restoration of his rent suit which stood dismissed in default - Appellate Authority allowing appeal and ordering restoration of rent suit – Revision – Tenant contending that appeal against said order not provided by Notification 10th December, 2006 and order of Appellate Authority being without jurisdiction – Held, order of Rent Controller which finally decides fate of aggrieved is appealable before Appellate Authority. (Para 11) Title: Shri Rajesh @ Raju. Vs. Shri Dayawant Singh & anr., Page- 400.

**Himachal Pradesh Village Common Lands ( Vesting and Utilization) Act, 1974 -** Section 2 (dd) - **Himachal Pradesh Village Common Lands Scheme, 1975 (Scheme)** – Paragraph no. 4 & 5 - Grant of nautor - Cancellation thereof – Challenge thereto – Competent authority cancelling nautor initially granted in favour of plaintiff's predecessor 'R' in 1978 - In previous litigation in which State was party grant in favour of 'R' held valid in RSA - Judgment attaining finality - However, subsequently competent authorities cancelling such grant on ground that 'R' was not entitled for it – Held, decree holding valid grant of land in favour of 'R' had attained finality – Act defining 'landless person' or 'other eligible person' and prohibiting grant of land to persons of owning land more than one acre introduced only by Amendment in 1987 - Grant in favour of 'R' in 1978 cannot be invalidated by operating aforesaid amendment retrospectively - Petition allowed - Order of cancellation set aside. (Paras 6-7) Title: Sohan Lal and others Vs. State of H.P. & others, Page- 1057.

**Hindu Succession Act, 1956** – Section 22 – Expression "immovable property" – Meaning – Held, expression "immovable property" used in sections 22 of Act, covers all kinds of property including agricultural land – Therefore heirs have preferential rights to acquire property of other heirs in certain cases - Object of provisions being to prevent fragmentation

and entry of strangers. (Paras 11 & 12) Title: Ram Tari & ors. vs. Shri Rattan Chand & ors., Page- 332.

**Hindu Succession Act, 1956 –** Sections 22 – Concluded sale transactions – Applicability – Held, already concluded sale transactions can also be opened on payment of sale consideration either as mutually agreed or at rates prevalent in market. (Para 13) Title: Ram Tari & ors. vs. Shri Rattan Chand & ors., Page- 332.

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**Income Tax Act, 1961** Section 2(24) – "Income"- Meaning- Held- Income includes all those benefits, whether in terms of money or otherwise which are to be taken into consideration for purpose of payment of income tax or professional tax. (Para 26) Title: Pr. Commissioner of Income Tax, Shimla Vs. M/s H.P. Excise & Taxation Technical Service Agency, Page-638.

**Income Tax Act, 1961** Section 2(24)(i)- "Profits"- Meaning- Held- "Profits" means gross proceeds of business transaction minus cost of transaction- "Profits" connotes idea of pecuniary gain- If there is an actual gain, its quantum or amount would not be material (Paras 27 & 28) Title: Pr. Commissioner of Income Tax, Shimla Vs. M/s H.P. Excise & Taxation Technical Service Agency, Page-638.

**Income Tax Act, 1961** Section 2(24)(i)- "Gains"- Meaning- Held- Expression "Gains" is not synonymous with word "Profits" for it is not restricted to pecuniary or commercial profits only as it includes other consideration of value gained also. (Para 29) Title: Pr. Commissioner of Income Tax, Shimla Vs. M/s H.P. Excise & Taxation Technical Service Agency, Page-638.

**Income Tax Act, 1961-** Sections 4 & 12 AA- **Societies Registration Act, 1860 (Act)**- Liability of Juristic person- Held- Requirement to seek exemption from payment of Tax by Trust or Institution registered under Act serving cause of general public utility would arise only when some actual income is derived by it. (Para 32) Title: Pr. Commissioner of Income Tax, Shimla Vs. M/s H.P. Excise & Taxation Technical Service Agency, Page-638.

**Income Tax Act, 1961-** Sections 4, 147,148 - **Himachal Pradesh Value Added Tax Act, 2005-** Section 34(2) **- Himachal Pradesh Value Added Tax Rules, 2005-** Rules 61 and 62 – Himachal Pradesh Excise and Taxation Technical Service Agency (Society) setting up check post barriers in different parts of State and collecting Tax amount for and on behalf of State- Collected amount also being deposited in Treasury after defraying expenses incurred on collection of Tax- Income Tax Appellate Tribunal upsetting order of Commissioner, Income Tax (Appeals) and holding that amount deposited by Society in Government treasury not taxable- Appeal by Revenue- Held- Amount collected by Society straightway used to be deposited in Government treasury after deducting actual expenditure made by it on collection process- Society neither gained anything nor earned any profit- Vat amount recovered by Society was an entrustment of statutory function- It performed statutory function and collected tax amount for and on behalf of State and transferred such collection to Government- Temporary parking of Tax collection with Society for some time cannot be treated as income generated by it- Amount so collected by Society not taxable as its income (Para 30) Title: Pr. Commissioner of Income Tax, Shimla Vs. M/s H.P. Excise & Taxation Technical Service Agency, Page-638.

**Income Tax Act, 1961 -** Sections 44AA and 44B- Income from business or profession – Computation – Requirements of maintaining account books and audition thereof – Held, every person carrying on business or profession is required to keep and maintain such books of account and other documents as may enable Assessing Officer to compute total income in accordance with provision of Act and get such accounts audited. (Para 11) (D.B.) Title: M/s J.M.J. Essential Oil Company vs. Commissioner of Income Tax, Shimla , Page- 103.

**Income Tax Act, 1961 -** Section 68- Assessment of income from business or profession- Cash credit, when can be taken as income of assessee ? – Requirements – Held, in order to invoke Section 68 of Act, it is necessary that (i) sum is found credited in books of assessee (ii) for which assessee offers no explanation about nature and source thereof (iii) explanation offered if any, in opinion of Assessing Officer not satisfactory (iv) then sum so credited may be charged to income tax as income of assessee in relevant year. (Para 16) (D.B.) Title: M/s J.M.J. Essential Oil Company vs. Commissioner of Income Tax, Shimla , Page- 103.

**Income Tax Act, 1961 -** Section 68- Expression "in the opinion of Income Tax Officer" – Meaning – Held, formation of opinion even though is subjective process, yet circumstances upon which such an inference based must be demonstrable. (Para 26) (D.B.) Title: M/s J.M.J. Essential Oil Company vs. Commissioner of Income Tax, Shimla , Page- 103.

**Income Tax Act, 1961 -** Sections 68 & 143- Cash credit – Assessed as income of assessee- Validity –After perusing account books of petitioner, Assessing Officer ordering cash sales made across the counter as income of assessee chargeable to income tax on his failure to give satisfactory explanation for such sales – Order upheld by Commissioner Income Tax (Appeals) Shimla and Income Tax Appellate Tribunal – Petition against – Petitioner contending that unless books of accounts are rejected by Assessing Officer, he cannot assess income under Section 143(3) of Act as income of assessee and in his case, books of accounts never rejected by Assessing Officer- Held, it is not mandate of Section 143 of Act that Officer must reject books of accounts maintained by assessee –Falsification of books of accounts is one thing and not furnishing explanation with respect to entry made therein, is another thing - Certain entries reflected in books of accounts which on basis of explanation furnished by assessee not found satisfactory - Assessing Officer authorized to carry out assessment under Section 143(3) of Act– Appeal dismissed. (Paras 19, 20 & 39) (D.B.) Title: M/s J.M.J. Essential Oil Company vs. Commissioner of Income Tax, Shimla , Page- 103.

**Income Tax Act, 1961 -** Sections 140A, 142 & 143- Assessment of income for taxation- Held, return can be processed and income assessed on basis of self assessment in terms of Section 140A- However, Assessing Officer authorized and empowered under Section 142 of Act may call upon assessee asking him to produce such accounts or documents as may be so required for completing proceedings – By virtue of Section 143(3) of Act, Assessing Officer empowered to assess and pass an order on evidence so produced by an assessee. (Paras 12 & 13) (D.B.) Title: M/s J.M.J. Essential Oil Company vs. Commissioner of Income Tax, Shimla , Page- 103.

**Indian Contract Act, 1872** - Section 23- Agreement to sell- Refund of earnest amount- Contract opposed to public policy- Breach thereof- Consequences- Held, agreement to sell being contrary to public policy since cannot be specifically enforced, it cannot be indirectly made executable by ordering refund of earnest amount or damages. (Paras 15 & 16) Title: Kanshi Ram Vs. Radhi Devi (deleted) Jiwnu and others, Page-774.

**Indian Contract Act, 1872-** Section 55**- Specific Relief Act, 1963** – Section 15 -Agreement to sell - Specific Performance- Time specified for execution, whether essence of contract ?- Parties agreed to execute sale deed within specified time - In case of breach on part of buyer, part consideration paid was to be forfeited - Buyer not fulfilling his part of agreement within time- Issuing notice to seller for execution of sale deed only thereafter- Time limit specified in unmistakable language in agreement - Held, time was essence of agreement- Specific performance after expiry of specified period cannot be ordered - Suit dismissed. (Paras 8, 11 to 15 ) Title: Sanjeev Gupta vs. Shri Shyam Dutt (since deceased) through his legal heirs, Page- 55.

**Indian Contract Act, 1872** - Sections 74 & 75 – Breach of contract - Unliquidated damages – Grant of - Circumstances – Defendants entering in agreement in September, 2000 with plaintiff for preparing and supplying fabricated material - In terms of agreement plaintiff was to supply drawings thereof to defendants - Contract renewed in 2006 - Defendants supplying only some of materials to plaintiff – Plaintiff filing suit alleging breach of contract and claiming damages in sum of rupee one crore by averring that time was essence of contract – And on account of non-performance of their part of contract by defendants, they (plaintiff ) could not commission their new plant – Facts revealing that defendants had to prepare and send consignment of remaining material after supply of drawings and inspection of finished goods - Plaintiff not supplying drawings of remaining material in time - Time not found essence of contract - Plaintiff continuing manufacturing paper in their old plant - No evidence of plaintiff suffering any loss - Demand of 'machining' found beyond scope of agreement - Suit partly decreed on admission of defendants that sum of Rs. 47,000/- was due towards plaintiff - Suit partly decreed. (Paras 8, 10, 12 &15) Title: M/s Pragati Papers Industries Limited Vs. M/s Chanderpur Works Jorian and others, Page-1051.

**Indian Easement Act, 1882**-Customary easement vis-à-vis Prescriptive Easement- Distinction- Held, customary easement embraces needs of variable persons belong to class or locality- Whereas right by way of prescription is always personal. (Para 8) Title: Brahma Nand Vs. Teju Ram (deceased) through his legal representatives Surat Ram and others, Page- 765.

**Indian Easement Act, 1882**-Customary easement vis-à-vis customary rights- Held, easement belongs to determinate person or persons in respect of his or their land and fluctuating body like inhabitants of locality cannot claim an easement- Whereas customary rights are public rights annexed to place in general. (Para 13) Title: Brahma Nand Vs. Teju Ram (deceased) through his legal representatives Surat Ram and others, Page-765.

**Indian Easement Act, 1882**-Section 15- Prescriptive easements- Held, claimant should exercise it under some claim existing in his favour independently of all others- Though his user need not be exclusive- He must prove pre-existing easement, its peaceful enjoyment as an easement and as matter of right continuously for period of 20 years. (Paras 8 & 10) Title: Brahma Nand Vs. Teju Ram (deceased) through his legal representatives Surat Ram and others, Page- 765.

**Indian Easements Act, 1882** - Section 15 - Right of passage over land recorded as "Share-am-rasta" - Acquisition of – Held, right over other's land can be acquired either by way of easement or by adverse possession – Other than these two rights, right to interfere and use someone else property against his consent, unknown to law – Mere classification of land as

"Share-am-rasta" does not confer larger right upon plaintiff to claim right of passage by way of easement – Right of passage since negated by both lower courts, suit for permanent prohibitory injunction could not have been decreed – RSA allowed – Decrees of lower courts set aside – Suit dismissed. (Paras-13 & 18) Title: Atma Ram Vs. Onkar Singh Page-196.

**Indian Easement Act, 1882-**Sections 15 & 18- Customary easement- Essentials- Held, person claiming customary easement has not only to prove elements required under Section 15 of Act, but also that custom set up is ancient, continuous, reasonable, certain and compulsory. (Para 8) Title: Brahma Nand Vs. Teju Ram (deceased) through his legal representatives Surat Ram and others, Page- 765.

**Indian Evidence Act, 1872-** Section 3- Circumstantial evidence – Evidentiary value - Held, each and every circumstance is required to be proved by prosecution and circumstances as a whole have to make out chain in manner that only conclusion is that accused has committed offence. (Para 7) (D.B.) Title: Mohan Lal vs. State of Himachal Pradesh, Page- 72.

**Indian Evidence Act,1872** - Section 3 – Appreciation of evidence – Rape case – Testimony of prosecutrix – Held, statement of prosecutrix cannot be universally and mechanically applied in every case of assault – Court must keep in mind cardinal principles of criminal justice system. (Para 21) Title: Baldev Singh vs. State of H.P., Page- 375.

**Indian Evidence Act, 1872-** Sections 3 & 45- Expert evidence – Strangulation – Proof – Held, mere fact that hyoid bone and thyroid cartilage not found fractured, itself does not prove that death was not due to strangulation – Appearance of neck can vary depending upon means adopted and used – Ligature since below level of thyroid cartilage, it did not lead to fracture of hyoid bone and thyroid cartilage. (Para 33) (D.B.) Title: Mohan Lal vs. State of Himachal Pradesh, Page- 72.

**Indian Evidence Act, 1872-** Section 8 - Motive – Evidentiary value- Held, motive can give persuasive value to evidence but non-existence of evidence qua motive behind crime cannot provide any help to accused. (Para 36) (D.B.) Title: Mohan Lal vs. State of Himachal Pradesh, Page- 72.

**Indian Evidence Act, 1872-** Section 8 **-** Conduct of Accused - Relevancy – Held, in case based on circumstantial evidence, post – crime conduct of accused is relevant – Person committing murder would try to escape – Roaming of accused in Bazar immediately after alleged murder inconsistent with his guilt – Prosecution case doubtful. (Para 33) Title: Lok Bahadur vs. State of Himachal Pradesh, Page- 435.

**Indian Evidence Act, 1872-** Section 8**-** Conduct of accused – In case based on circumstantial evidence motive to commit crime becomes relevant – Absence of motive or failure to prove alleged motive makes prosecution doubtful. (Para 36) Title: Lok Bahadur vs. State of Himachal Pradesh, Page- 435.

**Indian Evidence Act, 1872-** Section 9 **–** "Last seen together" principle – Applicability – Held, last seen together theory comes into play when gap between point of time when accused and deceased were last seen together alive and when deceased found dead is so small that possibility of any person other than accused being author of crime becomes impossible – Court should also look for corroborative evidence – Witness merely seeing

accused moving towards Bazar and one person lying dead on road, insufficient to draw last seen theory. (Para 33) Title: Lok Bahadur vs. State of Himachal Pradesh, Page- 435.

**Indian Evidence Act, 1872-** Section 35 -Entries in voter & ration cards – Evidentiary value – Held, these documents merely show approximate age of person in a given year without indicating actual date of birth. (Para 13) Title: Balbir Singh vs. State of Himachal Pradesh & Ors, Page- 211.

**Indian Evidence Act, 1872** – Sections 62 & 63 – Documentary evidence – Mode of proof - Objections thereto - In proceedings before SDM, party putting exhibits on photocopies of documents without objection - Party also calling custodian of record to duly prove those documents - SDM declining party to examine custodian of record – Petition against - Held, objections to mode of proof ought to have been decided at final stage of argument - Petition allowed- Order set aside. (Paras 5 & 6) Title: Tariq Mohammad Vs. State of H.P. & others, Page- 851.

**Indian Evidence Act, 1872-** Sections 64 & 65- Photocopy- Held, photocopy is not primary evidence- Contents of photocopy cannot be read in evidence unless permission to adduce its secondary evidence is sought and allowed by Court. (Para 7) Title: Jaya Sharma Vs. Prabhat Chand and others, Page-762.

**Indian Penal Code, 1860 -** Sections 193, 471 and 120-B - Forgery and use of forged document before court - Summoning order – Challenge thereto - In civil suit party producing two documents, one photocopy and another certified copy, containing different versions though with respect to same transaction – Civil court accepting version of custodian of records and declining to conduct enquiry - However, Judicial Magistrate taking cognizance of offences and summoning accused - Additional Sessions Judge (Fast Track) setting aside summoning order - Petition against - Held, document was not used for getting benefits since suit was withdrawn - Complaint for alleged offences was premature- Petition dismissed. (Paras 6 & 7) Title: Nalini Vs. Gulbir Chaudhary & others, Page- 806.

**Indian Penal Code, 1860-** Sections 201 & 302- Murder – Proof – Circumstantial evidence- Accused allegedly strangled his wife and scattered things lying in room including almirah etc. for showing as it were case of death-cum-robbery – Trial Court convicting accused on basis of circumstantial evidence – Appeal against – On facts, death of deceased on account of strangulation, relation of accused and deceased strained because of demand of dowry, no evidence of forced entry into room of deceased or presence of tool marks on latches and metallic loop – Evidence indicating entry of known person into room on opening of door by deceased - Theory of burglary inherently improbable and pretentious - Recovery of rope used in crime and ornaments of deceased at instance of accused, absence of accused from his work place during relevant period and failure to prove plea of alibi– Held, accused proved to have committed aforesaid offences – Appeal of accused dismissed – Conviction and sentence upheld. (Paras 33 to 46) (D.B.) Title: Mohan Lal vs. State of Himachal Pradesh, Page- 72.

**Indian Penal Code, 1860 -** Sections 201, 323, 302, 326A, 452, and 506 read with 34**- Indian Evidence Act, 1872-** Section 32(1)- Learned Sessions Judge, vide impugned judgment, convicted one accused father in law of deceased under Section 302, 326A, 452 IPC and acquitted of offences punishable under Sections 201, 506 and 323 IPC after extending benefit of doubt in his favour and acquitted other accused- Appeal by accused- State also filling cross appeal against acquittal- Testing reliability of Dying Declaration

keeping in view all relevant attending circumstances- Criminal jurisprudence- evidence has to be evaluated on touchstone of consistency and consistency with the account of other witnesses is keyword for upholding conviction of accused- Prosecution failed to prove charges against accused under Sections 302, 323, 326-A and 201 IPC, However, there is evidence on record proving beyond shadow of doubt that accused persons committed offences punishable under Sections 448 and 506 IPC-Accused charged for offence under Section 452 IPC which is an offence of higher degree than offence under Section 442/448 IPC. Accused convicted for offence under Section 442/448 IPC. (Paras 69 & 70) Title: Balak Ram Vs. State of Himachal Pradesh, Page- 599.

**Indian Penal Code, 1860** – Section 279 – Rash driving – Proof – High Speed – Held, high speed of vehicle itself not proof of rash driving – Situation in which driver is placed also a relevant factor. (Para 24). Title: State of H.P. vs. Amar Nath, Page- 466.

**Indian Penal Code, 1860** – Sections 279, 337, 338 and 304A – Rash and negligent driving and death – Proof - Trial Court acquitting accused on ground that his identity as driver of offending vehicle not established – Appeal- On facts, witnesses not identifying accused as driver of vehicle – Rather deposing that one 'P' was driving it at relevant time – No evidence of negligent driving on part of driver – Held, resultant death not on account of rash and negligent driving of driver – Acquittal upheld. (Para 24). Title: State of H.P. vs. Amar Nath, Page- 466.

**Indian Penal Code, 1860** – Section 279 and 304- A –Rash and negligent driving-Proof of-Trial court convicting and sentencing accused of causing death of victim by his rash driving-– A Post mortem report showed that the victim died due to hemorrhage and shock resulting from head and intrathoracic injuries - Evidence on record showed that the deceased victim arrived at the site of occurrence abruptly – Victim was not in sight of the accused – Workshops existed at the site with vehicles stationed there for repair work - A truck was stationed there and the deceased suddenly appeared from its rear – Held, accused while driving the offending vehicle meted adherence with the standards of due care and caution - Ld. Appellate Court's judgment not suffering from any perversity and absurdity, judgment maintained and affirmed – No merit found in appeal, accordingly dismissed. (Paras 9, 10 & 11) Title: State of H.P. Vs. Ishwar Dass, Cr. Appeal No. 691 of 2008, Page-1004.

**Indian Penal Code, 1860** - Sections 279, 304-A and 337 – Rash and negligent driving – Proof - Accused allegedly driving truck in an inebriated condition, hitting against scooter from behind and killing one of its occupants and injuring two others – Prosecution filing chargesheet for offences under Sections 279 , 304-II and 337 etc., of Code before Court of Session – Trial court acquitting accused of offence under Section 304 Part II but convicting for offences under Sections 279, 304-A, and 337 of Code – Appeal against conviction – Accused submitting before High Court of conviction being based on mis-appreciation of material on record by Trial Court – Facts on record proving (i) accused driving truck in high-speed and in zig-zag manner - (ii) accused hitting scooter from behind – (iii) identity of accused as driver of offending truck also proved – (iii) his blood and urine samples found carrying percentum of alcohol beyond permissible limits –( v) statements of witnesses consistent and without contradictions - Held - No mis-appreciation and non appreciation of evidence on record by Trial Court - Conviction rightly recorded - Appeal dismissed – Conviction upheld. (Paras 10 to 14) Title: Ajmer Singh Vs. State of H.P., Page- 963.

**Indian Penal code, 1860** - Section 302- **Arms Act, 1959-** Section 27 - Trial Court

convicting and sentencing accused for committing murder of his wife with gun shot – Appeal against – On facts, High court found (i) accused frequently resorting to beating of his wife whenever she requested him not to take liquor (ii) compromise had arrived between parties before Panchayat wherein accused had agreed not to take liquor in future (iii) 'R' son of accused had seen him at door of kitchen with gun immediately after gun shot and his mother lying in pool of blood there (iv) 'V' another son of accused,who rushed to spot on call of 'R' saw accused with gun on stairs connecting upper floor of house with courtyard (v) Deceased disclosing to her sister-in-law (Devrani) residing in same building (Inhone Mar Diya) referring to accused having killed her (vi) Forensic evidence showing death taking place from gun shot (vii) Gun recovered at instance of accused found workable and empty cartridge having been fired from it – Held, evidence clearly point to guilt of accused – Appeal dismissed – Conviction and sentence upheld. (Paras 9 to 18) Title: Kamla Nand vs. State of Himachal Pradesh, Page- 200.

**Indian Penal Code,1860-** Sections 307, 323, 392 read with 34- Attempt to murder and robbery - Proof of- Trial court convicting accused for offences of robbery and simple hurt but acquitting them for attempt to murder - Appeal against by accused – Accused contending wrong appreciation of evidence on part of trial court while convicting them for said offences – Facts revealing (a) accused hiring taxi of victim 'H' for going to Naina Devi ji (b) accused 'S' identifying place of offence during investigation , (c) mobile of victim recovered from accused 'A' (d) abandoned vehicle of complainant also recovered at instance of accused 'J' (e) injuries on person of complainant duly corroborated by medical evidence-(f) complainant duly identifying accused during trial - Held, judgment of conviction based on proper appreciation of evidence by trial court – No ground of interference made out – Appeal dismissed. (Paras 17 & 18) Title: Shayamu Yadav Vs. State of H.P., Page-981.

**Indian Penal Code, 1860** - Sections 323, 324, 341 read with Section 34 – Assault and wrongful restraint – Proof - Trial court convicting accused of assaulting complainant and causing injuries to him with sharp edged weapon etc. - Appellate court allowing appeal and acquitting accused – Appeal by state – State submitting before high court that acquittal recorded by Appellate Court being result of wrong appreciation of evidence – (i) Facts revealing improvements and departures in statement of complainant on oath from statement given in FIR (ii) Independent witness resiling from his previous statement implicating accused – (iii) Recovery of weapon not being at instance of accused diminishing probative values of recovery of incriminatory article – (iv) FIR concerning said occurrence also filed by accused but not investigated by same officer – Held – Acquittal by Appellate Court based on proper appreciation of evidence on record – Acquittal upheld - Appeal dismissed. (Paras 2, 10, 11, 12 & 13) Title: State of H.P. Vs. Madho Ram and others, Page-954.

**Indian penal Code, 1860**- Sections 323, 354 and 427- **Code of Criminal Procedure, 1973**- Sections 372 and 378(3) – Assault, outraging of modesty and mischief- Trial court acquitting accused of offences of assault, outraging of modesty and mischief- Petition seeking leave to appeal against by victim- Held- Close scrutiny of evidence revealing that parties were inimical to each other on account of dispute regarding irrigation of fields- Cross FIRs regarding same incident by both parties against each other – No Independent witnesses joined in investigation by investigating officer though incident witnessed by 40-50 persons- Only persons related to victim were made witnesses-Case also pending against complainant party in respect of same incident- On evidence commission of aforesaid offences against accused not proved beyond doubt- Petition seeking leave to appeal dismissed (Paras 17, 18)Title: Rikko Devi Vs. Sant Ram and others, Page-498.

**Indian Penal Code, 1860**- Section 376– Rape – Proof – Trial Court convicting and sentencing accused of rape – Appeal against on ground of misappreciation of evidence by Trial Court – Evidence revealing (i) that accused and victim were in same college (ii) Victim intended to marry accused and on his call, went in taxi from Rohru to Shimla with him (iii) Victim falsely telling her parents of her staying with her cousin at Rohru though she accompanied accused for Shimla (iv) Story of sexual assault as propounded by her found inherently doubtful (v) Victim major and thus knew consequences of her actions (vi) Medical and forensic evidence not linking accused with crime (vii) Possibility of victim having registered case on refusal of parents of accused for their marriage can not be ruled out - Held, evidence on record does not prove allegations of rape – Coitus if any was consensual – Presence of seminal stains of accused on towel inconsequential - Appeal allowed – Accused acquitted. (Paras 13 to 20, 22, 23 & 33) Title: Vikram Khimta vs. State of H.P., Page- 229.

**Indian Penal Code, 1872**- Sections 376 and 506 – Rape and criminal intimidation – Proof – Trial Court convicting and sentencing father-in-Law of raping his daughter-in-Law solely on basis of statement of victim and medical evidence – Allegations against accused being that he had been raping victim on pretext of curing her while practicing witchcraft on her – Appeal - Accused contending gross misappreciation of evidence by trial Court – On facts, victim though raped in February, 2014 disclosing incident to her husband in April 2014 and to her father in June, 2014, no evidence that accused had been doing witchcraft and treating people with his super natural power, husband did nothing and went to his work place despite knowing in April, 2014 of accused raping his wife- Medical evidence of prosecutrix of having been subjected to sexual intercourse not much of help since she being married lady and husband having access to her – Held, evidence does not disclose commission of offence by accused – Probability of false implication cannot be ruled out- Appeal allowed. (Paras 22 to 31) Title: Baldev Singh vs. State of H.P., Page- 375.

**Indian Penal Code, 1860** - Sections 379, 447, 506 read with 149 – Trespass, theft and criminal intimidation – Proof – Complainant alleging trespass in his land, theft of wheat crop from there by accused – Trial Court acquitting accused – Appeal against – On facts, (i) Complainant found in settled possession of disputed land (ii) Possession also inferable from revenue record (iii) Accused forcibly harvested crop (iv) Accused also wielded sickles they were holding (v) Accused practically admitting occurrence in cross – examination of complainant and his witnesses – Held, evidence clearly proves commission of aforesaid offences by accused – Judgment of Trial Court suffers from misappreciation of evidence on record – Appeal allowed - Accused convicted of said offences. (Paras 8 to 13) Title: Tulsi Ram vs. Sh. Dhanu Ram and others, Page- 338.

**Indian Penal Code, 1860-** Section 448**- Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989**- Section 3(1)(v)- Appeal by the convict/ appellant against judgment of conviction by learned Special Judge. Dispute regarding ownership and possession of shops between complainant and accused- Accused took possession of shops by breaking locks and used foul language against complainant as accused belonged to Rajput community and complainant to Chamar community- FIR lodged and investigation by Dy. SP. Recovery of broken locks and rod from accused- On testimony of complainant and other PWs accused convicted by Trial court-Appeal filed by accused on ground of misappropriation of evidence and discrepancies in statements of prosecution evidence- Held, Cross-examination by learned defence counsel stood omitted by statements of prosecution witnesses and recoveries affected from accused. No merit in appeal. Appeal dismissed accordingly. (Paras 10 & 11) Title: Vishwajit Singh Vs. State of H.P., Page-592.

**Indian Registration Act, 1908 -** Section 17 (2)(vi) - Decree**,** whether compulsorily registrable ? Held – Decree or order merely declaring pre-existing right of party and by itself not creating new right title or interest inpreasnti in immovable property of value of rupees more than one hundred, does not require registration – It is duty of court to examine whether party had pre-existing right to immovable property or under order or decree of court one party having right interest of title agreed or suffered to extinguish same and created right inpreasenti in such property in favour of other party for first time either by compromise or pretended consent – If latter be the position, decree requires registration. (Para 18) Title: Surinder Singh Versus Narinder Singh and others, Page- 410.

**Indian Registration Act,1908 -** Section 17(2) (vi)- Decree**,** whether compulsorily registrable ? – Suit of "NR" decreed for pre-emption with respect to suit land – Suit was filed for plaintiff and his brother "N" without impleding plaintiff since he was minor – Plaintiff filing suit for declaring for his rights in land for which pre-emption rights were claimed in earlier suit- This suit decreed on basis of compromise – Held, compromise decree merely reconised pre-existing right of plaintiff in said land – Decreed did not require registration. (Paras 20 & 21) Title: Surinder Singh vs. Narinder Singh and others, Page- 410.

**Indian Succession Act,1925** - Section 63 – Will – Proof – Suspicious circumstances – Trial Court decreeing suit of plaintiffs and holding them owners in possession of suit property on basis of will executed by father – Also holding subsequent will in favour of defendant suspicious – District Judge, affirming decree in appeal – Regular Second Appeal – On facts, scribe/document writer of will relied upon by defendant not producing his register, testator dying few days after execution of said will, testator not opting to register subsequent will though office of Sub - Registrar located few meters away from his house and when earlier will was registered one, mutation in favour of plaintiffs on basis of earlier will, attested in presence of defendant, defendant not producing subsequent will at time of attestation of mutation, no provision for maintenance of wife in subsequent will, writing in will squeezing towards end indicative of attempt to adjust words in given space, judicial papers used for scribing will being of different series- Held, will relied upon by defendant shrouded by suspicious circumstances – Decree upheld. Regular Second Appeal dismissed. (Paras 14 to 18) Title: Bhagat Ram (deceased through LR Vinod Kumar) vs. Roop Lal and anr., Page- 421.

**Indian Succession Act, 1925** - Section 63 – Will - Attestation – Proof - Marginal witness "D.K." nowhere deposing about testator signing or thumb marking will in his presence or in presence of other witness or he signing will in presence of testator - Other marginal witness not examined by propounder - Held, due execution of will not proved - Regular Second Appeal against decree based on concurrent findings also dismissed. (Paras 8 to 10) Title: Rukmani Devi & Ors. vs. Rajinder Singh, Page-458.

**Indian Succession Act, 1925 -** Section 63 – Will – Proof - Plaintiff filing suit and challenging Will executed by his grand-father 'BR' in favour of defendants on grounds of fraud and misrepresentation – Trial court dismissing suit and appeal of plaintiff also dismissed by first appellate court – RSA - Facts showing father of plaintiff 'S' dying before 'BR' – Mother of plaintiff thereafter eloping with some other person – Plaintiff brought up by his maternal-uncle – 'BR' looked after and maintained by defendants – Marginal witness 'GN' duly supporting due execution and attestation of Will by 'BR' – Defendants performing final rites of deceased – Plaintiff even not attending final rites of 'BR' - Plaintiff failing to show as how will is vitiated by other vices - Held, no ground to

interfere with concurrent finding of facts made out – RSA dismissed – Judgments and decrees of lower courts upheld. ( Paras 8-11) Title: Lesh Ram Vs. Tej Ram and others, Page-1063.

**Industrial Disputes Act, 1947**- Section 2 (oo)- Retrenchment- Held, termination of employee for any reason whatsoever except by way of disciplinary action, amounts to retrenchment. (Para 4) Title: Principal, D.A.V. Centenary Public School, Kumarhatti Vs. State of H.P. & others, Page-745.

**Industrial Disputes Act , 1947 –** Section 9 A- **Requirement of giving notice – Circumstances explained -** Services of petitioner terminated by employer after holding disciplinary proceedings – Challenge thereto – Labour Court refusing stay of termination order- Petitioner filing writ and challenging termination of services on ground that no statutory notice u/s 9A of Act was given to him before terminating his services – Termination from services involved change in terms and conditions of employment and notice was required to be given- Held – Section 9 A of Act is applicable when terms and conditions of services of workman are intended to be altered by employer - It is not attracted when services are being terminated after holding due disciplinary proceedings against workman concerned. (Paras 1 & 2) Title: Vinod Kumar Vs. M/s Nova Security Service Pvt. Ltd. , Page-991.

**Industrial Disputes Act, 1947** –Sections 9A and 33(2) – Whether employee can be dismissed during pendency of conciliatory proceedings pending before Labour – Cum - Conciliatory Officer without his express permission ? - Held, no – Employer dismissing employee on ground of misconduct after holding enquiry and then filing application for approval before Labour Court – Labour Court dismissing application on ground of maintainability – Petition against – Employee contending that conciliatory proceedings with regard to disputed matter were pending before Conciliatory Officer on date dismissal order was passed – And no express permission was obtained, being so order is bad – Held, Statutory provisions contained in section 33 of Act, demonstrate that during pendency of conciliation proceeding before Competent Authority/ Tribunal /Court in respect of Industrial Dispute, employer cannot discharge or terminate employee without express permission of said Authority/ Court – No conciliatory proceeding pending before Labour Court – There was no question of obtaining such express permission/ approval from Labour Court – No application for express permission to dismiss employee filed by employer before Labour-Cum- Conciliatory Officer – Further held, there is no infirmity with findings of Labour Court – Petitions dismissed. (Paras 14, 17, 19 & 20) Title: Pritpal vs. M/s Federal Mogal Bearing India Ltd., Page- 292.

**Industrial Disputes Act, 1947**- Sections 25-B and 25-F-Retrenchment- Held, employee who rendered continuous service for requisite period can be terminated/ disengaged only in accordance with Section 25-F of Act- Disengagement without serving notice and without paying retrenchment compensation, bad in eyes of law- Award of Labour Court directing reinstatement with back wages, upheld- Civil Writ Petition dismissed. (Paras 4 to 6) Title: Principal, D.A.V. Centenary Public School, Kumarhatti Vs. State of H.P. & others, Page-745.

**Industrial Disputes Act, 1947 –**Section 33 (2) (b)- Nature of powers- Held - Order of dismissal or discharge passed by employer by invoking Section 33 (2) (b) of Act, remains incomplete and inchoate as it is subject to approval of Authority – If approval not granted by Competent Authority relationship of Employer – Employee deemed to be continuing entitling

employee to all service benefits. Paras 22 & 23) Title: Pritpal vs. M/s Federal Mogal Bearing India Ltd., Page- 292.

**Interpretation of Statutes** - Conflict between Central and State Acts - Principles – Held, even in situation of conflict between Central and State Laws, Court would attempt to reconcile conflicting items through harmonious or reconciliatory construction of provisions – Court should interpret Statutes liberally and not technically in narrow spirit – Pith and substance of Act and its reasonable intent would be guiding factor. (Para 25) Title: Virender Singh and another vs. State of HP and others, Page- 391.

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**Joint land** – Rights inter se of Co- sharers – Held – Co-sharer can raise construction over joint land either with consent of all other co-sharers or he can raise construction within his share over land in his possession provided it is not over best or valuable portion of joint property. (Para 8) Title: Sunder Lal vs. Sh. Ravinder Singh, Page- 367.

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**Land Acquisition Act, 1894 -** Sections 4 & 36 - Use and occupation charges – Determination – Beneficiary found in actual possession of acquired land since before issuance of Notification under section of 4 of Act – Reference Court granting use and occupation charges at rate of Rs. One Thousand per biga per annum from date of possession (1969) till Notification ( 1989) with interest – Appeal against – State relying on revenue entries showing land as uncultivated indicating that it was not generating any agricultural income – Held, likelihood of land owners making improvements and rendering it cultivable cannot be ignored – Assessment not unreasonable – RFA dismissed. (Paras 5 & 6) Title: The Land Acquisition Collector and others vs. Kishan Chand, Page- 357.

**Land Acquisition Act, 1894 –**Sections 18 & 23 – Acquisition of land for public purpose - Reference - Compensation - Market value - Determination - Exemplar sale transactions - Relevancy - Held, while adjudging compensation amount, two principles have to be borne in mind - Proximity in time and proximity in location of land with respect to which exemplars have been brought on record - Exemplar sale deeds not conforming to these principles cannot be taken into account while determining value of land - RFA dismissed - Award of Reference Court upheld. (Paras 3 & 4) Title: The Land Acquisition collector, H.P. Housing and Urban Development Authority Vs. Narinder Singh & others, Page-1031.

**Land Acquisition Act, 1894 -** Sections 18 & 23 - Acquisition of land for public purpose – Reference– Market value - Determination – Held, once fair compensation under Act determined judiciously all land owners whose land was taken away by same notification should become beneficiary thereof – Different treatment to identically situated persons would amount to discrimination. (Para 7) Title: Land Acquisition Collector, Parvati Hydro Electric Project, Larji vs. Manohar Lal & others, Page- 110.

**Land Acquisition Act, 1872**- Sections 18 & 23 - Acquisition of land for public purpose - Compensation- Market value - Determination-Exemplar sale- Exemplar sale of fairly big chunk of land with factory over it, can be taken to have already been developed capable of fetching higher price than land yet to be developed–Said sale also being pursuant to public auction, not voluntary transaction –Cannot be relied upon for determining market value.

(Para 28 ) Title: H.P. Housing and Urban Development Authority (HIMUDA) & another vs. Smt. Soma Devi and others, Page- 113.

**Land Acquisition Act, 1872-** Sections 18 & 23 - Acquisition of land for public purpose – Compensation- Market value- Assessment- Held, for determining market value of land for acquisition, it is purpose for which land acquired and not its nature and classification, what is relevant -Where nature or classification of land has no relevance with purpose, uniform rate to all kinds of lands is to be given and it cannot be less than higher rate determined by Land Acquisition Collector. (Paras 8 &10 ) Title: The Renuka Dam Project and another Vs. Surender Singh and others, Page-126.

**Land Acquisition Act, 1872-** Sections 18 & 23 - Acquisition of land for public purpose - Compensation – Market value – Assessment - Deductions towards development charges - Held, when for using land for purpose ( construction of Dam) for which it is acquired, no development activity is undertaken by beneficiary, deductions towards development charges impermissible. (Para 11) Title: The Renuka Dam Project and another Vs. Surender Singh and others, Page-126.

**Land Acquisition Act, 1894 -** Sections 18 & 23- Acquisition of land for public purpose – Reference - Compensation –Market value - Assessment – Previous Awards – Relevancy – Previous awards pertaining to adjoining village can be considered for paying identical compensation for land under acquisition provided nature and potentiality of lands of both villages are similar – In appropriate cases, where similarly or nature and potentiality of lands not established, some deductions can be made. (Para 23) Title: General Manager, Northern Railway Vs. Kamla Devi and Others, Page-184.

**Land Acquisition Act, 1894**- Sections 18 & 23- Acquisition of land for public purpose- Reference- Market value- Determination- Held- When land in different villages having same nature and potentiality is acquired for common purpose under same Notification, claimants entitled for compensation at uniform rate irrespective of classification of land. (Para 10) Title: State of Himachal Pradesh & another Vs. Inder Singh Verma (now deceased through the legal representatives) Promila Panwar & others, Page-669.

**Land Acquisition Act, 1894**- Sections 18 & 23- Acquisition of land for public purpose- Reference- Market value- Determination- State acquiring lands in villages 'N' 'S' and 'K' for construction of road under same Notification- Land Acquisition Collector awarding compensation to claimants of village 'K' at Rs.30,000/- per bigha- Reference Petitions- District Judge enhancing compensation at rate of Rs.10,00,000/- per bigha- RFA- Nature and potentiality of lands situated in villages 'N' 'S' and 'K' found similar- All lands to be used for common purpose- Lands acquired under same Notification- Collector awarding Rs.10,00,000/- per bigha in respect of best quality of land for villages N and S- Held- Since lands of all these villages have same nature and potentiality claimants are entitled to compensation at uniform rates- District Judge was justified in enhancing compensation at market rate of Rs.10,00,000/- per bigha of claimants of village 'K' (Paras 6 to 15) Title: State of Himachal Pradesh & another Vs. Inder Singh Verma (now deceased through the legal representatives) Promila Panwar & others, Page-669.

**Land Acquisition Act, 1872** - Sections 18 & 23- Acquisition of Land for public purpose- Compensation-Reference-Reference Court denying compensation qua house built over acquired land on ground of claimant not proving that said structure existed on date of

Notification issued under Section 4 of Act- Appeal- Claimant relying upon observation of Hon'ble Division Bench made in another litigation of house might be there on said land prior to Notification- Held, observation of Hon'ble Division Bench only prima-facie- Said judgment also directed District Judge not to take it into consideration while deciding main case- Khasra Girdawari not showing any house over acquired land till April, 1992 though allegedly built in 1981- Ex-parte decree of adverse possession obtained by claimant collusive in nature- No entry of house in Panchayat record- Notices issued by District Administration to owner in 1994-95 for stopping construction as land stood acquired and no construction could be raised over it- Spot inspection report of 1999 also revealing construction to be new without sanitation, electricity and water fittings and subsequent to Notification issued under Section 4 of Act- Appeal dismissed- Award upheld. (Paras12 to 17) Title: Subhash Mahajan Vs. The Land Acquisition Collector and another, Page-721.

**Land Acquisition Act, 1894 -** Section 18 & 23- Acquisition of Land for public purpose- Reference- Market value- Assessment- Collector discarding one year average of area on ground of its being based on 'sale of land with structures' whereas only vacant land being acquired by Government- Collector segregating value of structures vis-à-vis land and then determining market value of vacant land at Rs.4,310/- per square meters- Reference- Facts revealing valuation report not separately depicting valuation of land or structures- Held, it was not open to Collector to segregate amount mentioned in exemplar sale deed- Market value enhanced on basis of one year average. (Para 4) Title: Leena Dhingra and others Vs. Collector Land Acquisition & another, Page-760.

**Land Acquisition Act, 1872**- Sections 18, 19 & 23– Acquisition of land for public purpose – Reference - Compensation – Market value –Determination - Negotiations before Land Acquisition Collector (LAC)- Evidentiary value- Price for land offered by Department at time of negotiations before LAC, not accepted by Land owners- On evidence of official of Department, reference Court enhancing market value of land to price initially offered by Department at time of negotiations – Court also granting statutory benefits- RFA - Department contending that initial offer for compensation was in lump sum inclusive of all statutory benefits and said amount could not be basis for determination of compensation with further statutory benefits- Held, offer made by beneficiary at time of negotiations, since not accepted by landowner, cannot be made basis for determining amount of compensation. (Para 11) Title: H.P. Housing and Urban Development Authority (HIMUDA) & another vs. Smt. Soma Devi and others, Page-113.

**Land Acquisition Act, 1872**- Sections 18, 23 & 25–Acquisition of Land for public purpose – Compensation – Market value – Determination - Exemplar sales- Held, exemplar transactions determining value of land at rate lower than rate awarded by LAC, cannot be considered being violative of Section 25 of Act. (Para 18 ) Title: H.P. Housing and Urban Development Authority (HIMUDA) & another vs. Smt. Soma Devi and others, Page- 113.

**Land Acquisition Act, 1894 -** Sections 18, 23 & 25- Acquisition of land for public purpose –Compensation- Market value- Assessment – Sale transaction- Held, sale deeds on basis of which value of acquired becomes lesser than value assessed by Collector himself not relevant (Para 22) Title: General Manager, Northern Railway Vs. Kamla Devi and Others, Page-184.

**Land Acquisition Act, 1894** – Sections 18 & 28-A- **Limitation Act**, **1963**- Section 5 – Applications for re-determination of compensation- Delay- Condonation – whether Land

Acquisition Collector (Collector) competent to condone delay caused in filling applications for re-determination of compensation – Applicants filing applications before Collector for re-determination of compensation on basis of Award of Reference Court passed in favour of other landowners- Also seeking condonation of delay caused in moving such applications – Collector condoning delay but his successor -in -interest reviewing order and declining condonation of delay- Petition against- Held, Collector has no jurisdiction whatsoever under Section 28-A of Act to condone delay- Power to condone delay vests in Reference Court on basis of applications transmitted by Collector- Order of Collector condoning delay itself without jurisdiction- Petitions dismissed with liberty to petitioners to approach Collector again under Section 28-A of Act. (Paras 3 to 5) Title: Shayma Nand & Others Vs. State of H.P. & Others, Page- 1019.

**Land Acquisition Act, 1894** - Sections 18 and 51 A - Acquisition of land for public purpose – Reference – Market Value – Determination – Sale deed – Proof – Reference court discarding sale deeds on ground of these not having been proved in accordance with law – Appeal – Held, certified copies of sale deeds per se readable in evidence without formal proof – However, their probative value will depend on facts and circumstance of case. (Para 2) Title: Sh. Gian Chand vs. State of H.P. & others, Page- 355.

**Land Acquisition Act, 1894**- Section 25- Acquisition of land for public purpose- Market value- Determination- Held- Market value of Land cannot be determined by Reference Court lesser than value fixed by Land Acquisition Collector.(Para 10) Title: State of Himachal Pradesh & another Vs. Inder Singh Verma (now deceased through the legal representatives) Promila Panwar & others, Page-669.

**Land Acquisition Act, 1894**- Section 25- Appeals against common award passed by Learned District Judge (Forests), Shimla- Common question of law – Determination of compensation- Award pertaining to village Nagrhi and Award pertaining to village Sari - Land Acquisition Collector determined highest value of the land @ Rs.10,00,000/- per bigha- As per Section 25 of the Act, Court cannot determine value of land lesser than value determined by Land Acquisition Collector. Where purpose of land acquisition is common like construction of road, compensation is to be awarded on uniform rates by considering entire land as a single unit irrespective of its classification. Held- Reference Court has not committed any irregularity by awarding same rate of Rs.10,00,000/- per bigha to land owners of Village Keer irrespective of its nature and classification. Appeals dismissed. (Para 14) Title: State of Himachal Pradesh & another Vs. Inder Singh Verma (now deceased through the legal representatives) Promila Panwar & others, Page- 669.

**Limitation Act, 1963 -** Section 3 & Article 65 – Limitation - Computation thereof - Held, Limitation starts running from day plaintiff feels aggrieved of acts of defendants – Principles of conscious, awakened waivers and abandonment(s) have due applicability in computing period of limitation. (Para 9) Title: Raj Kumar & another vs. Jassa and another, Page-809.

**Limitation Act, 1963 –** Article 113 – Wrong revenue entries – Limitation for filing suit – Computation – Held, period of limitation in filing suit will commence from date when opposite party makes invasion on plaintiff's rights on basis of wrong revenue entries – Date of making entries not relevant. (Para 12) Title: Vipin Kumar & others Vs. Roshan Lal, Page-993.

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**Micro Small and Medium Enterprises Development Act, 2006**- Section 15 – Held, for supply of goods or services, buyer bound to make payment for same to seller on or before date agreed upon inter se parties – Period agreed upon for payment cannot exceed forty five days from acceptance or deemed acceptance of goods or services by buyer. (Para 11) Title: M/s Brijsons Hetreat vs. The Himachal Pradesh Micro, Small and Medium Enterprise, Facilitation Council and Anr., Page- 224.

**Micro Small and Medium Enterprises Development Act, 2006** - Section 16 – Non-payment – Interest on payment – Award thereof – Held, where buyer fails to make payment to seller for supply of goods or services in consonance with provisions of section 15 of Act, buyer shall notwithstanding anything contained in agreement or any law for time being in force be liable to pay compound interest with monthly rests from date agreed upon at rate three times of bank rates notified by Reserve Bank. (Para 11) Title: M/s Brijsons Hetreat vs. The Himachal Pradesh Micro, Small and Medium Enterprise, Facilitation Council and Anr., Page- 224.

**Micro Small and Medium Enterprises Development Act, 2006**- Section 18 – Dispute as to payment – Adjudication thereof – Held, in case of dispute between buyer and seller regarding amount due, parties shall make reference to Micro and Small Enterprises Felicitation Council (Council) – If no Conciliation is effected, Council shall take up dispute for Arbitration by itself or to send it to some Arbitrator – Order of Council dropping reference of petitioners against denial of interest on delayed payment, set aside – Council directed to send matter for Arbitration. (Paras 11 & 15) Title: M/s Brijsons Hetreat vs. The Himachal Pradesh Micro, Small and Medium Enterprise, Facilitation Council and Anr., Page- 224.

**Mines and Minerals (Regulation and Development) Act, 1957-** Section 9 (2) – **Mineral Concession Rules,1960 (Rules)** – Rules 64-A and 64-B – Petitioner company granted lease for extracting limestone – Contract speaking of payment of royalty to Government – State levying interest on delayed payment of royalty and raising demand – Challenge thereto – Petitioner arguing that as per past practice, royalty was being paid on quarterly basis and demand for payment on monthly basis never raised by Government - Petitioner also having legitimate expectation of not paying interest on delayed payment – Held, since Government had not fixed any specific date for payment of royalty, it became due moment minerals were consumed or removed from site by lessee – Interest on delayed payment to be calculated after sixtieth day of such removal from leased area and not on quarterly basis by computing calendar months – Past practice has to be consistent with Rules – Levying of interest upheld – Petition dismissed. (Paras 8 & 9) Title: M/s Ambuja Cements Ltd. vs. State of Himachal Pradesh and others, Page- 274.

**Motor Vehicles Act, 1988 -** Motor accident - Damage to vehicle - Claim application - Tribunal dismissing application for want of proof of claimant's ownership qua damaged vehicle – Appeal - Application intended for adducing copy of Registration Certificate in evidence allowed - Matter remanded. (Paras 4 & 5) Title: Tek Singh vs. Sh. Amarjit Singh and others, Page- 24.

**Motor Vehicles Act, 1988 –** Motor accident – Claim application – Rash and negligent driving – Proof – Tribunal holding driver of offending vehicle having caused accident because of his rash and negligent driving and fastening compensatory liability on him - RFA – Driver contending that he having been acquitted by Criminal Court for rash driving in respect of

said offence, he cannot be burdened with compensatory liability – Held, findings recorded by Criminal Court being not binding on Claims Tribunal while adjudicating claim application – Accident happened because appellant negligently opened door of his van and claimant coming from behind hit against it and fell down – Tribunal justified in holding accident to have taken place on account of his negligent driving. (Para 3) Title: Michael Desouza vs. Sh. Suresha Nand, Page- 26.

**Motor Vehicles Act, 1988 –** Motor accident – Claim application – Contributing negligence – Deduction of compensation - Proof – Claimant while driving scooter striking against door of Van suddenly opened by its driver and receiving injuries – Tribunal taking accident as result of contributory negligence and deducting fifty per cent from amount assessed as compensation – Cross objection – Held, on facts accident occurred solely because of negligent driving of driver of Van – Deduction from compensation for alleged contributory negligence not tenable – Cross objection allowed – Compensation as assessed by Tribunal ordered to be paid – Award modified. (Paras 4 & 5) Title: Michael Desouza vs. Sh. Suresha Nand, Page- 26.

**Motor Vehicles Act, 1988** – Section 2 (1) – "Area" – Meaning – Held, expression "Area" may include land or area where National Highway, State Highway or Local road has been constructed. (Para 33) Title: Virender Singh and another vs. State of HP and others, Page-391.

**Motor Vehicles Act, 1988 –** Section 2(13) and 149 **–** Motor accident – Claim application – Defences – Gratuitous passenger – Claims Tribunal allowing application of legal representatives of deceased and imposing liability on insurance company – Appeal by insurer – Insurance company contending that deceased was not travelling as owner of goods in vehicle at time of accident -He was gratuitous passenger and it has no liability – Facts indicating deceased having carried livestock for sale in it and after sale thereof he was returning back in same vehicle – Accident taking place on return journey – Held, deceased was not gratuitous passenger in offending vehicle till he reached destination from where he hired vehicle aforesaid – Claims Tribunal justified in imposing liability on insurer. (Paras 2, 3, 4, 5 & 6) Title: New India Assurance Company Ltd. Vs. Sarla Devi and others, Page-950.

**Motor Vehicles Act, 1988-**Section 2(30)-"Owner"- Held, for purposes of Act, owner of vehicle means a person registered as owner of or lessee or hypothecatee thereof (Para 2) Title: Shri Ravi Sharma vs. Smt. Sumitra Devi & Others, Page- 52.

**Motor Vehicles Act, 1988 –** Sections 3 and 149 – Motor accident – Claim application – Defences – Driving license – Validity – Held, person holding LMV driving license entitled to drive goods vehicle of same category – No separate endorsement authorising to drive goods vehicle of same category required. (Paras 4 and 5) Title: New India Assurance Company Ltd. Vs. Sarla Devi and others, Page-950.

**Motor Vehicles Act, 1988-** Section 6- Restriction on simultaneously holding two driving licenses- Applicability- Claims Tribunal allowing claim application and fastening liability on insurer- Appeal against- Insurer submitting that driver of offending vehicle had two driving licenses at time of accident and there was infraction of section 6 of Act- On facts, driver was having driving license issued by Licensing Authority Agra and Learner's license issued by Licensing Authority Dharamshala- Held- Restriction on holding simultaneously two driving licenses is not attracted when one of licenses person possessing is a learner's license.(Paras

4 & 5) Title: United India Insurance Company Limited Vs. Chander Rekha & others, Page-581.

**Motor Vehicles Act, 1988-** Section 9- Driving License- Issuance of- Jurisdiction- Requirement- Held- Licensing Authority has jurisdiction to issue driving license to person who is ordinarily residing or carrying on business within its jurisdiction – Permanent stay of person within its jurisdiction not necessary.(Para 6) Title: United India Insurance Company Limited Vs. Chander Rekha & others, Page-581.

**Motor Vehicles Act, 1988-** Sections 56 and 166 – Motor accident – Claim application- Defences- Claims Tribunal allowing application and imposing liability on insurer- Appeal against- Insurer arguing that offending vehicle being a transport vehicle, was used without fitness at time of accident- Owner of offending vehicle though did not place on record fitness certificate but all other documents like valid driving license, insurance policy duly proved on record. Insurance company also not made any endeavor to summon record of RLA to prove that offending vehicle did not have fitness certificate at time of accident- Held- Plea of insurance company that vehicle was being plied without fitness, not proved- Appeal dismissed. (Paras 4 to 6) Title: Future General India Insurance Company Ltd. Vs. Bharti and others, Page-560.

**Motor Vehicles Act, 1988** – Section 115 – Prohibition against of plying of vehicles – Scope – Held, powers which can be invoked by State Government under section 115 of Motor Vehicles Act are spread over to ban or prohibit driving of any specified Motor Vehicle either generally in specified area or on specified road. (Para 30) Title: Virender Singh and another vs. State of HP and others, Page- 391.

**Motor Vehicles Act, 1988** – Section 115 – National Highways Act, 1956- Sections 4 and 5 - National Highway Authority Act,2002 - Section 35 – Ban on entry of Sleeper Coaches – State Government in exercise of powers conferred by Section 115 of Motor Vehicles Act banning entry of Sleeper Coaches in State – Challenge thereto – Petitioners contending that such powers vest only in Central Government under Act of 1956 or Act of 2002 – And notification of State Government is ultra virus of Constitution – Held power exercisable under Act of 2002 is restricted qua National Highways only – Whereas wider powers have given to State Government through Section 115 of Motor Vehicles Act for banning or restricting any specified class or description of Motor Vehicles in specified area as compared to corresponding power conferred on National Highways Authority in respect of National Highways and not the other areas - There is no conflict or overlapping of powers between State Government and National Highways Authority of India – Petition dismissed. (Paras 34 & 35) Title: Virender Singh and another vs. State of HP and others, Page- 391.

**Motor Vehicles Act, 1988 -** Sections 149 and 166 **-** Claim application- Defences - Driving Licence – Validity - Insurer avoiding its liability on ground of driving licence of driver of offending vehicle - Contending that driving licence issued by Government of Nagaland not in Smart Card Format, whereas said Government vide Notification required all driving licences to be converted in Smart Card Format - Held, in absence of evidence that said notification was given vide publication and driver had knowledge thereof or signatures embossed in said driving licence fictitious, driving licence cannot be held fake - No breach of terms of insurance policy proved - Appeal dismissed- Award upheld (Para 4) Title: The New India Assurance Company Ltd. vs. Smt. Sunita Devi & others, Page- 28.

**Motor Vehicles Act, 1988-** Sections 149 & 166- Motor accident- Claim applications- Gratuitous passengers- Proof- Claim applications clearly mentioning that occupants were going to pay obeisance- No averment that any goods were also being carried along with them- Offending vehicle being goods carrier, travelling of passengers was not permissible- Held, vehicle was being plied in breach of terms of policy- Imposition of liability on owner of vehicle justifiable- However, award(s) partly modified with direction to insurer to first satisfy award(s) and then recover amount from insured. (Paras 3 to 5) Title: Jagdish Chand Vs. Master Rohit alias Ravi & Ors., Page-755.

**Motor Vehicles Act, 1988 -** Sections 149 & 166 **-** Motor accident - Claim application – Defences - Fitness of vehicle - Claims Tribunal awarding compensation and fastening liability on insurer - Appeal against - Insurer contending owner of vehicle not having furnished in evidence certificate of fitness of offending vehicle for plying – And no liability can be fastened on it - Insurer not found having taken this plea in its pleadings nor raised it before Claims Tribunal - Held, plea regarding fitness of vehicle cannot be taken in first appeal.(Para 6) Title: Future General India Insurance Company Ltd. Vs. Sheetal and others, Page-931.

**Motor Vehicles Act, 1988 –** Sections 149 & 166 – Motor accident – Claim application – Defences – Validity of driving licence – Duty of owner of vehicle - Claims Tribunal allowing application of legal representatives of deceased and fastening liability on insurer - Appeal against – Insurer relying upon entries of Parivar Register showing age of deceased driver 14 years and contending that he was not entitled to hold driving licence (DL) - And DL issued in his favour was invalid - DL of deceased, however, found valid - Deceased authorised to drive offending vehicle under it – His post mortem report indicating age 38 years - Held, owner of vehicle was not bound to verify age of driver by going through entries recorded in Parivar Register once DL was prima facie valid in all respects. (Para 5) Title: Oritnetal Insurance Co. Ltd. Vs. Rita Sharma & Others, Page- 924.

**Motor Vehicles Act, 1988** – Sections 149, 166 & 185 – Motor Accident – Claim application – Defences – Drunken driving – Held, drunken driving is not statutorily recognized defence available to insurer – It cannot avoid its liability on ground that driver was driving vehicle in inebriated condition. (Para 2) Title: United India Insurance Company Ltd. vs. Anil Kumar & others, Page- 352.

**Motor Vehicles Act, 1988-** Sections 157 & 166- Held, when registration of vehicle is transferred along with insurance certificate, certificate of insurance and policy shall be deemed to have been transferred in favour of transferee from date of transfer. (Para 2) Title: The Oriental Insurance Company Ltd. Vs. Durga Dass and another, Page-757.

**Motor Vehicles Act, 1988** - Section 166- Motor accident - Claim application- Compensation- Assessment- Claims Tribunal allowing application of claimants and awarding compensation including compensation of Rs.1,00,000/- towards loss of consortium to widow and Rs.1,00000/- towards loss of love and affection to children - Appeal- Held- Tribunal wrongly awarded aforesaid sums under conventional heads- Compensation towards loss of consortium and loss of love and affection brought down in consonance with National Insurance Company Ltd. vs. Pranay Sethi and others, reported in 2017 ACJ, 2700. Appeal partly allowed- Award modified (Paras 3, 8 & 9) Title: Managing Director, HRTC, Shimla & another Vs. Shweta Thakur & Others, Page-626.

**Motor Vehicles Act, 1988-** Section 166- **Code of Civil Procedure, 1908** - Order XLI Rule 27- Additional evidence- Insurer intending to adduce report of Investigator in evidence by way of additional evidence at appellate stage- Held- Report of Investigator material for just decision- Matter remanded to Claims Tribunal with direction to take Investigator's report on record and then proceed in accordance with law. (Para 4) Title: National Insurance Company Ltd. Vs. Surat Ram and others, Page-753.

**Motor Vehicles Act, 1988**- Section 166 - Motor accident- Claim application- Recitals of FIR- Relevancy- Held, contents of FIR giving manner of occurrence of accident cannot be relied upon if not proved by informant. (Para 2) Title: National Insurance Company Ltd. Vs. Daleep Singh and another, Page-758.

**Motor Vehicles Act, 1988** – Section 166- Code of Civil Procedure 1908 -Order XXII Rule 3 – Motor accident – Bodily injuries – Claim application – Death of claimant – Consequences – Held, when, death of claimant is not on account of injuries sustained in motor accident, cause of action does not survive – Principle of maxim actio personalis Mortiur cum persona would be attracted in such case – His legal representatives can not be substituted in such claim proceedings. (Para 5) Title: Reeta Awasthi & others Vs. Dalip Thakur & another, Page-897.

**Motor Vehicles Act, 1988 –** Section 166- Motor accident – Bodily Injuries – Compensation- Determination- Claimant suffering bodily injuries in road accident and remaining hospitalized – Claims Tribunal granting compensation in sum of Rs. 2 lacs towards pain and suffering– Appeal against by insurer - Hospital stay only for 6 days – Held, grant of compensation of Rs. 2 lacs under head of pain and suffering excessive – Compensation reduced to Rs. 50,000/- Award modified. (Para 4 ) Title: National Insurance Company Limited Vs. Vikrama Devi & another, Page- 973.

**Motor Vehicles Act, 1988** – Section 166**-** Motor accident – Permanent disability - Compensation- Determination- Claimant suffering permanent disability of 15% - Claims Tribunal awarding Rs 3 Lacs as compensation by relying upon *Mallikarjun v. Divisional Manager, reported in AIR 2014, S.C., 736,* -Appeal against by insurer – Held, Assessment of compensation of Rs.3,00,000/- under head of permanent disability is erroneous – *Mallikarjun case* is applicable in cases involving children -In view of age of claimant (50 years) and applying multiplier of 13, compensation under this head reassessed at Rs.84244/ - Appeal partly allowed and award modified. (Para 7) Title: National Insurance Company Limited Vs. Vikrama Devi & another, Page-973.

**Motor Vehicles Act, 1988 –** Section 166 **– Motor accident – Claim application –** Engineering student – Death - **Monthly income- Future prospects- Determination –** Claims Tribunal assessing monthly income of deceased, an engineering student @ Rs. 10000 and awarding compensation accordingly- Appeals by claimants as well as insurer– Insurer contending that deceased was unemployed and no increase towards future prospects can be given **-** Held – Deceased was an engineering student - On completing his engineering course he would have definitely secured an employment either in government sector or in private sector- Per mensem salary of deceased can be presumed to be Rs.15,000 - 40% increase on presumed salary to be given towards future prospects as he was 22 years- Deceased being bachelor, 50% deductions to be made for personal expenses –Multiplier of 18 applicable –Compensation re determined- Award modified – Appeals partly allowed.

(Paras 4,5,6 & 7) Title: United India Insurance Company Limited Vs. Nindu Sharma and others, Page- 986.

**Motor Vehicles Act, 1988 –** Sections 166 & 173- Motor accident- Claim application- Compensation- Assessment- Tribunal assessing monthly income of deceased at Rs.3,600/- and granting compensation accordingly after fastening liability on insurer- Appeal and cross objection- Claimants praying enhancement in compensation by arguing that income of deceased was Rs.7500/- per month- In cross objection, insurer taking plea that in absence of evidence that offending vehicle was insured with it, liability ought to have been fastened on owner of vehicle – On facts income of deceased proved to be Rs.7500/- per month- Insurance policy/ Certificate not filed in evidence by insurer- Held- Insurer intentionally avoided to place on record insurance cover issued by it for escaping indemnificatory liability to get it fastened upon owner. Appeal and cross objection partly allowed. Indemnificatory liability fastened upon insurer. (Paras 3 to 6) Title: Rakesh Thakur Vs. Ram Lal and others objectors, Page-568.

**Motor Vehicles Act, 1988** - Sections 166 & 173- Motor accident- Claim application- Compensation- Assessment- Tribunal assessing monthly income of deceased at R.4500/- and granting compensation on its basis to claimants - Tribunal also granting Rs. One lack towards loss of consortium to widow- Appeal against by claimants - Deceased a Safai Karamchari, on contract basis at Rogi Kalyan Samiti, found drawing Rs.10,700/- per month as salary- Held- monthly income to be taken as Rs.10,700/- Compensation granted accordingly - Compensation under conventional heads also modified in tune with Pranay Sethi's case [JT 2017 (10) SC 450]- Appeal partly allowed- Award modified. (Paras 4 to 6) Title: Shama Devi alias Shayama and others Vs. Suresh Kumar & others, Page-571.

**Motor Vehicles Act, 1988-** Sections- 166 & 173- Motor accident- Claim application- Permanent disability- Assessment- Claims Tribunal granting Rs. Rs.6,48,000/- towards future income by holding that claimant suffered permanent disability on account of injuries- Appeal by insurer- Held - In absence of adduction of disability certificate in evidence Tribunal not justified in granting compensation towards future income- Appeal partly allowed- Award modified. (Paras 4 to 6) Title: The New India Assurance Company Limited Vs. Sheetanshu, Page-580.

**Motor Vehicles Act, 1988-** Sections 166 & 173- Award by tribunal of sum of Rs.6,87,000/- along with interest @ 9% per annum from date of petition till its deposit on account of injuries to claimant in road accident- Award challenged by insurer on ground that original medical bills not produced before tribunal and claimant got reimbursement from his department, secondly Rs. two lacs awarded by Tribunal under head "loss of future income" not proper. Held- Rs. two lacs awarded by Tribunal under head "loss of future income" set aside. Impugned award modified to amount of Rs.6,87,000/- with interest @9% from date of petition till date of deposit. (Paras 4 to 6) Title: United India Insurance Company Ltd. Vs. Sahib Singh and others, Page-587.

**Motor Vehicles Act, 1988 –** Sections 166 and 173 – Motor accident – Claim application – Claims Tribunal allowing application of legal representatives of deceased and granting compensation in sum Rs 17,37,000 – Appeal by insurer – Deceased unskilled worker and aged 28 years at time of death – Held, Income of deceased to be computed on basis of Govt. Notification for unskilled workers - Last drawn salary of deceased to be taken as Rs. 7,000/-p.m. - Addition of 40% to be given towards future prospects and after deducting

1/4th thereof towards dependency, income of deceased assessed at Rs. 7350/ p.m. - Multiplier of 16 will apply- Compensation reassessed. (Para 4) Title: Reliance General Insurance Company Limited Vs. Meena Devi & others, Page- 976.

**Motor Vehicles Act, 1988 –** Sections 166 and 173 – Motor accident – Claim application – Compensation under conventional heads – Claims Tribunal granting Rs. 1 lac to widow towards loss of consortium and R. 1 lac to children towards loss of love and guidance – Appeal against – Held, grant of compensation under conventional heads not in tune with National Insurance Co. Ltd. vs. Pranay Sethi and others, reported in 2017 ACJ 2700, – Compensation under conventional heads reduced – Appeal partly allowed – Award modified . (Para 5 ) Title: Reliance General Insurance Company Limited Vs. Meena Devi & others, Page-976.

**Motor Vehicles Act,1988** -Sections 166 and 173 -Motor accident -Claim application -Compensation under conventional heads -Determination -Claims Tribunal allowing application of legal representatives of deceased and granting Rs. 1 lakh towards loss of consortium to his widow -Appeal against -Held, grant of compensation under conventional heads not in tune with National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700, -Compensation under conventional heads brought down -Appeal partly allowed -Award modified. (Paras 3 & 4) Title: Reliance General Insurance Company Ltd. Vs. Leela Devi & others, Page-1009.

**Motor Vehicles Act, 1988 -** Sections 166 and 173 - Motor accident - Claim application – Death of engineering student – Monthly income – Determination - Claims Tribunal taking income of deceased , an engineering student at Rs1000 p.m. and granting compensation- In appeal, insurance company arguing that deceased was simply an engineering student and his monthly income should be taken equivalent to wages of skilled worker as fixed vide Govt. notification – Held,- aforesaid notification pertains to wages of workmen- It does not relate to employees who work in supervisory capacity- Services of an engineer cannot be equated with that of skilled workman-Deceased on employment would have earned Rs 1000 p.m. – Tribunal was justified in taking income of deceased at Rs 10000 p.m. (Para 4). Title: Shriram General Insurance Company Limited Vs. Byasa Devi & Others, Page- 1023.

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**Narcotic Drugs and Psychotropic Substances Act, 1985 –** Section 2 (viia), (xxiiia) – Small Quantity or Commercial Quantity – Determination – Whether weight of pure contents of prohibited substance to be considered or aggregate thereof ? – Bail - Recovery of 1015 tablets of Alprazolam – Pure contents (4.90 grams) making recovery in less than commercial quanity, but aggregate weight bringing it in commercial quanity – Held, when Narcotic drug and Psychotropic Substance is mixed with one or more neutral substances, then for purposes of imposition of sentence, only pure contents of prohibited stuff are to be considered - Pure contents of recovered stuff bring it to in category of less than commercial quantity – Bail granted subject to conditions –E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau (2008) 5 SCC 161, relied upon. (Paras 5 to 7) Title: Surender Kumar vs. State of H.P., Page- 65.

**Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 8 and 20 – Recovery of Charas – Proof - Police claiming to have recovered huge quantity of Charas from bags thrown by accused on seeing them having laid Nakka at road – Trial Court acquitting

accused by extending benefit of doubt – Appeal by State - On evidence, (i) patrol by Police party in private vehicle without claiming travelling allowance and setting up Nakka at that place highly improbable (ii) Independent persons easily available but not joined investigation (iii) statements of Police witnesses contradictory as to place where Nakka laid and manner in which accused apprehended (iv) de-facto complainant doing entire investigation (v) enmity between police officer and one of accused on account of dispute (vi) accused 'T' convicted on confession of co-accused without corroboration – Held, case of prosecution doubtful – Appeal dismissed. ( Paras 13 to 20) Title: State of Himachal Pradesh vs. Abdul Latif and another, Page- 430.

**Narcotic Drugs and Psychotropic Substances Act, 1985** - Sections 8 & 20- **Indian Evidence Act, 1872**-Sec. 3- Recovery of Charas- Non-joining of independent witnesses during search – Effect - Held, association of independent witnesses in search and seizure process is a rule and non-joining is an exception permissible in peculiar circumstances of a case- Mere non-joining of independent witnesses not fatal to prosecution case provided testimony of official witnesses reliable, trustworthy and convincing. (Paras 19 & 20) (D.B.) Title: Vikram Singh vs. State of Himachal Pradesh, Page- 133.

**Narcotic Drugs and Psychotropic Substances Act, 1985** - Sections 8 & 20- **Indian Evidence Act, 1872**-Sec. 3- Material contradictions – Effect - Held, irreconcilable discrepancies and material contradictions make prosecution case doubtful- Discrepancies as to manner in which accused was apprehended with bag containing contraband, place at which he was apprehended, date and time of recovery, overwriting in NCB Form etc., are material in nature and cumulatively make prosecution case doubtful- Appeal allowed- Conviction and sentence as awarded by Trial Court, set aside. (Paras 21 to 36) (D.B.) Title: Vikram Singh vs. State of Himachal Pradesh, Page- 133.

**Narcotic Drugs & Psychotropic Substances Act, 1985-** Section 20- Recovery of charas- Proof – Prosecution alleging recovery of commercial quantity of charas by police from bag carried by accused – Trial Court convicting and sentencing accused for said offence – Appeal against – Accused alleging mis-appreciation of evidence by trial court – On facts, found that (a) Independent persons at spot available but not joined in process of search and seizure (b) Statements of police witnesses contradictory on material particulars (c) Delayed delivery of Special report to Competent Authority – Held, recovery of contraband from accused as alleged by prosecution highly suspicious – Appeal allowed – Conviction and sentence set aside. (Paras 17 to 21) Title: Neer vs. State of Himachal Pradesh, Page- 216.

**Narcotic & Psychotropic Substances Act, 1985 (Act)** - Section 20 **–** Recovery of Charas - Trial court convicting and sentencing accused of possessing Charas (800 gm) in bag carried by him – Challenge thereto – Accused contending wrong appreciation of evidence by trial court – Submitting that recovery not proved from his possession - Material discrepencies not taken into consideration by trial court – Independent witnesses not joined in investigation and his signatures were taken on papers by Investigating Officer under duress - Facts revealing (i) accused consented for search being made be Investigation Officer in presence of police officials (ii) witnesses consistently deposing about recovery of charas from bag in possession of accused (iii) no suggestion made regarding discrepancies (iv) no suggestion to any witness in cross- examination regarding duress on accused at time of taking his signatures during investigation (v) no suggestion of animosty of police officials vis-a-vis accused - (vi) various documents prepared during investigation bearing signatures of

accused - Held, material on record clearly proves recovery of Charas from concious and exclusive possession of accused - Appeal dismissed - Conviction upheld. (Paras 10, 12 & 14) Title: Chet Ram Vs. State of H.P., Page-1045.

**Narcotic Drugs & Psychotropic Substances Act,1985-** Sections 21 & 37**- Code of Criminal Procedure, 1973-** Section 439**-** Regular bail- Grant of-Petitioner allegedly found possessing 6 grams of heroin seeking bail- Prosecution resisting prayer on ground of his being involved in another case under Act- Held- Accused in custody for the last four months– Mere pendency of previous case cannot be ground for rejection of bail in subsequent FIRs- Trial in previous case still pending for adjudication and his guilt not yet proved- Freedom of individual is of utmost importance and same cannot be curtailed for indefinite period. Gravity alone cannot be decisive ground to deny bail rather competing factors are required to be balanced by court while exercising its discretion. Petition allowed- Bail granted subject to conditions. (Paras 8 to 15) Title: Ankush Vs. State of Himachal Pradesh, Page- 488.

**Narcotic Drugs and Psychotropic Substances Act,1985** - Sections 35 & 54- Presumption of conscious possession – Applicability - Held, presumption as enshrined in said provisions of Act shall come in operation only after discharge of initial onus by prosecution qua recovery of contraband from accused beyond reasonable doubt. (Para 38) (D.B.) Title: Vikram Singh vs. State of Himachal Pradesh, Page- 133.

**National Highways Act, 1956** – **Motor Vehicles Act, 1988** – Sphere of applicability – Held, parliament has consciously segregated subject of manufacturing, size or design of Motor Vehicle vis-a-vis construction, maintenance and safety of National Highways – For these two subjects, two independent sets of legislations have been enacted – Powers exercisable under Motor Vehicles Act, are totally unconnected and independent of powers which may be exercised by competent authorities under National Highways Act. (Para 26) Title: Virender Singh and another vs. State of HP and others, Page- 391.

**National Highway Authority Act, 2002** (Act) – **Motor Vehicles Act, 1988** – Sphere of applicability - Held, Act has been enacted to provide for control of land within National Highways, right of way and traffic moving on National Highways – And removal of unauthorized occupation thereon – Source to legislate Motor Vehicles Act is entry 35 of Concurrent List – These two are distinct and different fields of legislations without any overlapping and multiplicity of powers exercisable thereunder. (Para 27 & 28) Title: Virender Singh and another vs. State of HP and others, Page- 391.

**Negotiable Instruments Act, 1881-** Sections 118 & 139- Presumption- Held, statutory presumption is that cheque issued by drawer is in discharge of legally enforceable debt or other liability– Burden of proof to prove otherwise is on drawer. (Para 19) Title: Dhir Singh Vs. Jagmohan Mehta, Page- 2.

**Negotiable Instruments Act, 1881 –** Sections 138 & 139 – Dishonour of Cheque – Complaint – Presumption of consideration – Complainant filing complaint by alleging dishonored cheque having been issued by accused towards outstanding sale price of land – Trial Court dismissing complaint – Sale deed executed in 2007 – Cheque also issued in 2007 – Subsequent agreement inter se parties indicating outstanding sale price stood paid to complainant – Cheque not proved to have been issued towards legally enforceable debt –

Appeal dismissed – Acquittal upheld. (Paras 8 to 10) Title: Pawan Dhiman vs. Messers Asian Towanvillen Farms Ltd., Page- 341.

**Negotiable Instruments Act, 1881** - Sections 138 & 139- Dishonour of cheque – Presumption of consideration – Held, Presumption that cheque issued was for consideration is rebuttable – Complainant alleging cheque having been issued by accused to clear liability arising out of partnership business – Trial Court acquitting accused – Appeal – Evidence revealing disputed cheque issued in 2006 whereas, all other cheques of same book-let stood exhausted in 2004 – issuance of one cheque from same book-let in 2006 doubtful – Complainant not producing any document indicative of partnership business inter se parties – Complainant himself filling recitals of cheques – Further held, evidence does not prove that cheque was issued for consideration – Probability of misuse of cheque by Complainant cannot be ruled out – Appeal dismissed. (Paras 8 to 10) Title: Sh. Vishal Sharma vs. Shashi Sharma, Page- 344.

**Negotiable Instruments Act, 1881**- Sections 138 & 139- Complaint - Presumption of consideration – Proof - Held, presumption that issued cheque was for consideration is rebuttable- Complainant alleging disputed cheque having been issued by accused to discharge 'friendly loan'- However, defence evidence revealing said cheque having been given to father of complainant, "BD" qua sale consideration of sale deed executed between "BD" and wife of accused- "BD" had registered FIR against accused and investigation of that case revealing that sale consideration stood paid by accused- Held, presumption that disputed chqeue being issued for consideration, stood discharged- Revision allowed- Conviction set aside. (Paras 9 to 12) Title: Krishan Kumar Kotvi Vs. State of H.P. & another, Page-731.

**Negotiable Instruments Act, 1881 -** Sections 138 & 139 - Dishonour of Cheque- Complaint- Presumption of consideration- Held- Presumption that cheque was issued for considerations is rebuttable - Standard of proof required for such rebuttal is preponderance of probability and not proof beyond reasonable doubt- Preponderance of probabilities can be drawn not only from material on record but also by reference to circumstances upon which accused has relied. (Paras 11 & 20) Title: Uttam Ram Vs. Devinder Singh Hudan and another, Page-710.

**'P'**

**Patents Act, 1970 –** Sections 2(ja) and 64(1) **- Inventive Step - Cancellation of Patent –** Circumstances – Plaintiff obtaining patent with respect to device for manually hauling of agricultural produce – However, Defendant started producing device for carrying agricultural produce similar to one patented by plaintiff – Plaintiff filing suit for injunction and damages for infringement of their patent – Defendant contesting suit and filing Counter claim for cancellation of patent on account of lack of inventive step involved in plaintiff's patent – Plaintiff arguing that patent once granted is unimpeachable – Held: patent once granted is not unimpeachable – Look alike of traditional products is not an invention – On facts, patented product found similar to traditional device used for carrying agricultural produce – Mere change in size and raw materials do not make the product an invention (para 16) – Workshop improvement is not inventive step – Mere new form of known substance does not prove enhancement of efficacy– Patent canceled – Suit dismissed and counter-claim decreed. (Para 17) Title: Dhanpat Seth and others Vs. M/s Nilkamal Plastic Ltd., Page-909.

**Payment of Gratuity Act, 1972** – **Industrial Disputes Act, 1947** (Act) – Gratuity vis- a –vis Retrenchment Compensation – Inter se relationship – Controlling Officer directing employer to pay Gratuity with interest to employee- Appeal against – Appellate Authority dismissing appeal of employer – Petition – Employer submitting that services of employee, a dailywager were retrenched after paying Retrenchment Compensation and he is not entitled for any Gratuity under Payment of Gratuity Act – Held – Gratuity and Retrenchment Compensation are two independent and separate claims under different welfare legislations – Award of benefit under one Act does not deprive employee from benefit under other Act – Gratuity is payable for satisfactory service rendered by employee – Retrenchment Compensation is paid for retrenchment of services – Petition dismissed. (Para 3) Title: Chief Engineer, Bhakra Beas Management Board vs. Souju Ram and others, Page- 281.

**Payment of Gratuity Act, 1972**- Gratuity – Payment – Nature of service – Whether relevant ? Held, concept of "regular service" has no bearing so far claims of employee under Payment of Gratuity Act or Industrial Disputes Act are concerned – Benefits under various welfare legislations are admissible regardless of status of employee provided claimant fulfils conditions prescribed under statute for grant of such benefits. (Para 8) Title: Chief Engineer, Bhakra Beas Management Board vs. Souju Ram and others, Page- 281.

**Payment of Gratuity Act, 1972** – **Industrial Disputes Act, 1947** (Act) – Gratuity vis- a –vis Retrenchment Compensation – Inter se relationship – Controlling Officer directing employer to pay Gratuity with interest to employee- Appeal against – Appellate Authority dismissing appeal of employer – Petition – Employer submitting that services of employee, a daily wager were retrenched after paying Retrenchment Compensation and he is not entitled for any Gratuity under Payment of Gratuity Act – Held – Gratuity and Retrenchment Compensation are two independent and separate claims under different welfare legislations – Award of benefit under one Act does not deprive employee from benefit under other Act – Gratuity is payable for satisfactory service rendered by employee – Retrenchment Compensation is paid for retrenchment of services – Petition dismissed. (Para 3) Title: Chief Engineer, Bhakra Beas Management Board vs. Souju Ram and others, Page- 281.

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**Prevention of Corruption Act, -**1988 - Sections 13 (1)(d) and 13(2) – Indian Penal Code, 1860 – Sections 120B, 409, 420, 467, 468 and 471 – Cheating, forgery and misappropriation of Government money – Proof – Special Judge convicting and sentencing accused, Junior Engineer (JE), Block Development Officer (BDO) and Contractor (A3) of hatching conspiracy, forging documents and misappropriating Government money on basis forged documents – Appeal- Accused contending wrong appreciation of evidence by Special Judge – Facts revealing that Department had accepted tender of "R" for supply of construction material, but payment made to (A3) on his application instead of "R" – No explanation from Accused as how (A3) came into picture when he had not even submitted his quotation – Hand writing on application submitted for payment for said work tallied with handwriting of (A3) – This application processed by BDO and he sanctioned payment of Rupees One Lakh Thirty Three Thousand One Hundred Seventy Nine to (A3) – Cheque of said amount got encashed by (A3)

- JE endorsing certain payments towards construction material purchased from "SU" and "ST" through whose trucks it was carried – No receipts of "SU and "ST" on record showing payment of money to them by JE – Accused not disclosing anything who were "SU" and "ST" – Held, amount was misappropriated under conspiracy by accused – Appeals dismissed – Conviction upheld. (Paras 18 to 21 and 27) Title: Sheesh Pal vs. State of Himachal Pradesh, Page- 321.

**Principle of Ratio decidendi** – what is ? – Held, it is only ratio of judgment which has binding effect on Court subordinate to Court that passed judgment – Ratio of any decision must be understood in background of facts of that case – Case is only an authority for what it actually decides and not what logically follows from it. (Paras 10 & 11) Title: Gulabjeet Singh & Ors. vs. Ravel Singh, Page- 268.

**Protection of Children from Sexual Offences Act, 2012-** Sections 5(m) and 5(n)- Penetrative sexual assault by father on daughter – Proof- Prosecution alleging that after death of his wife accused had been sexually abusing his daughters- Trial Court convicting accused of said offences- Appeal against- Accused contending wrong appreciation of evidence on part of Trial Court- Facts revealing (i) FIR registered on complaint of Health Worker of NGO, but NGO was not registered. (ii) Health worker not mentioning names of members of Mahila Mandal who revealed her sexual exploitation of victims by accused (iii) 'R' aunt of victims inimical towards accused (iv) Medical evidence not disclosing injuries on the person of victim. (v) Statement of victim self contradictory (vi) Possibility of victim having been tutored by NGO on day her statement was recorded- Held- Having regard to totality of circumstances, appeal allowed - Conviction set aside. (Paras 20 to 30) Title: Gorkha Ram Vs. State of Himachal Pradesh, Page-614.

**Punjab Excise Act, 1914 (as applicable to State of H.P ) –** Section 61(i)(a) **–** Recovery of liquor without licence – Police filing charge sheet against accused for having recovered Country and Indian Made Foreign Liquor from bag thrown by him – Trial court acquitting accused – Appeal against – State contending wrong appreciation of evidence on part of trial court – Facts revealing that on seeing police, accused allegedly fled from spot – Bag not recovered from his conscious and exclusive possession – No evidence regarding person who revealed identity of accused to police – Identification parade also not held – Identification of accused during trial weak piece of evidence – Held, prosecution failed to firmly link accused to alleged offence – Appeal dismissed – Acquittal upheld. (Paras 2 & 10) Title: State of H.P. Vs. Rachhpal Singh, Page-1028.

**'R'**

**Representation of The People Act, 1951(Act)-** Sections 82 & 86 (4)**- Code of Civil Procedure, 1908-** Order 1 Rule 10- Election Dispute- Nature of proceedings- Held- Election disputes being matter of special nature are not lis at common law or an action in equity- The Act is complete code in itself- Election disputes are strictly statutory proceedings under sections 82 and 86(4) of Act- Contest of election petition is confined to candidates at election and all others are excluded- Application filed by Election Commission of India and Returning Officer of Legislative Constituency seeking their deletion from array of parties allowed. (Paras 14 to 20). Title: Ramesh Chand Vs. Mahender Singh and others, Page-654.

**'S'**

**Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**- Section 3(1)(x)- House trespass, Criminal Intimidation and calling by caste names- Proof- Special Judge convicting and sentencing accused of criminal intimidation and demeaning complainant by hurling caste abuses- Appeal- Evidence revealing accused coming to courtyard of victim, then Pradhan of Gram Panchayat and hurling caste abuses on her- Also intimidating complainant and her husband by wielding sticks and darat- Witnesses consistent in their deposition and corroborating each other qua prosecution case- Appeal dismissed- Conviction upheld. (Paras 9 to 16) Title: Narotam Chand and another Vs. State of H.P., Page-727.

**Specific Relief Act, 1963** - Section 5 - Suit for Possession - Reversionary rights - Nature thereof- Held, person suing for reversionary rights actually sues in representative capacity for entire body of reversioners - He has no reversionary interest apart from entire reversionary body - But advantage under decree like possession of land are available to immediately next/nearest heir of deceased who on demise would inherit his estate - Previous suit of "R" declaring reversionary rights though decreed but his subsequent suit filed for possession of said land dismissed as "R" was not nearest heir of deceased - Nearest heirs were "M: and "RO"- Decree of Lower Court upheld - Regular Second Appeal of "R" dismissed. (Para 8) Title: Romel Singh vs. Gur Devi & Ors, Page- 37.

**Specific Relief Act, 1963-** Section 5 - Suit for possession on strength of title – Entitlement - Plaintiff filing suit for possession alleged to be in unauthorized possession of defendants - Defendants claiming long possession and stating to have become owner by way of adverse possession – Trial Court decreeing suit - First Appellate Court dismissing appeal of defendants – RSA – Defendants relying upon electricity bills of superstructure to prove their adverse possession - However, period starting from date of filing application for installation of electricity meter by defendants falling short of statutory period of 12 years on date of suit - Held, on facts, defendants failed to prove their adverse possession over suit land - RSA dismissed - Judgments and decrees of lower courts upheld. ( Para 9 ) Title: Raj Kumar & another vs. Jassa and another, Page-809.

**Specific Relief Act, 1963 -** Section 5 - Suit for possession on strength of title – Plaintiff filing suit for possession on strength of title- Defendant claiming adverse possession over suit land- Trial Court decreeing suit by holding adverse possession of defendant not proved – Decree upheld by first Appellate Court - RSA –On facts, plaintiff found having instituted suit for possession within twelve years from his dispossession – Held, possession of defendant falling short of statutory period did not mature into adverse possession – RSA dismissed – Judgments and decrees of lower courts upheld. (Paras 9 & 10) Title: Shayam Sunder Vs. Jagjit Singh & Ors., Page-874.

**Specific Relief Act, 1963**- Section 5 – Suit for possession on strength of title- Defendants claiming adverse possession – Trial court decreeing suit – District Judge affirming decree in appeal – RSA – Defendants pleading wrong appreciation of evidence by lower courts – Facts reveling that plaintiff came to know of defendants unauthorized possession only recently when demarcation of land took place - Prior to that he was not aware of defendants holding his land – Therefore, no question of defendants possessing such land adversely and with hostile animus to knowledge of plaintiff prior to demarcation – Long possession of defendants without being open and with hostile animus did not mature into adverse possession- RSA dismissed - Judgments and decrees of lower courts upheld. (Paras 7 to 11)

Title: Man Singh (since deceased) through his LRs and others Vs. Dinesh Kumar and others, Page-894.

**Specific Relief Act, 1963** – Sections 5 & 39 – Possession and mandatory injunction – Grant of – Plaintiff filing suit for possession of land allegedly encroached by defendant by way of construction – Plaintiff relying upon demarcation report – Trial Court dismissing suit and first Appellate Court dismissing appeal also – Regular Second Appeal – Demarcation report relied upon by plaintiff found to have been held invalid in previous litigation inter se parties – Previous decree attained finality – Held, suit based on such demarcation report righty dismissed by Court – Regular Second Appeal dismissed. (Paras 9 & 10) Title: Harpreet Singh vs. Subhash Chand, Page- 364.

**Special Relief Act, 1963 –** Sections 5 & 39- Suit for possession and mandatory injection by demolition of unauthorized constructions-Grant of - Trial Court relying upon demarcation report, decreeing suit and ordering removal of defendant's structures from suit land- In appeal, District Judge discarding demarcation report, accepting appeal and dismissing suit – RSA – On facts, demarcation though found conducted on basis of Musavi after ascertaining Pucca points and in presence of parties, but local commissioner wrongly construed western dimensions of disputed land as 6 Karams instead of 9 Karams – Held, misderivation of western dimensions of disputed land resulted in error in demarcation – Demarcation report not worth credence – No fresh demarcation can be ordered without correction of Musavi prepared at time of settlement- RSA dismissed. (Paras 8 & 9) Title: Yoginder Paul Vs. Rup Lal, Page-905.

**Specific Relief Act, 1963-** Section 10 – Agreement to sell – Specific performance - Entitlement- On facts, execution of agreement to sell in favour of plaintiffs not in dispute - Plaintiffs present in office of Sub-Registrar on date fixed for execution of sale deed- Affidavit regarding his presence in office of Sub-Registrar on appointed day proved by Public Notary attesting it – Plaintiffs found ready and willing to perform their part of agreement- Suit for Specific performance decreed. (Paras 7 to 11 & 14) Title: Ram Swaroop & others Vs. Inder Singh (since deceased) through his legal heirs, Page-888.

**Specific Relief Act, 1963**- Section 10- Agreement to sell – Specific performance- Part consideration paid under earlier agreement – Effect - Plaintiffs paying part consideration under agreement to sell – Time stipulated for execution of sale deed extended by subsequent agreement - Defendant contending that part payment paid under earlier agreement stood forfeited and specific performance if any is to be subject to payment of entire consideration – Held, subsequent agreement was executed only for extending time for purposes of execution of sale deed – Part consideration paid under earlier agreement became requisite earnest money or advance vis -a-vis total sale consideration. (Para 10) Title: Ram Swaroop & others Vs. Inder Singh (since deceased) through his legal heirs, Page-888.

**Specific Relief Act 1963 -** Sections 10 and 16 **-** Specific performance of agreement to sell - Grant of **–** Plaintiff entering in agreement with defendants and agreeing to sell his brick kiln , huts, tools, wooden trolleys and equipments to them - Plaintiff also delivering possession of brick kiln alongwith licence to them- On failure of defendants to pay balance amount, plaintiff filing suit for specific performance of agreement for directing defendants to purchase suit property - Plaintiff praying for damages also on account of removal of bricks and other material by defendants- Evidence disclosing that brick kiln was being run by partnership firm on lease – Only one partner had executed General Power of Attorney ( GPA) with respect to brick kiln in favour of plaintiff without consent of other partners- GPA not

registered one – GPA not empowering plaintiff to transfer rights in brick kiln- Document relied upon by plaintiff as sale deed in his favour actually GPA executed by one partner only - Land underlying brick kiln owned by third party- G , unconnected with lis – Licence in name of partnership but it is not arrayed as party in suit- Held – Plaintiff cannot seek specific performance of agreement to sell as against defendants- Suit dismissed – (Paras 8, 9 & 11) Title: Jarnail Singh Vs. Sukhbir Singh and another, Page-1037.

**Specific Relief Act, 1963** – Section 15 – Agreement to sell - Specific performance – Entitlement - Agreement clause providing for payment of double of earnest amount to purchaser in case of breach of contract on part of seller – Sale deed not executed as per agreement and purchaser filing suit for specific performance - Seller contending that in view of this default clause, specific performance of agreement cannot be ordered- Held, it is incumbent upon Court to render primary decree of specific performance of agreement to sell unless stipulated damages adequately compensate him. (Para 8) Title: M/s Bliss City Developers Pvt. Ltd. vs. Krishan Singh, Page- 12.

**Specific Relief Act, 1963**- Section 15- Agreement to Sell- Specific performance- Grant of - Defendant agreeing to sell land granted to him as Nautor in breach of conditions of grant- Plaintiff filing suit for specific performance- Suit dismissed by trial Court and appeal against decree by District Judge- Regular Second Appeal- Held, agreement to sell executed by grantee with plaintiff purporting to transfer his right in such land being in breach of Nautor Policy, is void and unenforceable- Agreement against public policy cannot be specifically enforced- Regular second appeal dismissed. (Paras 11 & 12) Title: Kanshi Ram Vs. Radhi Devi (deleted) Jiwnu and others, Page-774.

**Specific Relief Act, 1963-** Section 34 - Suit for declaration and mandatory injunction – Correction of date of birth in Service Records and Matriculation certificate – Trial Court dismissing suit and District Judge dismissing plaintiff's appeal also - RSA – On facts, none of witnesses could tell exact date of birth of plaintiff - No other document proved on record qua date of birth claimed by him as being the actual date of birth – Held, suit/appeal rightly dismissed by lower Courts. (Paras-13 & 15) Title: Balbir Singh vs. State of Himachal Pradesh & Ors, Page- 211.

**Specific Relief Act, 1963-** Section 34- Suit for declaration and injunction- Adverse possession- Plaintiff claiming himself to have become owner of suit land by way of adverse possession and seeking prohibitory injunction against defendant's interference- Defendants denying plaintiff's possession and filing counter claim against him for permanent prohibitory injunction - Trial Court dismissing suit and decreeing counter claim- Appeal of plaintiff dismissed by District Judge- Regular Second Appeal- On facts, plaintiff's possession over suit land not proved- Defendants found in its actual possession- Their possession also recorded in revenue record- Held- Plaintiff not being in actual possession of suit land, his suit and counter claim were rightly decided. (Paras 8, 9 and 11) Title: Mansa Ram Vs. Kehsav Ram & others, Page-564.

**Specific Relief Act, 1963**- Section 34 – Himachal Pradesh Land Revenue Act, 1954 – Section 45 - Suit for declaration – Presumptions qua revenue entries – Earlier entries showing three brothers, 'B' 'D' and 'L' as co- tenants – Mutation conferring proprietary rights upon all of them also attested in their favour – In previously instituted suit, 'B' admitting 'D' and 'L' as co-owner in possession of land – However, pursuant to order of Director, Consolidation ownership entries of 'D' and 'L' stood deleted and 'B' shown as exclusive

owner – Held, change of revenue entries in favour of 'B' entirely wrong and liable to set aside. (Paras 8 & 9) Title: Jagan Nath and others vs. Des Raj and others, Page- 40.

**Specific Relief Act, 1963**- Sections 34 and 38- Suit for declaration and permanent prohibitory injunction -Plaintiff filing suit for declaration and claiming its ownership by way of adverse possession-Trial court dismissing his suit but First Appellate Court allowing his appeal and decreeing suit - RSA -In previous suit, predecessor of plaintiff declared to have become owner of suit land by adverse possession- Earlier suit was against Panchayat – Judgment attaining finality -Land devolved upon State from Panchayat under legislation- Held- State of H.P just being successor to erstwhile panchayat is bound by decree passed between parties in earlier litigation – State cannot take plea that it was not party in earlier suit - First appellate court rightly appreciated evidence on record and there is no infirmity in judgment and decree passed by it- Appeal dismissed- Decree of First Appellate Court upheld. (Paras 7 & 8) Title: State of H.P. Vs. Ishwar Dass (since deceased) through his legal heirs & another, Page-944.

**Specific Relief Act, 1963** – Sections 34 and 38 –Suit for declaration and injunction – Plaintiff filing suit and seeking declaration of his half share in suit land and challenging revenue entries showing defendant No. 1 as owner of suit land – Defendant No.1 denying plaintiff's share and alleging his father having purchased said land from plaintiff's father – Trial Court decreeing suit – First Appellate Court dismissing appeal of defendant No.1 – RSA – Defendant No.1 relying exclusively on basis of Roznamcha entries regarding oral sale – Mutation however attested in favour of 'M' father of defendant no.1 on disclosures unilaterally made by him - Other sale deeds relied upon by him not relatable to plaintiff's predecessor – Held, conclusions derived by Lower Courts based on proper and mature appreciation of evidence on record – RSA dismissed- Judgments and decrees of lower courts upheld. (Paras 8 to 12) Title: Bir Singh Vs. Dharam Singh & others, Page-966.

**Specific Relief Act, 1963**- Sections 34 & 38 – Suit for declaration and injunction – Trial Court decreeing suit and holding plaintiffs as owner in possession of suit land – Also denying defendant's plea of ownership and possession over said land by observing that their predecessor in interest was not occupancy tenants and he never acquired proprietary rights – First Appellate Court dismissing defendants appeal – Regular Second Appeal – Evidence revealing mutation in favour of predecessor - in - interest of plaintiffs "M" showing him in possession of suit land, attested on basis of some orders passed by Revenue Officers – Such orders however not adduced in evidence - Held – Substitution of entries in favour of "M" was wrong – And revenue entries carried forward in Jamabandies on basis of said mutation do not carry presumption of truth. (Para 9) Title: Paras Ram vs. Pushpa & anr., Page- 359.

**Specific Relief Act, 1963** – Sections 34 & 38 – Suit for declaration and permanent prohibitory injunction – Grant of - Plaintiff filing suit for declaration and claiming exclusive ownership over suit land by way of purchase from its owners– Also seeking permanent prohibitory injunction against defendants for restraining them from interfering in land – Defendants contesting suit on ground of suit property jointly owned by plaintiff, defendants and other co-sharers – Trial court dismissing suit – Appeal of plaintiff dismissed by first Appellate Court – RSA – Evidence revealing plaintiff having purchased undivided share from co-sharer – Defendants also recorded as co-sharer in suit land – Partition proceeding already pending before revenue officer – Held – In circumstances, plaintiff cannot declared to be exclusive owner of suit land - RSA dismissed – Judgments and decrees of

lower courts upheld . (Paras 10 to 12) Title: Vinay Kumar Sharma & others Vs. Yoginder Pal Verma and others, Page-958.

**Specific Relief Act, 1963** – Sections 34 & 38 – **Himachal Pradesh Tenancy and Land Reforms Act, 1972** – Sections 31 & 104 (Act) - Suit for declaration and injunction – Grant of – Plaintiff filing suit for declaration that he was tenant in suit land under predecessor- in-interest of defendant and has become owner under provisions of Act – Defendant contesting suit and claiming plaintiff having relinquished tenancy in favour of his father - Trial court decreeing suit – First Appellate court dismissing defendant's appeal - RSA – Evidence revealing plaintiff continuously recorded as tenant under predecessor-in- interest of defendant – Revenue entries wrongly entered in favour of defendant without orders of competent authority – Relinquishment of tenancy in favour of predecessor-in-interest of defendant not permissible under law - Plaintiff found in possession of land initially as tenant and having become owner under Act – Held, lower courts justified in decreeing plaintiff's suit – Judgments and decrees of lower courts upheld – RSA dismissed (Paras 8, 9 & 10) Title: Vipin Kumar & others Vs. Roshan Lal, Page-993.

**Specific Relief Act, 1963** - Section 38 - Permanent Prohibitory Injunction - Joint land - Grant of - Held, injunction is an equitable relief - Co-sharer is entitled for injunction qua joint land against another co-sharer provided he himself not raising constructions on it and other co-sharer raising construction upon valuable portion of joint land or is exceeding his share and jeopardizing interests of other co-sharers. (Para 8) Title: Panna Lal vs. Mehar Chand, Page- 33.

**Specific Relief Act, 1963 -** Section 38 - Suit for permanent prohibitory injunction – Plaintiff filing suit and seeking decree of permanent prohibitory injunction by alleging defendant's interference in his possession over disputed land - Defendant contesting suit and averring suit land to be ancestral in hand of plaintiff in which he also having right, interest and title – Defendant contending suit land having been devolved upon plaintiff from 'W', his grand father - Trial court decreeing suit - District Judge allowing appeal and dismissing suit – RSA – Documentary evidence not specifically revealing suit land having been devolved upon plaintiff from 'W'- Ancestral nature of property in hands of plaintiff vis-a–vis defendant not proved - Plaintiff recorded in exclusive possession of suit land - Held, in circumstance plaintiff entitlement for permanent prohibitory injunction – RSA allowed – Judgment and decree of District Judge set aside and of trial court restored. (Paras 9 to13) Title: Tara Singh Vs. Mohinder Singh, Page-877.

**Specific Relief Act, 1963 -**Sections 38 and 39**-** Permanent prohibitory and mandatory injunctions-G rant of-Plaintiff filing suit for permanent prohibitory injunction for restraining defendant from raising construction over joint land-Also seeking mandatory injunction for removal of "Dhara" constructed by him without his consent-Trial Court decreeing suit in toto-First Appellate Court partly allowing defendant's appeal and denying mandatory injunction qua removal of "Dhara"-RSA by plaintiff-Facts disclosing suit land to be joint between co-sharers including defendant-Plea of private partition raised by defendant not proved-Partition proceedings pending before revenue officer- "Dhara" raised by defendant over portion in his exclusive hissadari possession- "Dhara" not raised on best portion of land and beyond his share by defendant-Held -First Appellate Court was justified in declining mandatory injunction to plaintiff- RSA dismissed. (Paras 7 to 10) Title: Rattani Vs. Amrit Lal, Page-936.

**Special Relief Act, 1963-** Sections 38 and 39 – Suit of permanent prohibitory and mandatory injunctions –Interference with Customary right of irrigation – Plaintiff seeking prohibitory injunction for restraining defendant from drawing water from natural source (Nallah)- Also praying for direction to him to remove Alkathene pipe from source through which he is taking water to his land – Trial Court decreeing Suit – In appeal, District Judge, allowing appeal and dismissing Suit– RSA - On facts,Wazib-ul-arz of estate entitling right holders to carry water for drinking and irrigation by creating channels without causing damage to natural source –Defendant being riparian right holder entitled to carry water through alkathene pipe – Other right holders also found taking water through alkathene pipes for their use - No evidence of damage to natural course of source – Plaintiff not having exclusive right to take water from rivulet – Held, defendant can not be deprived of using water of rivulet in exercise of his customary rights –RSA dismissed- Decree of first Appellate Court up held. (Paras 8 to 11) Title: Surinder Singh Vs. Goverdhan Dass, Page-900.

**'T'**

**Transfer of Property Act,1882 (TPA)-** Section 53-A**- Specific Relief Act, 1963-** Section 38 **- Himachal Pradesh Tenancy and Land Reforms Act, 1972(Act)**- Section 104- Plaintiff filing suit for permanent prohibitory injunction by alleging his possession over 4 biswas of land under agreement to sell executed by predecessor-in –interest of defendant- Defendant contesting suit, denying plaintiff's possession and alleging plaintiff having constructing Dhara after trespassing over said land- Trial court decreeing suit and dismissing counter claim of defendant- First Appellate Court dismissing defendant's appeal- RSA- Evidence showing (i) suit land recorded in ownership of State and predecessor-in-interest of defendant as non occupancy tenant in it (ii) agreement obliging predecessor in interest of defendant to execute sale deed in plaintiff's favour as and when mutation regarding conferment of properietory rights attested in his favour (iii) Under Act, properitory rights of government land cannot be conferred on non occupancy tenant- Held, Agreement in question was beyond scope of Act- It cannot be specifically enforced- Plaintiff cannot protect his possession by invoking Section 53-A of TPA - Plaintiff can be declared sub-tenant in said land by Revenue Officer- Plaintiff entitled to retain possession till dispute regarding unauthorised construction raised by him is decided by statutory authority- RSA allowed- Decrees of lower Courts set aside.(Paras 14 to 16) Title: Dheeraj Ram (since deceased) through his LRs Vs. Ram Singh, Page-1077.

**'W'**

**Workmen Compensation Act, 1923** - Section 3 – Motor Accident – Claim application – defences – Commissioner allowing application of legal representatives of deceased employee and fastening liability on insurer – Appeal – Insurer contending that deceased driver was driving under fake driving license and there was breach of terms of insurance policy – Held, in proceedings under Act arising out of death or permanent disability, it is not open to insurer to contend that driving license of employee was fake, unless it is proved by insurer that employer was negligent at time of engaging driver and he did not ascertain competence, proficiency and driving skills of driver. Appeal dismissed. (Para 33) Title: Oriental Insurance Co. Ltd. vs. Daya Ram and others, Page- 349.

**Workmen Compensation Act, 1923 -** Section 4-A **–** Motor Accident – Claim application – Compromise – Effect – Parties effecting compromise before Commissioner – Claimants receiving full and final payment under compromise – Commissioner however, further imposing penalty on employer – Challenge thereto – Held, employer bound to pay

compensation immediately on occurrence of accident – And when he disputes extent of compensation claimed, he is enjoined to make provisional payment to extent of liability he admits – Non- compliance of this statutory duty will result in imposition of penalty – Employer neither paid compensation nor deposited provisional payment – Commissioner justified in imposing penalty – Appeal dismissed – Award upheld. (Paras 4 & 5) Title: Ritesh Kumar Goyal vs. Sarvari Begum and others, Page- 346.

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**'Y'**

Y. Sleebachen and Ors. vs. State of Tamil Nadu & Anr., 2015 (5) SCC 747

**'Z'**

Zakir Hussain and others vs. State of Maharashtra and another, AIR 2001 Bombay 21

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

Ms. Asha Devi. ...Petitioner
Versus
The State of HP and others. ...Respondents

CWP No. 2554 of 2017
Date of Decision: 25.9.2018

**Administrative Law-** Principles of Natural Justice – Applicability - Engagement as mid-day meal worker – Petitioner being President of School Management Committee convened meeting and got herself appointment as mid-day meal worker in School – Block Education Officer after holding inquiry removing her – Petition against –Held - Appointment of petitioner in a meeting presided over by herself in capacity of President of said Committee was in violation of all canons of service jurisprudence – No one can be judge of his own selection – Her removal by Block Education Officer not illegal – Petition dismissed. (Paras-3 to 5)

For the Petitioner: Mr.Atul Jhingan, Advocate.
For the Respondents: Mr. Narinder Guleria, &Mr.Vikas Rathore, Additional Advocate Generals, for respondents No. 1 and 2.
Mr.Mukesj Sharma, Advocate, for respondent No. 3.
Mr.Vivek Singh Attri, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

**Dharam Chand Chaudhary, Judge (oral)**

The petitioner is aggrieved by the resolution of School Management Committee-3rd respondent, whereby her services as Mid-day Meal Worker in Government Primary School, Sadhor, Education Block-Surla P.O. Chakli Tehsil Nahan, District Sirmour, (H.P.) has been dispensed with and respondent No. 4 appointed as Mid Day Meal Worker in her place.

2. Admittedly, respondent No. 4 was working as Mid Day Meal Worker in Government Primary School, Sadhor. She as per Annexure R-1 to the reply filed on her behalf fell ill and was admitted for treatment in MM Medical College & Hospital KumarhattiSolan. She was admitted on 28.3.2017 and discharge on 18.4.2017. It can reasonably be believed that during this period, she was prevented on account of her ailment to attend her duties. No doubt as per the case set up in the writ petition, she absented from duties on and w.e.f. 12.4.2017. The discharged slip (Annexure R-1) to the reply filed on her behalf further reveal that she was not attending her duties from 28.3.2017 onwards. Respondent No. 3 has conducted fresh elections in its meeting held on 17.4.2017 and elected the office bearers including the petitioner as its President. Since respondent No. 4 had not been attending her duties, therefore, taking advantage of that situation, petitioner in the capacity of President of respondent No. 3 has convened a meeting on 27.4.2017 and resolved to get herself appointed as Mid Day Meal Worker in place of respondent No. 4 on taking note of her absence from duty from 17.4.2017 onwards.

3. The complaint (Annexure R-1) to the reply field on behalf of respondent No. 3 was made by one Dayawanti to Block Primary Education Officer, Surla, Tehsil Nahan, District Sirmour. The services of complainant Dayawanti as Mid Day Meal Worker in the same school were dispensed with due to decrease in the number of children. On her complaint, Block Primary Education Officer-respondent No. 2 conducted an inquiry and found that the petitioner managed her engagement as Mid Day Meal Worker in the school by way of violation of guidelines and also removal of service of respondent No. 4 without issuing notice, she as such was removed from the school and in her place vide resolution dated 5.9.2017 (Annexure R-3) to the reply filed on behalf of respondent No. 3, has been re-appointed as Mid Day Meal Worker.

4. In view of pleadings of the parties and also the record of the case coupled with the submissions made by learned counsel on both sides, the appointment of the petitioner by respondent No. 3 in its meeting held on 27.4.2017, presided over by none else, but the petitioner herself in the capacity of the President of said respondent, is not only contrary to the guidelines, but also in violation of all cannons of service jurisprudence. As a matter of fact, no one can be the judge of his/her own selection. Otherwise also, the removal of respondent No. 4 from the school in given facts and circumstances, is not only harsh, but oppressive also for the reason that she was prevented from attending to her duties on account of her ailment and also remained hospitalized as an indoor patient as per (Annexure R-1) to the reply filed on her behalf. Not only this, respondent No. 2 after holding inquiry into the allegation made in the complaint (Annexure R-1) to the reply filed on behalf of respondent No. 3 has concluded that the appointment of the petitioner as Mid Day Meal Worker in the school was irregular and not in consonance with the service jurisprudence. Respondent No. 2 has also concluded in the inquiry report (Annexure R-2) that removal of respondent No. 4 from the school without following the procedure and issuing even a notice to her, was illegal. Respondent No. 4, as such has rightly been re-appointed by respondent No. 3 vide resolution (Annexure R-3) to its reply.

5. We, therefore, are not satisfied with the submissions that removal of the petitioner from the school as Mid Day Meal Worker is illegal and also arbitrary. The writ petition as such being without any merit, is dismissed, so also the pending application(s), if any.

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

Dhir Singh. ...Petitioner.

Versus

Jagmohan Mehta. ...Respondent.

Cr. Revision No. 60/2018
Reserved on: 24.10.2018
Decided on: 30.10.2018

**Code of Criminal Procedure, 1973 -** Sections 397 & 401- Revisional jurisdiction- Scope – Held - Revisional jurisdiction should normally be exercised in exceptional cases where there is glaring defect in proceedings or there is manifest error on point of law and consequent miscarriage of justice. (Para-5)

**Negotiable Instruments Act, 1881-** Sections 118 & 139- Presumption- Held, statutory presumption is that cheque issued by drawer is in discharge of legally enforceable debt or other liability– Burden of proof to prove otherwise is on drawer. (Para-19)

**Code of Criminal Procedure, 1973 -** Section 357(1) and (3)- **Negotiable Instruments Act, 1881 -** Section 138- Whether court is competent to grant compensation to complainant without first assessing amount of fine? – Held – Yes - Power of court to award compensation is not ancillary to other sentences but in addition thereto – If fine is imposed then Magistrate can award compensation out of fine imposed by him under Section 357(1) of Code – Where fine is not imposed, it is permissible to award compensation under Section 357(3) of Code. (Paras-22 & 31)

**Code of Criminal Procedure, 1973-** Section 357(3)- **Negotiable Instruments Act, 1881-** Section 138- Compensation – Sentence in default, whether can be imposed? – Held – Yes- It is permissible for court to impose imprisonment in default of payment of compensation. (Para-26)

***Cases referred:***

Amur Chand Agrawal vs. Shanti Bose and another, AIR 1973 SC 799
Bansi Lal others vs. Laxman Singh, AIR 1986 SC 1721
Dilip S. Dahanukar vs Kotak Mahindra Co. Ltd. another (2007) 6 SCC 528
K.A. Abbass H.S.A. vs Sabu Joseph and another (2010) 6 SCC 230
Kaptan Singh others vs. State of M.P. and another, AIR 1997 SC 2485
CCR 109
Kumaran vs State of Kerala and another (2017) 7 SCC 471
Meters Instruments Private Limited and another vs Kanchan Mehta, (2018) 1 SCC 560
Pathumma another vs. Muhammad, AIR 1986 SC 1436
Ramu @ Ram Kumar vs. Jagannath, AIR 1991 SC 26
R. Mohan vs A.K. Vijaya Kumar (2012) 8 SCC 721
R. Vijyan vs Baby and another (2012) 1 SCC 260
Somnath Sarkar vs Utpal Basu Mallick and another (2013) 16 SCC 465
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State of Karnataka vs. Appu Balu, AIR 1993, SC 1126 = II (1992) CCR 458 SC
State of Kerala vs. Puttumana Illath Jathavedan Namboodiri (1999) 2 SCC 452
State of Orissa vs. Nakula Sahu, AIR 1979, SC 663

For the Petitioner: Mr. Rajesh Mandhotra, Advocate.
For the Respondent: Mr. Ashok Kumar, Advocate vice Mr. K.S. Kanwar, Advocate.

The following judgment of the Court was delivered:

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**Tarlok Singh Chauhan, Judge**:

The petitioner was convicted for offence under section 138 of the Negotiable Instruments Act (for short "the Act") for dishonour of cheque amounting to Rs.1,49,000/- and was sentenced to undergo simple imprisonment for one year and to pay a compensation of Rs. 2,20,000/- to the complainant and in default of payment of compensation to further undergo simple imprisonment for six months. However, on an appeal even though the amount of compensation was left undisturbed, but the substantive imprisonment of one year was modified and reduced to three months. Aggrieved by the judgment of conviction

and sentence so passed by the learned Sessions Judge, the petitioner has filed the instant revision petition.

2. Brief facts of the case, as set out in the complaint, are that the respondent is an orchardist and a private fruit contractor/commission agent and having his apple orchard and deals in sale and purchase of fruits and vegetables and runs his business in Sabzi Mandi, Khesgu, P.O. Luhri, Tehsil Anni, District Kullu, whereas the petitioner is a Ladani by profession and deals in sale and purchase of apples and other cash crops. In the month of October, 2011, the petitioner approached the respondent and offered to purchase the apples boxes from him. This offer was accepted and consignments of apples were sent to the petitioner and when the respondent asked for the payment of the said lot, the petitioner promised to pay the same within few months. However, upto September, 2012, no payment was made despite the petitioner having been contacted through his well wishers. It was only after great persuasion, the petitioner issued a cheque No. 120753 dated 15.11.2013 amounting to Rs. 1,49,000/- payable at State Bank of India, Branch Office Luhri, District Kullu in favour of the respondent. However, when the cheque was presented for encashment, the same was returned by the banker with the remarks "insufficient fund" and thus it was dishonoured. The respondent issued a legal notice, which was duly served upon the petitioner. However, no payment was made by the petitioner. Therefore, the complaint under section 138 of the Act came to be filed in the court of learned Judicial Magistrate, Anni, who has convicted and sentenced the petitioner, as aforesaid and on an appeal, the judgment of conviction was modified and the substantive sentence of one year imprisonment was reduced to three months imprisonment.

3. It is vehemently argued by Sh. Rajesh Mandhotra, learned counsel for the petitioner that the findings recorded by the courts below are perverse inasmuch as the complainant/respondent has failed to prove the case against the petitioner, more particularly, when the cheque in question has not been sent to the Handwriting Expert, and therefore, there was no occasion for the courts below to have convicted him. On the other hand, Mr. Ashok Kumar, learned vice counsel for the respondent, would contend that the petition being without merit should be dismissed as the judgments rendered by the courts below cannot be termed to be perverse, particularly, when these are based on the correct appreciation of the evidence on record.

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

5. 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.

6. 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".

7. 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".

8. 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."

9. 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.

10. 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.

11. 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."

12. 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".

13. 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."

14. 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."

15. Having set out the legal parameters for exercise of revisonal 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.

16. Therefore, it is necessary to advert to the findings, more particularly, the evidence that has come on record. To prove the issuance of cheque Ex.CW-1/B, the respondent examined himself as CW-1 and tendered in evidence his affidavit Ex.CW-1/A wherein he virtually reaffirmed and reasserted the averments raised by him in his complaint wherein it has been inter alia pleaded that in lieu of the payment of apple transactions, which had taken place in the apple season of 2011, the petitioner had issued him a cheque Ex.CW-1/B in the month of September, 2012, which upon presentation for encashment had been dishonoured. In cross-examination, the witness admitted that the petitioner had not purchased the apples from him after 2011, but maintained that the petitioner still owed him money. He denied that the petitioner had given him two cheques towards security and also denied that there was agreement between them in the year 2011 that he would tear off the said security cheques and self stated that the petitioner had given him cheques in the month of September, 2012.

17. CW-2 Yogesh Kumar was posted as Clerk/Cashier at State Bank of India, Branch Luhri and had brought the relevant record of the Bank and stated that cheque bearing No. 120753 belongs to their bank and had been issued to the account No. 11647127849 and was in the name of the petitioner Dhir Singh. He further stated that the cheque Ex.CW-1/B was presented at the Luhri Branch, but was returned due to insufficient fund in the account of the petitioner vide return memo Ex.CW-1/C and entry qua the same was made in the register of the bank at mark 'A', a copy of which was Ex.CW-1/G. He further proved on record the bank statement of the aforesaid account number Ex.CW-1/H, which also carries an entry qua the return of the cheque on 24.12.2013 and shows the balance in the account of the petitioner to be only Rs. 4,088.33 on the said date.

18. To rebut the case of the respondent, the petitioner examined himself as sole witness and in his examination-in-chief tendered his affidavit as Ex.DW-1/A wherein he stated that he purchased apples from the respondent in the year 2011. He had given two security cheques to the respondent, out of which the respondent had given one cheque to a person named Suresh. Thereafter when he and respondent settled their accounts at the end of the year 2011, he requested the respondent to return the security cheque. However, despite assurance that the cheques would be torn off, the respondent presented the same for encashment. He further stated that he did not owe any amount to the respondent and went on to state that he had not given any cheque to the respondent in the month of

September, 2012. In his cross-examination, he admitted that he had bought apples from the respondent about 6-7 times. He further stated that at the time of settlement of accounts with the petitioner in the month of September, 2011, he had paid Rs. 1,50,000/- to the respondent. However, no receipt was prepared. He further admitted that he had received the legal notice and that he had not replied to the same. He admitted that he had not initiated any proceedings against the respondent even after the receipt of legal notice qua his claim that he had given the cheque only as a security. He further admitted his signatures on the cheque Ex.CW-1/B. This in entirety is the evidence that has come on record.

19. It is not in dispute that the cheque was issued by the petitioner. The only defence taken by him was that it was issued as a security under arrangement that the respondent had agreed to tear off the cheque after the payment, which was made by the petitioner in September, 2011 itself. However, the petitioner has failed to prove this fact, as was required by him. After all, under sections 118-A and 139 of the Act, the presumption is that the dishonoured cheque has been issued in discharge of legally enforceable debt or other liability by the accused/petitioner. Therefore, the burden of proof to prove otherwise is on the accused/petitioner.

20. It is then contended by Sh. Rajesh Mandhotra, Advocate that the courts below could not straightway award compensation without first determining the amount of fine as it is only when the Court has determined the amount of fine then the question of compensation out of the same amount would arise; and would place heavy reliance on the concurring judgment of Hon'ble Mr. Justice T.S. Thakur (as his Lordship then was) in ***Somnath Sarkar*** vs ***Utpal Basu Mallick and another***, (2013) 16 SCC, 465 wherein it was observed as under:

> "17. The second aspect relates precisely to the need for appreciating that the power to award compensation is not available under Section 138 of Negotiable Instruments Act. It is only when the Court has determined the amount of fine that the question of paying compensation out of the same would arise. This implies that the process comprises two stages. First, when the Court determines the amount of fine and levies the same subject to the outer limit, if any, as is the position in the instant case. The second stage comprises invocation of the power to award compensation out of the amount so levied. The High Court does not appear to have followed that process. It has taken payment of Rs.80,000/- as compensation to be distinct from the amount of fine it is imposing equivalent to the cheque amount of Rs.69,500/-. That was not the correct way of looking at the matter. Logically, the High Court should have determined the fine amount to be paid by the appellant, which in no case could go beyond twice the cheque amount, and directed payment of compensation to the complainant out of the same."

21. Section 357 of the Cr.P.C. reads as under:

> "357. Order to pay compensation.
>
> (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-
>
> (a) in defraying the expenses properly incurred in the prosecution;
>
> (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855 ), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

22. The question as to whether it is permissible to grant compensation without imposing fine while convicting the accused for the commission of offence punishable under section 138 of the Act is no longer *res integra* in view of the judgment of the Hon'ble Supreme Court in ***Dilip S. Dahanukar*** vs ***Kotak Mahindra Co. Ltd. and another,*** (2007) 6 SCC 528 wherein the Court held that the power of the Courts to award compensation to victim under section 357 of the Cr.P.C. is not ancillary to other sentences but in addition thereto and that the imposition of fine and/or grant of compensation to a great extent must dependant upon the relevant factors apart from such amount of compensation being just and reasonable. The Court after considering the provisions of Section 357 (1) (3) held that if fine has been imposed, the Magistrate can award compensation out of the fine imposed by him under section 357 (1). However, where fine has not been imposed, it is permissible to award compensation under section 357 (3). A distinction was drawn between these two provisions and it was held that while the jurisdiction of the Magistrate under section 357 (1) would be limited to the limit of fine prescribed under section 29 of Cr.P.C. However, there would be no limit under section 357 (3) and therefore, unlimited fine can be imposed. It was observed as under:

"26. The distinction between sub-Sections (1) and (3) of Section 357 is apparent. Sub-Section (1) provides for application of an amount of fine while imposing a sentence of which fine forms a part; whereas sub-Section (3) calls for a situation where a Court imposes a sentence of which fine does not form a part of the sentence.

29. The purposes for application of fine imposed has been set out in clauses (a) to (d) of sub-Sections (1) of Section 357. Clause (b) of sub- Section (1) of Section 357 provides for payment of compensation out of the amount of fine.

> The purpose enumerated in clause (b) of sub-Section (1) of Section 357 is the same as sub-Section (3) thereof, the difference being that whereas in a case under sub-Section (1) fine imposed forms a part of the sentence, under sub-Section (3) compensation can be directed to be paid whence fine does not form a part of the sentence.
>
> 30. The fine can be imposed only in terms of the provisions of the Act. Fine which can be imposed under the Act, however, shall be double of the amount of the cheque which stood dishonoured. When, however, fine is not imposed, compensation can be directed to be paid for loss or injury caused to the complainant by reason of commission of the offence. Clause (b) of sub-Section (1) of Section 357 only provides for application of amount of fine which may be in respect of the entire amount or in respect of a part thereof. Sub-Section (3) of Section 357 seeks to achieve the same purpose.

23. It was further held that the purpose of imposition of fine and/or grant of compensation to a great extent must be considered having the relevant factors therefor in mind. It may be compensating the person in one way or the other.

24. The aforesaid exposition of law was reiterated in ***K.A. Abbass H.S.A.*** vs ***Sabu Joseph and another*** (2010) 6 SCC 230 wherein the Hon'ble Supreme Court held that the power to award compensation is not ancillary to other sentences but in addition thereto. This power was intended to reassure victim that he/she is not forgotten by the justice delivery system. It was held as under:

> "15. Essentially the section empowers the courts, not to just impose a fine alone or fine along with the sentence of imprisonment, but also when the situation arises, direct the accused to pay compensation to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced."

25. It was further held that sentence of imposition can be granted in default of payment of compensation awarded under section 357 (3) because the whole purpose of the provision is to accommodate the interests of the victim in criminal justice system because sometime the situation becomes such that there is no purpose served by keeping the person behind the bar. Instead of directing the accused to pay an amount of compensation to the victim or affected party can ensure delivery of total justice. Therefore, this grant of compensation is sometimes in lieu of sending a person behind bars or in addition to a very light sentence of imprisonment.

26. Similar reiteration of law can be found in ***R. Mohan*** vs ***A.K. Vijaya Kumar*** (2012) 8 SCC 721 wherein it was held that it is permissible for the Courts to impose imprisonment in default of the payment of compensation. It was held:

> "Thus, if a fine is not a part of the order of sentence, the court may order the accused to pay compensation to the person who has suffered any loss or injury because of the act of the accused for which he I sentenced."

27. Thus, if a fine is not a part of the sentence, the Court may order the accused to pay compensation to the person who has suffered any loss or injury because of the act of the accused for which he is sentenced.

28. Earlier to that, in ***R. Vijyan*** vs ***Baby and another*** (2012) 1 SCC 260, the Hon'ble Supreme Court held that it was not permissible to award compensation in addition to the fine and the compensation could have been awarded out of the fine imposed. Hence,

the amount of Rs. 20,000/- awarded as compensation was held to be beyond jurisdiction. It was further noticed that since the power to impose fine was limited to Rs. 5,000/-, therefore, the amount of fine could not have been increased to justify the compensation. However, the distinction between section 357 (1) and (3) was noticed and it was held as under:

> "9. It is evident from Sub-Section (3) of section 357 of the Code, that where the sentence imposed does not include a fine, that is, where the sentence relates to only imprisonment, the court, when passing judgment, can direct the accused to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. The reason for this is obvious. Sub-section (1) of section 357 provides that where the court imposes a sentence of fine or a sentence of which fine forms a part, the Court may direct the fine amount to be applied in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a Civil Court. Thus, if compensation could be paid from out of the fine, there is no need to award separate compensation. Only where the sentence does not include fine but only imprisonment and the court finds that the person who has suffered any loss or injury by reason of the act of the accused person, requires to be compensated, it is permitted to award compensation under compensation under section 357(3)."

29. In ***Kumaran*** vs ***State of Kerala and another*** (2017) 7 SCC 471, the Hon'ble Supreme Court, while dealing the question whether it was permissible to impose sentence in default of payment of compensation held that it was permissible to do so and while doing so, reliance was placed upon section 357 (3) and in para 23 it was observed as under:

> "23. A conspectus of the aforesaid judgments would show that compensation under the old Cr.P.C. was always recoverable as a part of fine, and that even after default imprisonment having been undergone, a fine could still be collected in the manner provided by Section 386. The requirement of special reasons was introduced by the amending Act of 1923. The special reasons outlined in the Bombay High Court judgment of 1935 as well as in the Mysore High Court judgment of 1964 would show that it is enough that sufficient reasons or some good reason be given in order that fine be realized even after default imprisonment has been undergone. The Courts held that despite the fact that the reach of Section 386(1) proviso was only qua warrants that issued after default imprisonment was undergone, yet, the principle of the proviso to Section 386(1) would apply even to warrants issued before default imprisonment was undergone. The law, therefore, till the enactment of the 1973 Code, made it clear that Section 386, and Section 70 IPC read together would lead to the conclusion that fines were recoverable even after default imprisonment was undergone, provided there were special reasons for recovery of the same. With the Code of 1973 came an interesting change. Sub-section (3) was added to Section 357, which was an entirely new provision making it clear that the Court may, when passing judgment, order the accused to pay by way of compensation such amount as may be specified in the order to the person who has suffered loss or injury by reason of the act for which the accused person has been sentenced. This is provided that the Court imposes a sentence of which fine does not form a part.

Another important change was made in Section 421(1). The proviso to the said sub-section was altered because the 41st Law Commission Report, in recommending amendments to the old Section 386 stated, after noticing the Bombay High Court judgment in Digambar's case as follows :

> "28.10. Fine should be recoverable when compensation has been ordered. We notice that in the above judgment the fact that the complainant has been allotted part of the fine was not considered a relevant special reason for purposes of the proviso as it stands. A contumacious offender should not, in our opinion, be permitted to deprive the aggrieved party of the small compensation awarded to it by the device of undergoing the sentence of imprisonment in default of payment of the fine. When an order under Section 545 has been passed for payment of expenses or compensation out of fine, recovery of the fine should be pursued, and in such cases, the fact that the sentence of imprisonment in default has been fully undergone should not be a bar to the issue of a warrant for levy of the fine. We recommend that the proviso to section 386(1) should make this clear."

30. In a very recent judgment of the Hon'ble Supreme Court in ***Meters and Instruments Private Limited and another*** vs ***Kanchan Mehta***, (2018) 1 SCC 560, it has clearly been held that in a complaint under section 138 of the Act, the complainant can be given not only the cheque amount but double the amount so as to cover the interests and costs. Section 357 (1) (B) of the Cr.P.C. provides for payment of compensation for the loss caused by the offence out of the fine. Where fine is not imposed, the compensation can be awarded under section 357 (3) to the person who has suffered loss. Sentence in default can also be imposed. The object of the provision is not merely penal but to make the accused honour the negotiable instruments. The Hon'ble Supreme Court thereafter laid down the following principles:

> 18.1. Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.
>
> 18.2. The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.
>
> 18.3. Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.
>
> 18.4. Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. <u>The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of</u>

imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

18.5 Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances."

31. Thus, what can be deduced from the aforesaid exposition of law is that in a complaint under section 138 of the Act having been proved the complainant can be awarded not only the cheque amount but the double amount so as to cover the interests and costs under section 357 (1) (B) of the Cr.P.C. Payment of compensation for the loss caused by the offence can be ordered to him. The Court can award fine under section 357 (1) and out of the same direct the payment of compensation for the loss caused by the offence to the complainant. Further where fine is not imposed, compensation still can be awarded in favour of the complainant under section 357 (3) Cr.P.C.

32. In view of aforesaid discussion and for all the reasons as stated, I find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs.

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**BEFORE HUMBLE MR. JUSTICE SURESHWAR THAKUR, J.**

M/s Bliss City Developers Pvt. Ltd. .....Plaintiff.
Versus
Krishan Singh .....Defendant.

Civil Suit No. 136 of 2012.
Reserved on : 22nd October, 2018.
Date of Decision: 31st October, 2018.

**Specific Relief Act, 1963** – Section 15 – Agreement to sell - Specific performance – Entitlement - Agreement clause providing for payment of double of earnest amount to purchaser in case of breach of contract on part of seller – Sale deed not executed as per agreement and purchaser filing suit for specific performance - Seller contending that in view of this default clause, specific performance of agreement cannot be ordered- Held, it is incumbent upon Court to render primary decree of specific performance of agreement to sell unless stipulated damages adequately compensate him. (Para 8)

***Cases referred:***
Gomathinayagam Pillai and others vs. Palaniswami Nadar, AIR 1967 SC 868

For the Plaintiff: Ms. Meenakshi Sharma, Advocate.
For the Defendant: Mr. P.S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The plaintiffs' case in brief is that the plaintiff is a company constituted under the Companies Act having its head office at SCO 215-216-7, Sector 34-A, Chandigarh. The plaintiff company passed a resolution of 25.12.2012, and, hence authorised its Director Sh. Satish Lal Arora to institute the instant civil suit before this Court, hence, Shri Satish Lal being an authorized person is competent to file the instant suit. It has been averred that the defendant along with other co-sharer is owner in possession of land comprised in Khata/Khatauni No. 1/1 min, Khasra No.227/164 situated in Mauza Kheel Jesli, Pargana Bharlali, District and Tehsil Solan, H.P. It is pleaded that as per jamabandi for the year 2005-2006, the defendant is owner in possession to the extent of 1/3rd of his share measuring about 2-18 bighas. It has been averred that the defendant was interested in selling his share, and, after negotiations and settlement the defendant entered into a formal agreement to sell qua the suit land with the plaintiff for a total sale consideration of Rs.50,75,000/-. It has been averred that it was agreed that the purchaser will be at liberty to get the land transferred in its own name or to some other company. It has been further averred that in pursuance to the agreement to sell of 10.02.2012, the plaintiff paid a sum of Rs.10,50,000/- to the defendant as earnest money, amount whereof duly acknowledged by the defendant. The aforesaid amounts were paid through two different cheques, respectively bearing cheque No.640703 of 10.02.2012 amounting to Rs.Nine Lakhs and cheque No. 640708 of 7.5.2012, amounting to Rs.1,50,000/-. It has been averred that the defendant has also obtained NOC from other co-sharers qua sale of land in favour of the plaintiff or to some other person. It has been averred that as per the terms and conditions of the agreement to sell entered into the plaintiff and the defendant, it was agreed that the balance amount would be paid by the plaintiff at the time of execution of sale deed. It is averred that since the plaintiff being the non agriculturist of the Himachal Pradesh, hence required to obtained necessary registration certificate and permissions under Section 118 of the H.P. Tenancy and Land Reforms Act before execution of the sale deed. The plaintiff company applied for the requisite registration certificate. However, during the pendency of the same,, unfortunately the H.P. Apartment and Property Regulation Act, 2005 is repealed and hence the application of plaintiff company came to a stand still. The plaintiff company through its authorised person kept on visiting and inquiring about the fate of these pending applications and it was intimated that proposals for the new Act have been almost finalized and is likely to be enacted shortly. The plaintiff company remained under bonafide impression that the new Act would be enacted and requisite permission would be granted in favour of the plaintiff. It has been further averred that the time qua the execution of sale deed was fixed till 31.12.2012. However, owing to repealing of old Act, the plaintiff company could not get itself registered and as such requisite permission under Section 118 of the H.P. Tenancy and Land Reforms Act was not issued to it, hence, the sale deed could not be executed. The plaintiff is keen to purchase the suit land, however, due to repealing of the Act, the necessary sanction could not be obtained. Under these compelling circumstances, it has become very difficult to the plaintiff

to execute the sale deed and the plaintiff company is circumvented by adverse circumstances, as such, the agreement to sell requires its rectification for enlargement of time for getting the sale deed executed. It has been further averred that the plaintiff company has made many requests to the defendant for modification/rectification of the agreement, and, to enlarge the time for executing of the sale deed, but all in vain. However, the defendant is taking an undue advantage of the compelling circumstances of the plaintiff, and, is intending to grab plaintiffs money being paid as part of sale consideration. It has been averred that the plaintiff is ready and willing to complete transaction of purchase, however, due to the afore circumstances, the sale could not be executed. Consequently, it has been prayed that a decree be passed for specific performance for rectification of agreement, directing the defendant to rectify the agreement of 10.02.2012 to enlarge the time for further period of three months from the date of enactment of new Act in place of repealed H.P Apartment and Property Regulation Act, 2005 and in the alternative a decree be passed for refund of an amount of Rs.10,50,000/-, amount whereof paid as earnest money to the defendant, along with interest @18% per annum. Hence the suit.

2. The sole defendant, contested the suit, and, filed written statement, wherein he has taken preliminary objections, inter alia, the suit being false, vexatious and being filed with ulterior motives to harass the defendant, cause of action, maintainability, etc. On merits, execution of agreement sell, of 10.02.2012 qua the suit land is admitted. It is also admitted that in pursuance to the agreement to sell of 10.02.2012, the plaintiff paid a sum of Rs.10,50,000/. It is also admitted that the defendant had obtained NOC from other co-sharer for selling the land in favour of the plaintiff. It is also submitted that in fact he also obtained the NOC from all the co-sharers regarding selling of his hare qua the above said land in favour of the plaintiff, however, the defendant has completed all formalities regarding transfer of the land in favour of the plaintiff within time, and, as per the terms of agreement to sell of 10.022012, the defendant had fully co-operated with the plaintiff for this purpose. It is further submitted that at the time of execution of the agreement, it was agreed by the plaintiff that it would pay the balance amount of sale consideration amount to Rs.40,25,000/- at the time of registration of sale deed i.e. on or before 31.12.2012. As per the terms and conditions set out in agreement in para NO.3, it was also decided that the plaintiff would obtain necessary permission under Section 118 of the H.P. Tenancy and Land Reforms Act, on or before 31.12.2012. The time is the essence of the agreement for the purpose of making of payment to the seller. It is also submitted that it was also agreed that purchaser, who is non agriculturist, shall apply for grant of permission in its favour for getting the above said land transferred in its favour on or before 31.12.2012, and, the seller shall fully corporate with the purchaser in getting such permission and shall provide and make available all the document required for such purpose. It is further submitted that in para No.9 of the agreement to sell, it was also agreed that in case the seller backs out from this agreement in that event the purchaser shall be entitled to enforce this agreement through the process of law or the seller shall be liable to pay the double of the received money to the purchaser, the option shall be that of the purchaser and further in para No.10 of the agreement it was agreed and decided that in case the purchaser backs out from this agreement in that event, amount paid to the seller, as, earnest money, shall be forfeited by the seller, and, the agreement to sell come to an end. The time is the essence of the agreement to sell. It has been pleaded that in fact, the plaintiff has alleged in paragraph No.7 of the plaint that the plaintiff applied for the requisite registration certificate, however, during the pendency of the same unfortunately the H.P. Apartment and Property Regulation Act, 2005 was repealed, and, on inquiry it was intimated that the proposal for new act have bee almost finalised and is likely to be enacted shortly. The aforesaid plea as raised in paragraph No.7 of the plaint by the plaintiff is alleged by the defendant to be totally false and vague and manipulated simply to obtain extension of time of agreement in the

alternatively to obtain a decree for recovery of refund of money, however, nowhere the plaintiff company has any intention to get the land transferred in their name because as per the information collected from the office of District Revenue Officer, Solan, by the defendant, it came to his knowledge that no such application has been found to be filed by M/s Bliss City Developers Pvt. Ltd. In their office in the period commencing from February, 2012 to December, 2012 for the grant of permission to purchase land under Section 118 of the H.P. Tenancy and Lands Reforms Act, 1972. However, the plaintiff company even also nowhere applied regarding registration in the department of Town and Country Planning or HIMUDA regarding registration under the H.P. Apartment and Property Regulation Act, 2005. So, all the contents of the para regarding taking time and extension of agreement are totally false, and, the plaintiff company under the garb of the aforesaid false plea wants to refund of the earnest money along with interest, however, it is not entitled for the aforesaid relief, since the time was the essence of the contract. It has been pleaded that the plaintiff company is itself negligent and has no intention to purchase the property, hence, now by alleging the time consuming process for getting necessary sanction and due to repealing of the Act, same could not be obtained, hence seeking the rectification of the agreement or in the alternative seeking the refund of the earnest money along with interest. It has been pleaded that the time fixed for the execution and registration of the sale deed has already expired, and, the earnest money received towards sale consideration stands forfeited in favour of the defendant, as per condition No.10 of the agreement to sell, hence, the plaintiff company nowhere has any legal right for extension of time for getting the sale deed executed in its favour. In fact, the defendant is a bonafide and genuine person, who obtained all the necessary documents/papers with regard to the execution and registration of sale deed within the time but the plaintiff company itself failed to get the sale deed executed in its favour, even also to contact the defendant and now through this suit the plaintiff company is projecting false excuses. It has been averred that the plaintiff did not even take any single step to perform his part of obligation, rather it left the matter with the State by simply saying that the Act was repealed, if it has any intention to get the sale deed executed in its favour it has to prove as to what steps were taken for the transfer of the land. Owing to the failure of the plaintiff to execute the sale deed within the time prescribed the agreement to sell, the defendant was left with no other option to invoke the clause 10 of the agreement to same, and, the agreement to sell was terminated, fact whereof was also brought to the notice of the plaintiff. Hence, the defendant prayed for dismissal of the suit.

3. The plaintiffs herein filed replication to the written statement of the defendant, wherein, it denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

4. On the contentious pleadings of the parties, this Court on 20.11.2013, struck the following issues inter-se the parties at contest:-

> 1. Whether the plaintiff is entitled for grant of decree for rectification and specific performance of agreement dated 10.02.012, as prayed for vide prayer clause a? OPP
>
> 2.Whether in the alternative, the plaintiff is entitled for refund of advance sale consideration of Rs.10,50,000/- (Rupees Ten Lacs, Fifty Thousand only) along with interest at the rate of 18% per annum? OPP.
>
> 3.Whether the suit being totally false, vexatious, frivolous, malafide and having been filed with ulteriormotives to harass and humiliate the defendant as alleged, is liable to be dismissed? OPP.

4.Whether the plaintiff has no legal, valid enforceable and subsisting cause of action, and, the suit is liable to be dismissed under Order 7, Rule 11 CPC?OPD.

5.Whether the plaintiff has not come to the Court with clean hands and is guilty of concealment of material facts and if so, its effect?OPD.

6.Whether the suit is not maintainable in the present form?OPD.

7.Relief.

5. For the reasons to be recorded hereinafter, my findings on the aforesaid issues are as under:-

Issue No.1..... No.

Issue No.2.....No.

Issue No.3.....No.

Issue No.4.....No.

Issue No.5..... No.

Issue No.6..... No.

7. Relief..... Suit of plaintiff is dismissed as per the operative portion of the judgment.

**Reasons for findings.**

**Issues No.1 and 2.**

6. Both the aforesaid issues are taken up together for discussion, as they are common in nature besides common evidence thereon, stands, hence adduced by the parties.

7. The apposite agreement to sell is embodied in Ex.PW2/A. In clause 3 whereof, which stands extracted hereinafter:-

> "3. That the purchaser has paid a sum of Rs.9,00,000/- (Rupees nine lacs only) to the seller as earnest money through cheque No.640703 dated 10.2.2012 drawn on Allahabad Bank, Kharar Branch, District Mohali, Punjab, the receipt of which is hereby acknowledged by the seller. The purchaser shall pay a further sum of Rs.1,50,000/- (Rupees one lac fifty thousand only) to the seller on or before 7.4.2012 and the entire remaining amount of Rs.40,25,000/- (Rupees forty lacs twenty five thousand only) would be paid to the seller by the purchaser at the time of execution and registration of sale deed before the Sub Registrar, Solan which shall take place on or before 21.12.2012 during the period the purchaser shall obtain the necessary permission in its favour from the Government of Himachal Pradesh under Section 118 of the H.P. Tenancy & Land Reforms Act, 1972. The time is the essence of this agreement for the purpose of making the payment to the seller."

(a) a specific explicit recital is borne, vis-a-vis, the parties to the contract of sale hence obliging themselves, to, execute the registered deed of conveyance, vis-a-vis, the suit property, before the Sub Registrar concerned, on or before 31.12.2012, (b) and, also the plaintiff/purchaser being obliged thereunder, to, on or before the aforesaid period, obtain the requisite permission, from the authorities concerned, given the plaintiff being a non agriculturist within Himachal Pradesh. Furthermore, clauses 8, 9 and 10, borne in Ex.PW2/A, which stand extracted hereinafter:-

> "8. That the purchaser who is non agriculturist in the State of Himachal Pradesh shall apply to the State Govt. of H.P. for grant of permission in its favour for getting the above said land transferred in its favour on or before 31.12.2012 and the seller shall fully cooperate with the purchaser in getting such permission and shall execute, submit, provide and make available all the documents required for such purpose.
>
> 9. That in case the seller backs out from this agreement in that event the purchaser shall be entitled to enforce this agreement through the process of law by way of specific performance of the agreement and/or the seller shall be liable pay double of the received money to the purchaser. The option shall be that of the purchaser.
>
> 10.That in case the purchaser backs out from this agreement in that event the amount paid to the seller as earnest money or to be paid later on shall stand forfeited and this agreement shall come to an end. The time is the essence of this agreement."

(a) carry recitals, whereunder, a contractual obligation stands cast, upon, the defendant to ensure, his performing, his part, of, the apt contractual obligation, (b) and a right is reserved, vis-a-vis, the plaintiff, that in case the defendant fails to perform his part of obligation, it being entitled to enforce the agreement to sell, in, accordance with law, (c) or in the alternative the defendant/seller being amenable to pay double, the, earnest money paid to him by the plaintiff, in contemporaneity, to, the uncontroverted valid execution, of, EX.PW2/A. However, in clause 10 of Ex.PW2/A, a recital is borne qua, upon, the purchaser breaching his apposite contractual obligation, thereupon, the amount of earnest money paid, vis-a-vis, the defendant by the plaintiff, in, contemporaneity to the execution of EX.PW2/A, being liable for forfeiture by the defendant/seller, and, the agreement also coming to an end, besides it is mentioned with explicity therein qua the contractually prescribed time being the essence of the contract.

8. The execution of Ex.PW2/A occurred, on 10.02.2012, and, the prescribed time for, the, completest execution, of, the registered sale deed, vis-a-vis, the suit property, is, contractually agreed by the contesting parties, to, imperatively occur on or before 31.12.2012. However, before expiry of the afore period, the plaintiff, on 29.12.2012, rather instituted the instant suit before this Court, (i) wherein, it has espoused the relief for specific performance of contract of sale. It has also claimed therein, the, relief qua the time specified, in, the afore agreement to sell, being the essence of the contract, hence, being decreed to be rectified. Bearing in mind the afore extracted recitals borne in Ex.PW2/A, and, with the plaintiff instituting the suit, before the expiry of the apposite period, as, echoed with explicity in Ex.PW2/A, it is further enjoined to be determined, from the evidence, (ii) whether the plaintiff or the defendant, hence, derelicted in performing their respective part(s) of, the, apt contractual obligations, as, encumbered upon them, under Ex.PW2/A.

9. However, before making the afore strivings, it is also deemed imperative to bear in mind, the expostulation of law borne, in, a verdict of the Hon'ble Apex Court, rendered in a case titled as ***Gomathinayagam Pillai and others vs. Palaniswami Nadar***, reported in ***AIR 1967 SC 868,*** (i) expostulation of law whereof appertains, to, a construction being meted, vis-a-vis, the recital(s) borne in the apt contract of sale, and, as, explicitly pronounce qua time being the essence of the contract, and, theirs being hence construable nor not, to be the essence of the contract, and, stand(s) carried in paragraph No.4 thereof, para whereof stand extracted hereinafter:-

> "4. The facts which have a material bearing on the first question have already been set out. Section 55 of the Contract Act which deals with the consequences of failure to perform an executory contract at or before the stipulated time provides by the first paragraph:
>
> > "When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise if the intention of the parties was that time should be of the essence of the contract."
>
> It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable : it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the ,essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In Jamshed Khodaram Irani v. Burjorji Dhunjibhai, ILR 40 BOM 289: (AIR 1915 PC 83) the Judicial Committee -of the Privy Council observed that the principle underlying S. 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed :
>
> > "Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. . . . Their Lordships are of

> opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in Tilley v. Thomas (1867) L. R. 3 Ch. 61:-
>
> "The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in Roberts v. Berry (1853) 3 De G. M. & G. 284), there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. of the three grounds mentioned by Lord Justice Turner express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."
>
> Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay as its foundation. "Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified."
>
> (p.870-871)

The apt recital in a contract of sale, vis-a-vis, time being essence of the contract, and, upon breach thereof being made by the plaintiff, the latter being disentitled, to, claim the relief of specific performance, of contract of sale, (i) stands, propounded therein, to be, imperatively borne or stand couched, in, an unmistakable language, and, any inference(s), vis-a-vis, the afore factum, being derivable from the conduct, and, the circumstances prevailing thereat or before the contract. Furthermore, in paragraph No.5, of, Gomathinayagam Pillai case (supra), para whereof stands extracted hereinafter, it is also prescribed therein, that, the mere fixation of a period, within, which the contract is to be performed, rather not making, the stipulation qua the contractually prescribed time, rather, being the essence of the

contract, rather obviously import thereof being garnered, from the afore twin conditions, being rather dis-proven, by, the plaintiff. Paragraph No.5 of the case supra, reads as under:-

> "5. The Trial Court relied upon three circumstances in support of its conclusion that time was of the essence of the contract of sale : (i) though no time was prescribed by the oral agreement, in the agreements writing dated April 4, 1959 and April 15, 1959 there were definite stipulations fixing dates for performance of the contract; (ii) that the second and the third agreements contained clauses which imposed penalties upon the party guilty of default; and (iii) that appellants 1 & 2 were in urgent need of money and it was to meet their pressing need that they desired to effect sale of the property. But the agreements dated April 4 and April 15 do not express in unmistakable language that time was to be of the essence and existence of the default clause will not necessarily evidence such intention. Fixation of the period, within which the contract is to be performed does not make the stipulation as to time of the essence of the contract. It is true that appellants 1 & 2 were badly in need of money, but they had secured Rs. 3006/- from the respondent and had presumably tided over their difficulties at least temporarily. There is no evidence that when the respondent did not advance the full consideration they made other arrangements for securing funds for their immediate needs. Intention to make time of the essence of the contract may be evidenced by either express stipulations or by circumstances which are sufficiently strong to displace the ordinary presumption that in a contract of sale of land stipulations as to time are not of the essence. In the present case there is no express stipulation, and the circumstances are not such as to indicate that it was the intention of the parties that time was intended to be of the essence of the contract. It is true that even if time was not originally of the essence, the appellants could by notice served upon the respondent call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the requisition the contract will be treated as cancelled. As observed in Stickney v. Keeble, 1915 AC 386 where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end. In the present case appellants 1 & 2 have served no such notice; by their letter dated July 30, 1959 they treated the contract as at an end. If the respondent was otherwise qualified to obtain a decree, for specific performance, his right could not be determined by the letter of appellants 1 & 2."
>
> (p.871-872)

10. Nowat, the afore extracted apposite recitals borne in Ex.PW2/A, do, with, in, explicit and unmistakable language, make clear, open, and, candid bespeaking(s) qua time being the essence of the contract. However, if subsequent thereto, the, parties yet evinced conduct, (i) wherefrom it may be inferable, qua, the apt time standing impliedly extended or the party claiming the relief, of, specific performance not either intentionally and deliberately, rather breaching any part of the apt contractual obligation(s) cast upon him or

it, (ii) thereupon, the relief of specific performance of contract, vis-a-vis, the hereat immovable property, being not permissible to be undenied, to the plaintiff. However, when as aforestated, the plaintiff is a non agriculturist within Himachal Pradesh, (iii) and, when it was contractually enjoined, to, within, the time prescribed therein, to, obtain the requisite statutory permission, from, the authorities concerned, (iv) yet when PW-2, the authorised Director of the plaintiff's company, in his cross-examination rather disclosing qua the requisite permission neither being applied for, nor obtained, and, when the afore omissions, are not, proven to occur on account, of, any dereliction on the part of the defendant, (v) thereupon, given the unmistakability, of, language, as, carried in the apt recital, recital whereof, hence, prescribes the time, wherewithin the contract of sale, is enjoined to be performed, hence, is to be given, the, apt deepest reverence. Moreso, when concomitantly the plaintiff deliberately or intentionally omitted, to, perform the aforesaid apt obligation, and, also failed to obtain the requisite peremptory permission, vis-a-vis, the apt entity, than, the one qua which, it, had obtained, the, inapt registration certificate, certificate whereof borne in Ex.PW1/A, (vi) besides when the afore registration certificate, does not, per se authorise, the plaintiff to, a, seek declaratory relief, of, specific performance of contract of sale, borne in Ex.PW2/A.

11. Be that as it may, with the plaintiff seeking the relief of rectification of the apt portion, of, the contract of sale, borne in Ex.PW2/A, whereunder, time is prescribed to be the essence of the contract, also enables, this Court to foist an inference qua the plaintiff acquiescing qua time being the essence of the contract, (I) and, also its acquiescing qua the afore omission being both deliberate or intentional, (ii) hence, the plaintiff is not entitled to the relief as prayed for, and, furthermore the, claim, for, forfeiture of the earnest money, reared by the seller, does not, suffer from any legal fallacy, emphasizingly, given the contractually prescribed time being the essence of the agreement. Consequently, both issues No.1 and 2 are answered in favour of the defendant and against the plaintiff. More so when no counterclaim, for compensation is reared by the defendant.

**Issue No.3 and 4.**

12. No evidence exists on record to show that as to how the suit is totally false, vexatious, frivolous and having been filed with ulterior motives to harass and humiliate the defendant or that as to how the plaintiff has no legal, valid and enforceable cause of action, and, that as to how the suit is liable to be dismissed under Order 7, Rule 11 of the CPC, hence, both the aforesaid issues are decided in favour of the plaintiff and against the defendant.

**Issue Nos. 5 and 6:**

13. There exists no evidence on record to show that as to how the plaintiffs have not come to this Court with clean hand, and, that as to how the suit is not maintainable in the present form, hence, issues No. 5 and 6 are decided in favour of the plaintiff and against the defendant.

**Relief.**

14. In sequel to findings on issues aforesaid, the plaintiff's suit is dismissed. No costs. Decree sheet be prepared accordingly. All pending applications also stand disposed of.

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

Durga Singh .....Petitioner/Plaintiff.
Versus
State of H.P. & others .Respondents/Defendants.

CMPMO No. 140 of 2017.
Reserved on : 3rd October, 2018.
Date of Decision: 31st October, 2018.

**Constitution of India, 1950-** Article 227- **Code of Civil Procedure, 1908-** Section 151- Order VI Rule 17- Trial Court dismissing plaintiff's application for summoning retired Patwari/translator for translating mutation from Urdu to Hindi – Petition against – On facts, no pleadings raised qua mutation in question by plaintiff in plaint – Application filed under Order VI Rule 17 of Code for incorporating such pleadings in plaint already stood dismissed – Order had become final – Held, evidence beyond pleadings cannot be permitted to be adduced – Petition dismissed. (Paras 2 & 3)

For the Petitioner: Mr. Ajay Sharma, Advocate
For Respondents No.1 to 3: Mr. Hemant Vaid, Add. A.G. with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. A.Gs.
For Respondent No.4: Mr. Ravinder Sharma, Advocate.
For Respondent No.5: `Mr. P. S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The plaintiff/petitioner herein, is, aggrieved by the orders rendered by the learned trial Court, upon, his application, wherein, he sought summoning of one Durga Dutt, the retired Patwari/translator, for, translating the mutation No.253, from, Urdu to Hindi.

2. The order of dismissal, wherefrom, the plaintiff is aggrieved, is anvilled upon the factum, of, disaffirmative conclusive, and, binding pronouncement, vis-a-vis, the afore mutation, rather standing rendered by the learned trial Court, upon, the plaintiff's application, cast under the provisions of Order 6, Rule 17 CPC, (i)wherethrough, he unsuccessfully concerted, to, with the leave of the Court, hence incorporate in the plaint, a, challenge, vis-a-vis, the afore mutation. Given the conclusivity acquired by the afore order, pronounced by the learned trial Court, upon, an application, cast under the provisions of Order 6, Rule 17, CPC, thereupon, it was not permissible for the plaintiff, to concert to adduce evidence, vis-a-vis, the afore mutation, (ii) paramountly, when hence it would concomitantly, lead to an unbefitting legal casualty, of, rendition, of, an ill order of evidence, beyond pleadings, being permitted to be adduced on record.

3. For the foregoing reasons, and, with the aforesaid observations, the instant petition is dismissed, and, the orders impugned before this Court are maintained and affirmed. The parties are directed to appear before the learned trial Court, on 26th November, 2018. All pending applications also stand disposed of. Records be sent back forthwith.

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

Durga Singh .....Petitioner/Plaintiff.
Versus
State of H.P. & others ...Respondents/Defendants.

CMPMO No. 148 of 2016.
Reserved on : 3rd October, 2018.
Date of Decision: 31st October, 2018.

**Code of Civil Procedure, 1908**- Sections 114 and 151- Review- Permissibility – Plaintiff's application for amendment of plaint and thereby incorporation of particular mutation, dismissed by trial court – Plaintiff however while filing affidavit evidence including that mutation also and trial court ordering deletion of that part of affidavit evidence – Plaintiff filing application for review of order directing deletion of part of affidavit evidence – Application dismissed by trial court – Petition against – Held, remedy for plaintiff was to file appropriate proceedings in High Court, and not to seek review particularly when application for amendment of plaint stood already dismissed. (Paras-2 & 3)

For the Petitioner: Mr. Ajay Sharma, Advocate
For Respondents No.1 to 3: Mr. Hemant Vaid, Add. A.G. with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. A.Gs.
For Respondent No.4: Mr. Ravinder Sharma, Advocate.
For Respondent No.4(a): Mr. P. S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The plaintiff/petitioner herein instituted a suit, espousing therein relief for rendition of a decree, for, declaration, for setting aside the revenue entries, vis-a-vis, the suit khasra numbers, besides also questioned the legality, of, attestation of mutations, respectively bearing Nos. 370, 523, 524, 555, and, any other mutations which stand attested after attestation, of, mutation bearing No.370. During the pendency of the suit before the learned trial Court, and, when the plaintiff proceeded to adduce evidence, in discharge of the onus, vis-a-vis, the apposite issue, he proceeded to tender into evidence, an, affidavit, comprising therein, an averment, whereunder, he questioned the legality, of, attestation of mutation bearing No.253. Before the plaintiff, could successfully incorporate, in his affidavit, as, strived to be tendered into evidence, during the curse of his examination-in-chief, hence the afore averment, the defendants, by, instituting an application, under section 151 of the CPC, espoused a relief qua the afore requisite portion of the affidavit, being beyond pleadings,a nd, hence being amenable for rejection. The defendants' application was allowed. The order rendered on 10.06.2015, by the learned trial Court, remained unassailed by the aggrieved plaintiff. Subsequently, the plaintiff by casting an application, under, the provisions of Section 151 CPC, made an endeavour, to recall the afore orders, previously pronounced, on 10.06.2015. The afore application was rejected, hence, the plaintiff being aggrieved therefrom, has motioned this Court.

2. In short, the factum of conclusivity standing acquired by the disaffirmative orders pronounced, on 5.11.2014, by the learned trial Court, upon, the plaintiff's application, cast under the provisions of Order 6, Rule 17 of the CPC, whereunder, he unsuccessfully strived, to incorporate in the plaint, a challenge, vis-a-vis, mutation No.253, obviously tenably prevailed, upon, the learned trial Court, to allow the defendants' application. Even if, any legality ingrained, the, orders pronounced by the learned trial Court, upon, the defendants' application, thereupon, the remedy available to the aggrieved plaintiff, was, comprised in his instituting appropriate proceedings before this Court, rather than his untenably concerting to rip it of its purported ill effects, by his moving an application, under, Section 151 of the CPC. Even otherwise, the remedy availed by the aggrieved plaintiff, by his casting an application, under, Section 151 of the CPC, whereunder, he strived to recall the orders, earlier, pronounced by the learned trial Court on 10.06.2015, orders whereof, are anvilled, upon, conclusive and binding disaffirmative findings standing recorded by the learned trial Court, upon, an application cast therebefore by the plaintiff, under, the provisions of Order 6, Rule 17 CPC, is, obviously an unsuitable concert, (i) also he made an unsuitable endeavour to seek review of the orders previously rendered on 10.06.2015, upon, the defendants' application, for striking out the requisite portion of the affidavit, tendered into evidence, wherein averments beyond pleadings, were, incorporated, (ii) thereupon, all the ill-canvased besides mis-constituted remedies, were, enjoined to suffer the ill fate, of dismissal.

3. For the foregoing reasons, and, with the aforesaid observations, the instant petition is dismissed, and, the orders impugned before this Court, are, maintained and affirmed. The parties are directed to appear before the learned trial Court, on 26th November, 2018. All pending applications also stand disposed of. Records be sent back forthwith.

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

Tek Singh ..... Appellant.
Versus
Sh. Amarjit Singh and others ....Respondents.

FAO No. 88 of 2018 aongwith
CMP No. 1839 of 2018.
Reserved on : 3rd October, 2018.
Decided on : 31st October, 2018.

**Motor Vehicles Act, 1988 -** Motor accident - Damage to vehicle - Claim application - Tribunal dismissing application for want of proof of claimant's ownership qua damaged vehicle – Appeal - Application intended for adducing copy of Registration Certificate in evidence allowed - Matter remanded. (Paras 4 & 5)

For the Appellant: Mr. P. S. Chandel, Advocate.
For Respondent No.1: Nemo.
For Respondent No.2: Mr. Dheeraj K. Vashishta, Advocate.
For Respondent No.3: Mr. Jagdish Thakur, Advocate

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal is directed by the claimant/appellant herein against the award pronounced by the learned Motor Accidents Claims Tribunal (III), Shimla, upon MAC Petition No. 40-S/2 of 2013/11, whereunder the claim for compensation, arising, from damages suffered by the vehicle, owned, by the claimant was rejected.

2. The learned counsel appearing for the appellant has contended with much vigour (i) that the finding recorded by the learned Tribunal qua the petitioner being not owner of vehicle bearing No. HP-51-3137 hence being amenable for interference, given the learned tribunal (ii) discarding the probative worth of the registration certificate issued, vis-a-vis, the afore vehicle, registration certificate whereof, occurs at page 104, of, the records of the learned tribunal, (iii) wherein, the claimant along with one Hardyal Singh is shown to be owner, of, vehicle bearing No. HP-51-3137. Consequently, he contends that the appellant was entitled to receive compensation, for, damage suffered by the afore vehicle, in, the collision which occurred inter se it, and, the offending vehicle.

3. For making, any firm conclusion, that, the dismissal of the claimant's petition, for damages, and, for compensation rather warranting interference, unequivocal evidence is enjoined to occur, in, display of (i) the claimant proving, by, adducing in accordance with law, the registration certificate of the damaged vehicle qua hence his being owner thereof. However, a copy of the registration certificate, though, exists at page 104, of, the records of the learned tribunal. (ii) Nonetheless, it is only a photo copy of the RC of the vehicle, which purportedly suffered damages, (iii) whereas, it was enjoined to proven from the records, of, the licencing authority concerned, whereat, the, original thereof was held. Consequently, for want, of, adduction, of, valid proof qua therewith, rather renders the purported registration certificate issued, vis-a-vis, the damaged vehicle, being amenable to hence, no, credence being imputed, to, the afore photo copy, of, the registration certificate, occurring at page 104, of, the records of the learned tribunal. For overcoming, the aforesaid infirmity, the learned counsel for the claimant moved an application, cast under the provisions of Order 41, Rule 27 of the CPC, application whereof, bears CMP No. 1839 of 2018, for leave being accorded, to the appellant, for placing on record the photo copy, of, the registration certificate, of, the damaged vehicle. A perusal thereof makes disclosure(s) qua it bearing consonance with the photo copy, of, the registration certificate, existing at page 104, of, the records of the learned tribunal. Since, the entitlement, to, compensation, of, the claimant, is hinged upon proof, in accordance with law, standing adduced, vis-a-vis, the authenticity of the registration certificate, (i) thereupon, when the afore registration certificate is just and essential, for recording a clear and clinching findings, upon, the entitlement of the claimant, for, compensation against the owner/driver of the offending vehicle, (ii) thereupon, the leave to adduce the afore photo copy, of, the registration certificate, of, the damaged vehicle, and, to prove it, in, accordance with law, is, granted. Consequently, CMP No. 1839 of 2018 is allowed.

4. Since, after the afore leave being granted, vis-a-vis, the claimant, it may render incumbent, upon, the learned tribunal, to, reevaluate the findings rendered, upon, the relevant issues, thereupon, it is deemed fit to set aside the impugned award, and, hence, to remand the claim petition to the learned tribunal, for, permitting the claimant, to adduce, and, prove, in accordance with law, the apposite R.C., of, the damaged vehicle, and, thereafter it shall consider its probative vigour, and, pronounce afresh award, upon, the claim petition.

5. Consequently, the impugned award is set aside, and, the appeal is allowed in the afore manner. The parties are directed to appear before the learned tribunal, on 26th November, 2018. The learned tribunal is directed, to, within three months therefrom, record a fresh decision, upon, the apposite petition. All pending applications also stand disposed of. Records be sent back forthwith.

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

FAO No. 275 of 2012 along with
Cross objections No. 411 of 2012.
Reserved on : 1st October, 2018.
Decided on : 31st October, 2018.

1. FAO No. 275 of 2012

Michael Desouza .Appellant.
Versus
Sh. Suresha Nand .Respondent.

2. Cross Objection No. 411 of 2012.

Suresha Nand ....Cross-objector/claimant.
Versus
Michael Desouza ....Non Cross-objector/Appellant.

**Motor Vehicles Act, 1988 –** Motor accident – Claim application – Rash and negligent driving – Proof – Tribunal holding driver of offending vehicle having caused accident because of his rash and negligent driving and fastening compensatory liability on him - RFA – Driver contending that he having been acquitted by Criminal Court for rash driving in respect of said offence, he cannot be burdened with compensatory liability – Held, findings recorded by Criminal Court being not binding on Claims Tribunal while adjudicating claim application – Accident happened because appellant negligently opened door of his van and claimant coming from behind hit against it and fell down – Tribunal justified in holding accident to have taken place on account of his negligent driving. (Para.3).

**Motor Vehicles Act, 1988 –** Motor accident – Claim application – Contributing negligence – Deduction of compensation - Proof – Claimant while driving scooter striking against door of Van suddenly opened by its driver and receiving injuries – Tribunal taking accident as result of contributory negligence and deducting fifty per cent from amount assessed as compensation – Cross objection – Held, on facts accident occurred solely because of negligent driving of driver of Van – Deduction from compensation for alleged contributory negligence not tenable – Cross objection allowed – Compensation as assessed by Tribunal ordered to be paid – Award modified. (Paras 4 & 5).

For the Appellant: Mr. V.S. Chauchan, Advocate.
For the Respondent: Mr. B.C. Negi, Sr. Advocate with
Mr. P. P. Singh, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed by the aggrieved respondent/appellant herein, against the award pronounced, upon, MAC Petition No. 32-N/2 of 2006, (i) whereunder, vis-a-vis, the compensation amount, as stood determined qua the claimant/respondent herein, the, apt indemnificatory liability thereof stood fastened, upon, him, (ii) whereas the claimant/respondent herein/cross-objector has preferred cross-objections, vis-a-vis, the impugned award, whereunder, he has sought reversal of the award, (iii) whereunder 50% deduction was meted, vis-a-vis, compensation amount determined qua him by the learned tribunal, on the ground of his not at the relevant time rather wearing, a, helmet, whereupon, hence he would rather hence suffer, a, disability less than the one as detailed in the apt disability certificate, borne, in Ex.PW5/A.

2. The prime argument, which is reared before this Court by the learned counsel for the aggrieved appellant, is, centered, upon, (a) the findings adversarial to the appellant herein rendered, upon, issue No.1, appertaining to the claimant sustaining injuries, owing to the rash and negligent manner of driving of the offending vehicle, by the appellant herein, rather being infirm. The counsel for the appellant herein, in making the aforesaid submission has canvassed that (a) with the Judicial Magistrate concerned, in his verdict, borne in Ex.RW1/A, acquitting the appellant herein, for, a charge under Section 279 of the IPC, and, his making observations therein qua it being a case of contributory negligence; (b) thereupon he submits that the evidence adduced by the claimant/respondent herein qua the relevant accident standing sparked, by, the rash and negligent manner of driving, of, the apt vehicle by the appellant, hence getting scuttled, besides waned, (c) rather evidence adduced by the claimant in propagation of his espousal qua the claimant/respondent herein while driving his scooter, his driving it rashly and negligently, (d) and his striking the afore scooter against the right rear of the parking light of the van, and, his thereafter getting perplexed, and, the afore scooter brushing against the tyres of the right side of the van, resulting in his losing his balance, and, his falling onto the road, whereafter, his sustaining injuries as reflected in the afore disability certificate, rather warranting meteing, of, credence thereto.

3. However, the aforesaid submission cannot be accepted, (i) as the findings recorded by the criminal Court, and, as embodied in Ex.RW1/A being not binding upon the Motor Accident Claims Tribunal, while trying a claim petition, rather it being incumbent, upon, this Court to analyse the credibility, of, the evidence as adduced in propagation, of, the claimant's claim. (b) Consequently, dehors the verdict of acquittal, rendered by the criminal Court, vis-a-vis, the appellant herein, this Court proceeds to fathom, the, comparative credibility of the evidence adduced by the claimant, and, by the respondent/appellant herein. PW-4, Chattar Singh, an ocular witness to the occurrence, while, stepping into the witness box, has supported the claimant's version, vis-a-vis, the relevant accident, by making disclosures, qua the appellant herein without adhering to the standards of due care and caution, (i) and, despite his being expected, to, from the mirror occurring in the van, to, hence sight the vehicles, coming from the rear, his negligently opening the door of the van, whereagainst, the scooter driven by the accused rather collided, (ii) and, in consequence thereof he fell onto the road, and, sustained injuries on his person, as detailed in the aforesaid disability certificate. The deposition of PW-4, as, comprised in his examination-in-chief, has, remained unscathed during the course of his cross-examination, hence, galvanizes immense vigour. The deposition of PW-4, an ocular witness to the occurrence. mobilises further corroboration, from, the prime, and, paramount evidence, comprised in Ex. Rx, exhibit whereof is a report of, the, mechanical expert, who carried, the, mechanical examination of the offending vehicle, and, who therein rather has

rendered a clear echoing qua, the, occurrence of a dent inside the window, of, the front door, of, the offending vehicle. The afore occurrence, of, a dent inside the window, of, the front door, of, the offending vehicle, when hence, stands emphatically voiced in Ex. Rx, thereupon, an inference, is, filliped qua (I) the occurrence, of, a dent inside the window, of, the front door, of the offending vehilce, obviously being causable thereon, only upon, the appellant herein, despite, holding capacity, to, from, the mirror occurring inside the van, hence, sight the scooter, whereon the claimant was astride, (ii) whereas, in open breach of the standards of the due care and caution, his, opening the door of the van, thereupon, obviously hence leading the scooter whereon the claimant was astride, to rather collide against the front door, of, the offending vehicle. The afore firm evidence cannot be belittled either by EX.RW1/A, exhibit whereof comprises a verdict rendered by learned Judicial Magistrate concerned, nor by the evidence in repudiation thereto, as, adduced by the appellant herein.

4. The disability entailed, upon, the claimant/respondent herein, in sequel to the afore collision which occurred inter se, the, van owned by the appellant, and, the scooter whereon, the claimant was astride, stands reflected in the apt disability certificate borne in Ex.PW5/A, to be 100% disability, vis-a-vis, the eye sight of the claimant. The afore critical, and, grave nature of the disability entailed upon the claimant, constrained the learned tribunal to assess compensation in a sum, of, Rs.8,81,403.00, vis-a-vis, him. However, vis-a-vis, the aforesaid amount of compensation, the learned tribunal, for want of the claimant, at the relevant time, wearing, a, helmet, for hence diminishing, the, extent of disability, thereupon, reduced 50% therefrom, and, rather awarded compensation in a sum of Rs.4,40,701/-. The aforesaid reduction, is, grossly untenable, (a) given this Court squarely and pointedly fixing the apt culpability, of, tort, only, upon the appellant, and, when hence the entire liability towards the total amount of compensation, is, enjoined to be fastened upon the appellant; (b) thereupon, in the learned tribunal meteing 50% deduction thereto, has committed, a, gross fallibility. The meteing of deduction, vis-a-vis, the compensation amount of Rs.8,81,403/- rather would stand validated, only, if the claimant had contributed to the occurrence, whereas, his neither contributing to the accident nor his being the tortfeasor, hence, reinforcingly, the, meteing of deduction, to, the extent of 50%, vis-a-vis, the compensation amount, by the learned tribunal, is, ingrained with, a, gross fallacy.

5. For the foregoing reasons, there is no merit in the instant appeal, and, it is dismissed, whereas, the cross-objections filed by the claimant/cross-objector are allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimant/cross-objector/respondent herein, is, held entitled to a total compensation of Rs.8,81,403.00 (Rs. Eight Lacs, eighty one thousand four hundred and three only) along with pending and future interest @ 7.5%, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. All pending applications also stand disposed of. Records be sent back forthwith.

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

The New India Assurance Company Ltd. .....Appellant.

Versus

Smt. Sunita Devi & others ....Respondents.

FAO No. 331 of 2018.
Reserved on: 4th October, 2018.
Decided on : 31st October, 2018.

**Motor Vehicles Act, 1988 -** Sections 149 and 166 **-** Claim application- Defences - Driving Licence – Validity - Insurer avoiding its liability on ground of driving licence of driver of offending vehicle - Contending that driving licence issued by Government of Nagaland not in Smart Card Format, whereas said Government vide Notification required all driving licences to be converted in Smart Card Format - Held, in absence of evidence that said notification was given vide publication and driver had knowledge thereof or signatures embossed in said driving licence fictitious, driving licence cannot be held fake - No breach of terms of insurance policy proved - Appeal dismissed- Award upheld (Para 4)

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| For the Appellant: | Mr. B.M. Chauhan, Advocate. |
| For Respondent No. 1: | Mr. Naresh Verma, Advocate. |
| For Respondent No. 2: | Mr. Vikrant Chandel, Advocate. |
| For Respondent No. 3: | Mr. Kishore Pundeer, Advocate. |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts a challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal(I), Mandi, H.P., upon, Claim Petition No. 25/2015, whereunder, compensation amount comprised, in, a sum of Rs.9,35,000/- along with costs, and, interest accrued thereon, at the rate of 7.5% per annum, from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimant, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer.

2. The learned counsel appearing for the insurer has contended with much vigour before this Court, that, the affirmative findings, as, rendered upon issue No.1, by the learned Tribunal being amenable for interference, (a) given the learned tribunal not meteing, an, appropriate reverence to the deposition of RW-1, who had lodged the FIR qua the occurrence, FIR whereof is embodied in Ex.PW2/A; (b) contrarily, in, the learned tribunal assigning reverence to the deposition of PW-3, who, in his deposition, comprised in his cross-examination, has acquiesced to a suggestion of his being, a, close friend of the deceased, whereupon, hence his deposition, is, ingrained with a vice of gross interestedness, rather has committed a gross fallacy. The afore contention reared by the learned counsel appearing for the appellant, for, reversing the findings returned by the learned tribunal upon issue No.1, would hold tenacity, (c) if upon, a, dispassionate comparative evaluation, of, the depositions respectively rendered qua the occurrence by PW-3, and, by RW-1, (d) an invincible conclusion erupts, qua the deposition of PW-3 wanting in credence, and, the, deposition of RW-1 rather warranting meteing of credence thereto. The aforesaid fathoming, is, to be made, dehors, the acquiescence made by PW-3, an ocular witness to the occurrence, who, in his examination-in-chief, has attributed, the, role of, a, tortfeasor, to respondent No.3 herein. (e) The worth of his deposition comprised therein, would lose its tenacity, when, upon, a wholesome reading of his deposition, especially the one comprised in his examination-in-chief, unravelings rather erupt qua his being not an ocular witness to the occurrence. However, a reading of his testification, embodied in his cross-examination, unfolds, that neither any suggestion stood meted to him, by the counsel for the insurer qua

his being not an ocular witness to the occurrence, nor any answer thereto stood meted by him. Consequently, the factum of his being, a, purported interested witness, arising, from his being a close friend of the deceased, cannot, render his deposition being construable to stand ripped of its probative vigour.

3. Be that as it may, RW-1 in his deposition, borne in his examination-in-chief, unfolds (i) that the offending vehicle was proceeding, from, Mandi towards Sundernagar, and, at the site of occurrence, another vehicle, of, a larger size arrived thereat, and, was proceeding from Sundernagar to Mandi; (ii) and, in simultaneity thereof, at the site of occurrence, the motorcycle driven by the deceased also arrived thereat, and, as testified by RW-1, the deceased attempted to over take the larger vehicle, proceeding from Sundernagar to Mandi. He has further testified that the (iii) driver of the offending vehicle after sighting the vehicle travelling from Sundernagar to Mandi hence applied brakes thereon, whereafter, the offending vehicle moved towards the inappropriate side of the road; (d) a further echoing also occurs in his examination-in-chief, qua, the driver of the larger vehicle also applying brakes thereon, and, thereafter, the vehicle moving outside, the main-road onto the Katcha portion thereof, and, subsequently, the motorcycle whereon the deceased was astride, striking, the rear of the offending vehicle. The afore deposition occurring in the examination-in-chief of RW-1, makes a clear bespeaking qua (a) that the offending vehicle moving astray from the appropriate side of the road, to the, in appropriate side of the road, (b) thereupon, it is to be concomitantly concluded, that, the motorcycle whereon the deceased was astride rather occupying the appropriate side of the road, (c) and, further sequel thereof is that the deceased in driving the motorcycle, was not rash and negligent, rather the driver of the offending vehicle being negligent in driving the latter vehicle. The effect of the aforesaid analysis of the deposition, of RW-1 rather supports the version qua the occurrence, as, spelt out by PW-3. Consequently, no leverage can be drawn by the counsel for the appellant, even if, RW-1 lodged an FIR qua the occurrence. The further effect thereof is that the affirmative findings rendered, upon, issue No.1, by the learned tribunal, are, not amenable for interference.

4. Uncontrovertedly, the offending vehicle was insured with the insurer/appellant herein. The copy of the insurance policy, is, embodied in Ex.R-1. However, the counsel for the appellant has contended with vigour, qua, the offending vehicle being driven, in, breach of the terms and conditions of the insurance policy, (i) breach whereof, is, canvassed to arise from the factum of the driving licence held by the driver of the offending vehicle, and, as embodied in Ex.R-5, not holding authenticity, (ii) given the Ex.RC making a clear display, vis-a-vis, the Government of Nagaland, assigning validity, vis-a-vis, only those driving licences issued in smart card format, whereas, the driving licence held by the driver of the offending vehicle, not, standing borne in the smart card format, (iii) thereupon, the, meteing of reverence to the driving licence, borne in Ex.R-5, by the learned tribunal, being insagacious as well as inapt. However, the aforesaid submission cannot be accepted by this Court as there is no evidence on record (a) that the apt necessity embodied in Ex.RC, being given the largest publicity, and, its being widely circulated, for ensuring, all, the licence holders, holding licences other than in the smart card format, hence concerting, to , make the requisite conversion; (b) for want of publicity of the apposite office order, it can be concluded that the driver of the offending vehicle, holding, no knowledge thereof, and, nor hence could make the requisite conversion, nor can he for lack of requisite conversion, hence concluded, to be amenable, for, the drawing of an adverse inference qua his driving licence, holding, inauthenticity and invalidity. More so, when no evidence stands adduced that the signatures of the authority concerned and the serial number embossed thereon, being fictitious, and, unauthentic. Consequently, the meteing of reverence to the driving

licence, borne in Ex.R-5, does not, suffer from any inherent fallacy nor the fastening of the apposite indemnificatory liability, upon, the insurer, hence, can be faulted.

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

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

Sh. Rajwant Singh .....Plaintiff/Non-applicant.
Versus
Sh. Tejwant Singh ...Defendant No.1/ Applicant.

OMP No. 160 of 2014
In Civil Suit No. 17 of 2014.
Reserved on : 25.10.2018.
Date of Decision: 31st October, 2018

**Code of Civil Procedure, 1908 -** Section 10 **-** Stay of Suit **-** Plaintiff filing suit for prohibitory injunction before Civil Judge (Senior Division) - Defendant subsequently instituting suit in High Court for possession of same land by showing it to be within its exclusive pecuniary jurisdiction - Plaintiff seeking stay of subsequent suit pending in High Court - Issue of valuation of subsequent suit for purposes of jurisdiction and court fees not yet decided - Instead of staying subsequent suit, earlier suit pending before Civil Judge (Senior Division) ordered to be transferred to High Court and clubbed with subsequent suit - Application dismissed. (Para 5).

For the Plaintiff/Non-applicant: Mr. G.C. Gupta, Sr. Advocate, with
Ms. Meera Devi, Advocate.
For the defendant No.1/Applicant: Mr. Arvind Sharma, Advocate

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

A suit bearing No.44 of 2016, stood, instituted by defendant No.1/applicant against one Rajwant Singh, plaintiff in Civil Suit No.17 of 2014. The institution, of, the afore civil suit bearing No. 44 of 2016, is, prior to the institution of Civil Suit No. 17 of 2014, and, the litigating parties, in, the earlier suit, are also, engaged in a legal combat, in, the extant suit. A reading, of, the plaint, of, Civil Suit No. 44 of 2016, instituted before the Court, of, the learned Civil Judge (Sr. Divn.) Kinnaur at Reckong Peo, and, a perusal of the plaint, of, Civil Suit No. 17 of 2014, unfolds qua both the suits containing visibly analogus hence suit property.

2. The distinctivity inter se both the afore suits, stands, comprised in the factum (I) qua Civil Suit No.54 of 2013, standing, instituted before the learned Civil Judge (Sr. Division), Kinnaur at Reckong Peo, by, the applicant/defendant No.1, in, the extant suit, (ii) wherein, he claims relief, of, rendition of a decree, of, permanent prohibitory injunction,

and, the afore claimed relief, stands, anvilled, upon, his acquiring title, vis-a-vis, the suit khasra numbers, under a bequest made in his favour, by the deceased testator concerned, and, thereafter, vis-a-vis, the suit khasra numbers, as valid, mutation standing attested, in his favour. In the written statement instituted thereto, by one Rajwant Singh, plaintiff in Civil Suit No.17 of 2014, instituted before this Court, the afore propagation reared by the plaintiff therein/defendant No.1/applicant hereat, rather stood denied. Also he claimed, qua his being, in exclusive possession, of, the suit property, hence, noticeably contested, the, validity, of, the bequest made by the deceased testator concerned, vis-a-vis defendant No.1 herein, yet he therein omitted to, anvil, his claim qua the suit property, upon, the fulcrum qua his receiving the suit property, under, a bequest, made prior thereto, on 22.2.2007, averment whereof, he rears hereat, whereunder, she made a bequest both in favour of the plaintiff, and, the applicant/defendant No.1 herein (plaintiff in the earlier suit). However, he reared, a, contention in the earlier suit qua the deceased testator being barred to execute the apt bequest, vis-a-vis, the suit property, given it carrying, the, traits and characteristics of ancestral property..

3. However, the afore rife distinctivity, inter se, the earlier suit, and, the extant suit, (a) conspicuously apart from the plaintiff Rajwant Singh in the extant suit, casting, a challenge, upon, the bequest made, vis-a-vis, the defendant/appellant, and his also depending, upon, a bequest made, on, 22.2.2007, stands comprised in his also espousing, relief(s), for, rendition of a decree, for permanent prohibitory injunction; (b) AND, for rendition of a decree of joint possession, vis-a-vis, the suit khasra numbers. In respect of the latter relief, the apt averments, for hence bringing the suit within the pecuniary jurisdiction of this Court, are also, embodied therein, and, the requisite ad valorem court fees, upon, the plaint hence stands appended therewith.

4. Prima facie, upon, the afore narrations, the principle enshrined in Section 10 of the CPC, provisions whereof stand extracted hereinafter:-, warrant application

> "**10. Stay of suit:-**No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court."

(i) with expostulations therein occurring, qua, when the matter in issue in both civil suits, are analogous or are materially, and, substantially, hence, similar, and, the litigants in both the suits are common, thereupon, this Court being enjoined to stay, the, proceedings in the extant suit. If the afore principle, is, *stricto sensu,* hence hereat applied, thereupon, this Court, would, hence he forestalled to make progresses, upon, the extant civil suit No. 17 of 2014, and, would rather permit the progress, of, the earlier thereto suit bearing No. 54 of 2017, suit whereof, is, pending before the learned Civil Suit (Sr. Division), Kinnaur at Reckong Peo. Consequently, this Court concludes, that, even though, the suit khasra numbers in both, the, suits are same, (ii) and, even though the parties in both suits are similar, (iii) besides when an alike challenge, is, made by the plaintiff herein, vis-a-vis, the bequest of the deceased testator, yet with the visible distinctivity, inter se, both when rather rests upon the factum, that, in the earlier suit, only, a simplicitor relief stands espoused by the defendant/applicant herein, for, rendition of a decree for permanent prohibitory injunction, besides for mandatory injunction, (iv) whereas, in the extant suit, the plaintiff

Rajwant Singh, has reared a claim for possession, vis-a-vis, the suit khasra numbers, AND, even if, the afore claim, for, rendition of a decree of possession, was, espousable through a counter claim instituted, by the plaintiff herein, alongwith his written statement, as, instituted to the plaint in the earlier suit, (v) yet when the afore apt counterclaim, was, rather undecreeable, given the counter claim, for, possession, vis-a-vis, the suit khasra numbers, hence not falling within the pecuniary limits, of, jurisdiction, of, the learned trial Court, (vi) thereupon, when this Court holds the pecuniary jurisdiction to maybe accord the afore decree of possession, vis-a-vis, the suit khasra numbers, to, the plaintiff herein, and, when at this stage, it is not befitting to conclude, that, the valuation of the suit, for, thepurpose of jurisdiction, and, for appending therewith, the, apt ad valorem court fees, is correct or incorrect, (vii) thereupon, it is deemed fit, to, decline the relief, claimed by the applicant/defendant No.1, especially for the stay of the proceedings, in, the extant suit.

5 For the foregoing reasons, the instant application is dismissed. However, for obviating the rendition of conflicting verdicts, upon, the afore trite issues/subject matter, common, in, both the suits, excepting, the rendition of a decree for possession, in the extant suit, this Court deems it fit, and, proper to order for transfer of Civil Suit No.54 of 2013, titled as Tejwant Singh vs. Rajwant Singh, pending before the learned Civil Judge(Sr. Divn.) Kinnaur at Reckong Peo, therefrom, to, this Court, and, it be consolidated with the extant suit, and, a joint trial of both the aforesaid suits, be, conducted by this Court. The Registry is directed to call the records of afore Civil Suit No. 54 of 2013, from, the quarter concerned. Both the suits be listed after four weeks.

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

Panna Lal .....Appellant/defendant.
Versus
Mehar Chand .....Respondent/plaintiff.

RSA No. 289 of 2008.
Reserved on : 24th October, 2018.
Decided on : 31st October, 2018.

**Specific Relief Act, 1963** - Section 38 - Permanent Prohibitory Injunction - Joint land - Grant of - Held, injunction is an equitable relief - Co-sharer is entitled for injunction qua joint land against another co-sharer provided he himself not raising constructions on it and other co-sharer raising construction upon valuable portion of joint land or is exceeding his share and jeopardizing interests of other co-sharers. (Para 8)

For the Appellant: Mr. G.R. Palsra, Advocate.
For the Respondent: Mr. Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The plaintiffs' suit for rendition of a decree, for permanent prohibitory injunction hence stood dismissed by the learned trial Court, and, the aggrieved plaintiff

preferred an appeal, therefrom, before the learned First Appellate Court, whereon, the latter Court rendered a verdict, hence, decreeing the plaintiff's suit. The defendant is aggrieved therefrom, hence, through the instant appeal cast a challenge thereon.

2. The brief facts of the case are that the plaintiff filed a suit for permanent prohibitory injunction with the averments that the land comprised in Khewat Khatauni No. 492/649 to 653, khasra Nos. 1835,1836, 1843, 1844, 1846, 1837, 1840, 1839, 1841 and 1845, kita 11, measuring 207.63 sq. meters, situated in mauja Tarna/366/5, Tehsil Sadar, District Solan, H.P. is recorded in the joint ownership and possession of the plaintiff, defendant and other co-sharers. It has been averred that the plaintiff has purchased the land measuring 8.65 sq. meters and mutation to this effect has been entered. The defendant has also purchased share of Smt. Sheela Devi, Rima Devi and Geeta to the extent of 6.49 sq. meters and mutation to this effect has also been attested in favour of the defendant. The suit has land is alleged to have not been partition in due course of law. According to the plaintiff, the defendant w.e.f. 7.4.2004 started making the plot over the joint property in order to raise construction of house without getting the land partitioned and without the consent of the plaintiff and other co-sharers. There is also no approval of the plan from the Municipal Council, Mandi. The defendant was requested number of times but all in vain. Hence the suit.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections of maintainability, cause of action etc. On merits, the description of land is admitted. It is averred that the plaintiff constructed two rooms in the month of July-August, 2004 by covering more area than purchased area. The defendant has purchased old Katchha house from Sheela Devi etc., and when plaintiff started construction adjoining to the said Katchha house, the same was damaged due to rainy water. The defendant felt necessity to repair the said house and necessary construction was done by the defendant which was completed on 20.8.2004. The defendant is co-owner and has got every right to use his share which is in the shape of katchha house already built and to protect the same. The defendant denied other averments contained in the plaint.

4. The plaintiff filed replication to the written statement of the defendant, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction?OPP.
2. Whether the suit is not maintainable? OPD.
3. Whether there is no cause of action in favour of the plaintiff? OPD.
4. Whether the plaintiff is estopped due to his own act and conduct?OPD.
5. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom, by the plaintiff/respondent herein before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein he assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 25.06.2008, 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:-

a) Whether there is misreading of oral as well as documentary evidence of the parties by the First Appellate Court, especially, the document Ex.PA, Jamabandi and statements of DW1 to DW3, which has materially prejudiced, the case of the appellant?

b) Whether the respondent is not entitled for equitable relief of injunction, as the respondent has not come with clean hands and has suppressed the material facts, while instituting the suit against the appellant?

**Substantial questions of Law No.1 and 2:**

8. The parties at contest, as, disclosed by the jamabandi appertaining to the suit land, jamabandi whereof is embodied in Ex.PA, are, joint owners-in-possession of the suit property. The defendant had purchased 6.45 square meters of the suit land, from, one Sheela Devi, Rima Devi and Geeta Devi, and, in consonance therewith hence mutation No.1502 stood attested. The plaintiff's share in the suit land is uncontrovertedly, borne, in an are of 8.65 square meters. The plaintiff has instituted a simplicitor suit, for, injunction hence for restraining the defendant, from, raising construction, upon, the undivided suit property, given his prior thereto not obtaining, the, consent of all the co-owners therein. Apparently, the relief of injunction is an equitable relief, (i) and, when the principle of co-ownership, is, anvilled on the principle of unity of title, and, community of possession, inhering in all recorded co-owners, (ii) principle whereof, uncontroverdly hence inheres, the, canon of joint ownership, (iii) thereupon, till partition by metes and bounds, of, the joint estate occurs, or the requisite consent is meted, vis-a-vis, the co-owner raising construction, upon, the undivided suit property, (iv) hence, the relief of injunction, as, prayed for by the aggrieved co-owners, is, to be bestowed upon him, unless, the excepting therewith principle thereof, is, evidently, proven, principle whereof, is, comprised in the parameter (a) the aggrieved co-owner evidently not raising any construction, upon, any portion of the undivided suit property; (b) in the co-owner, raising construction, upon, the undivided suit property, his raising construction thereon rather evidently beyond his share therein, or evidently, upon, a valuable portion thereof,hence, jeopardizing the right of the aggrieved co-owner, in, the undivided suit property.

9. The learned trial Court, had, on perusal of the evidence on record, has, concluded (i) that for want of adduction, of, firm evidence by the plaintiff, (ii) that in the defendant raising construction, upon, the undivided suit land, his raising it, beyond his share therein, (iii) or his raising construction, upon, a valuable portion of the undivided suit property, hence, jeopardizing the rights, of, the plaintiff thereon, hence, declined the equitable relief to the plaintiff, (iv) significantly, with the plaintiff rather completing construction, upon, the undivided suit property. However, the learned First Appellate Court, has reversed the aforesaid findings, merely, on the anvil of (a) during the course of inspection, it being noticed that in the defendant raising construction, his encroaching, upon, a path, used by the plaintiff, to, ingress into or egress from his abode; (b) of the defendant raising construction unauthorizedly and without obtaining prior thereto, the,

requisite sanction from the Municipal Committee, (c) and, the suit land remaining unpartitioned, hence, till occurrence, of, partition thereof, the defendant being amenable for being permanently injuncted, from, his interfering, upon, any part of the undivided suit land.

10. The afore conclusion, and, inferences, drawn by the learned First Appellate Court, are, per se shaky, and, infirm, (a) given the purported inspection carried, of, the suit property, whereat, it was noticed, that, the defendant was raising construction purportedly, upon, a common path, used for ingress into, and, egress by the plaintiff, vis-a-vis, his abode, being not supported by credible documentary evidence, (b) comprised in the revenue officer concerned being associated thereat, and, his making a valid demarcation, of, the suit land; (c) the controversy appertaining to the defendant, in, raising construction upon the undivided suit property, his hence making encroachment, upon, any path, being, palpably beyond pleadings, rather hence being discardable. Furthermore, the factum of the defendant raising construction, upon, the suit land, without, his obtaining, the, requisite approval from the Municipal Committee, would not per se entitle the plaintiff to claim the relief of injunction, importantly when the defendant hence would face, the, apt ill-consequence(s).

11. Be that as it may, the defendant had espoused in the written statement, qua his raising construction within the area purchased by him, and, the defendant's evidence, comprised in the depositions of DW-1 and DW-2, is in complete corroboration therewith. Since, as aforestated, for the plaintiff to succeed in obtaining, the, equitable relief of injunction, he was enjoined to usurp, the, probative vigour of the afore evidence adduced, by the defendant, and, when best evidence in respect thereof, (a) is, comprised in valid measurements, and, demarcation, being carried on the spot, whereafter, clear emanations erupting, vis-a-vis, the defendant, in, raising construction, upon, the undivided suit property, his exceeding his share in the undivided suit property, (c) and, his raising construction upon an valuable portion of the suit land. However, the aforesaid evidence remained unadduced. Consequently, the mere factum of the suit property remaining yet undismembered, and, the further fact that thereupto, each of the co-owners, holding apt entitlement(s) to use every inch of the undivided suit property, unless, consent is meted to the defendant concerned, is, however, hence proven to be subject, to, the afore trite excepting therewith principles, conspicuously, with the plaintiff evidently completing construction, over, his share in the suit property, (ii) and with the defendant evidently, in, raising construction, upon, the suit property, his not exceeding, his share therein, (iii) and, his not raising construction, upon, any valuable portion of the undivided suit property. In aftermath, the equitable relief, of injunction as prayed for by the plaintiff, was, aptly declined by the learned trial Court, whereas, the learned First Appellate Court in affording the relief of injunction rather has committed a gross illegality.

12. 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. Substantial questions of law No.1 and 2 answered in favour of the appellant and against the respondents.

13. In view of above discussion, the instant appeal is allowed. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 76 of 2007 is set aside, whereas, the judgment and decree rendered by the learned trial Court upon Civil Suit No. 204/04 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Sh. Romel Singh .....Appellant/plaintiff.
*Versus*
Smt. Gur Devi & Ors ....Respondents/Defendants.

RSA No. 290 of 2008.
Reserved on : 25th October, 2018.
Decided on : 31st October, 2018.

**Specific Relief Act, 1963** - Section 5 - Suit for Possession - Reversionary rights - Nature thereof- Held, person suing for reversionary rights actually sues in representative capacity for entire body of reversioners - He has no reversionary interest apart from entire reversionary body - But advantage under decree like possession of land are available to immediately next/nearest heir of deceased who on demise would inherit his estate - Previous suit of "R" declaring reversionary rights though decreed but his subsequent suit filed for possession of said land dismissed as "R" was not nearest heir of deceased - Nearest heirs were "M: and "RO"- Decree of Lower Court upheld - Regular Second Appeal of "R" dismissed. (Para 8)

***Cases referred:***
Radha Rani Bhargava vs. Hanuman Prasad Bhargava, AIR 1966 SC 216

For the Appellant: Mr. Ashwani K. Sharma, Sr. Advocate with
Mr. Jeevan Kumar, Advocate.
For the Respondents: Mr. Bhuvnesh Sharma, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The plaintiffs' suit for rendition of a decree, for possession stood dismissed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the plaintiff, the latter Court dismissed his appeal besides obviously affirmed the trial Court's judgment and decree of dismissal of the plaintiff's suit.

2. Briefly stated the facts of the case are that plaintiff Romel Singh has filed the civil suit for rendition of a decree for possession against the defendants. It has been pleaded that subject matter of the suit is the land comprised in Khata No.76, Khatauni No. 88, Khasra No. 55, 65, 100, 116, 128, 132, 179, 195, 200, 216, 222, 225, 309, 329, 805, 810, 921, 925 and 927, measuring 1-30-17 hectares and 3/32 shares out of the land comprised in Khata No.21, Khatauni No. 64, Khasra No.588 situated in village Dangra, Mauza Garli, Tehsil Dehra, District, Kangra, H.P. It has been pleaded that the suit land is recorded to be in the ownership and possession of defendants No.7 to 9 along with predecessor-in-interest of defendants NO.1 to 6 including other co-sharers and one Gittu son of Dalipa sold the suit land vide register sale deed of 3.2.1965 to one Man Chand, the predecessor-in-interest of defendants No.1 to 4 and Hukam Chand, the predecessor-in-interest of defendants No.5 and 6 along with defendants No.7 to 9 and thereafter the plaintiff filed civil suit No.107 of 1972, tilted as Romel Singh vs. Sh. Roshan Lal and others,

challenging the sale deed as void and ineffective and its being not binding upon the plaintiff along with other co-sharers against their reversionary interest after the death of alienor. The plaintiff has also challenged the sale deed on the grounds that the suit being ancestral and its being without legal necessity. It has been further pleaded that his previous suit was dismissed on 26.7.1976 and thereafter he preferred the appeal No.146/1976 before the learned District Judge and the appeal was also dismissed on 14.5.1979, whereafter, the plaintiff has preferred the Regular Second Appeal bearing RSA No.189 of 1979 before the High Court and that appeal was allowed and thereby the judgment and decree of both the learned courts below stood set aside and in sequel the plaintiff's suit stood decreed. The plaintiff has further pleaded that after the death of original vendor Gittu on 17.1.1974, during the pendency of the previous suit and thereby the plaintiff has pleaded and claimed to be reversioner and thereby entitled for decree for possession of the suit land.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections of maintainability, limitation, cause of action and locus standi. On merits, the defendants have admitted the the previous litigation inter se the parties. It is pleaded that the plaintiff is not the near reversioner of the deceased vendor, and, as such, he is not entitled to recover possession from them. According to them only S/Sh. Roshan and Magar are the nearest reversioners of late Shri Gitu and as such only they can claim possession of the suit land.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled to the relief of possession?OPP.
2. Whether the suit is barred bylimitation?OPD.
3. Whether the plaintiff is incapacitated to maintain the suit in the presence of Roshan Lal, Maghar son of Banka, if so its effect?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/appellant. In an appeal, preferred therefrom, by the plaintiff/appellant herein before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 26.6.2008, 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 suit of the plaintiff could have been dismissed only on the ground that the nearer reversioners Roshan and Magher had not filed any suit for possession of the land in question?

**Substantial question of Law No.1:**

8. Romel Singh, plaintiff in the instant suit, had, earlier instituted Civil Suit No. 107 of 1972, before the Civil Court concerned, espousing therein the relief, for, setting aside the registered deed of conveyance, executed, vis-a-vis, the suit khasra numbers, on 3.2.1965, by one Gittu, vis-a-vis Man Chand, the predecessor in interest of defendant No.1 to 5, and Hukam Chand, the predecessor-in-interest of defendants No.5 and 6, and, defendants No.7 to 9, hereat. The afore relief was canvassed on the ground (i) that the afore alienation effected by one Gittu, being null and void, and, its being not binding, upon, other heirs, or, against their apt reversionary interest, after the alienors' demise. The further ground, for, challenging the afore deed of conveyance, as, executed by one Gittu, in the year 1965, stood anvilled, (ii) upon, the factum of the suit land being ancestral coparcenary property, and, sale thereof, being without necessity. Civil suit bearing No.107 of 1972, stood dismissed, by the trial Court, and, in an appeal carried therefrom, before the First Appellate Court concerned, the verdict of dismissal pronounced, upon, the plaintiff's suit, stood, hence affirmed. Subsequently, Rumel Singh, the plaintiff in the earlier suit, being aggrieved, therefrom, hence instituted a Regular Second Appeal before this Court, and, this Court proceeded to allow the afore RSA, (iii) and, in sequel concurrent judgments and decrees rendered by both the learned Courts below were set aside, and, the plaintiff's suit for declaration was allowed. The afore factual matrix obviously enjoins, an allusion being made, to, the pronouncement made by this Court, upon, RSA No. 159 of 1979, (iv) rendered in a litigation inter se Rumel Singh (plaintiff therein) also plaintiff hereat, and the predecessor-in-interest of defendants No.1 to 4, and, of predecessor-in-interest of defendants No.5 & 6, and, of, defendants No.7 to 9. The successors-in-interest, of, the afore, respectively arrayed therein predecessor-in-interest, are, impleaded as parties in the extant civil suit. Sequel thereof, is, hence, qua a conclusive and binding verdict, rather being validly construed to stand pronounced, vis-a-vis, litigants, all litigants whereof, hold analogity, vis-a-vis, the litigants in the previous suit, and, in the instant suit, and, when the suit khasra numbers, in, the previous litigation, and, in the extant litigation, apparently hold commonality, (v) thereupon, the afore declaratory decree pronounced in the prior litigation, obviously holds, an apt conclusive, and, binding effect. Since, the rendition made by this Court, upon, the afore RSA No. 159 of 1979, hence holds conclusivity, thereupon, the apt ratio propounded therein and the relief therein pronounced, vis-a-vis, the plaintiff, whereunder, liberty stood reserved to the plaintiff therein, one Rumel Singh, also the plaintiff herein, to subsequent thereto, rather institute a suit for possession, (vi) and, also the effect and the import thereof, rather is enjoined to gauged, (vii) and, thereafter, the aptness of applicability thereof, by both the learned counsel below, upon, the plaintiff's suit, being also enjoined to be determined. The apt ratio propounded in the afore verdict is anvilled, upon, the principle encapsulated, in, a judgment rendered, by, the Hon'ble Apex Court in case titled as ***Radha Rani Bhargava vs. Hanuman Prasad Bhargava***, reported in ***AIR 1966 SC 216***, wherein, it stands encapsulated therein (a) that the apt right of the reversioner qua possession, vis-a-vis, the suit property, being accruable, vis-a-vis, the entire body of reversioners, (b) and one amongst the reversioners, who actually happened to be the next heir of the deceased, and, upon whose demise, the deceaseds' estate hence opened for succession, being entitled to secure, the, apt advantage(s), of the decree; (c) the suing reversioner holding no reversionary interest apart from the entire reversionary body. (d) The reversioners' suit for possession being a representative suit, vis-a-vis, the benefit(s), claimed thereunder, and, for the propagation of the interest of the entire body, of, the apposite reversioners, (e) whereuponwhom the right of possession or succession to the estate of the deceased, is, aptly bestowable or accruable. Conspicuously, in the rendition made by this Court, upon, RSA No.159 of 1979, it had in the afore manner concluded that (a) relief of possession, vis-a-vis, the suit khasra number being decreeable, vis-a-vis, the next reversioner, (b) who otherwise, stands, entitled on the demise of the deceased concerned, to, inherit, his estate, (c) yet this

Court, had, refused, the, afore relief of possession, vis-a-vis, Rumel Singh, for want of impleadment of the apt reversioners, rather holding, the, closest proximity to the deceased concerned, conspicuously, in the line of reversioners, and, consequently, this Court while making its decision, upon, RSA NO.159 of 1979, had reserved the apt benefit(s) to the nearest reversioner, to, hence, institute a suit for possession, vis-a-vis, the suit khasra numbers, (d) given the aforesaid pronouncement occurring in the rendition made by this Court, upon, the afore RSA No.159 of 1979, it was imperative for the plaintiff, to institute the suit, in a representative capacity, and, to also make prayer therein qua his suit being laid for benefit of the entire body, of, the apt reversioners. However, he failed to cast the instant suit in the apt representative capacity, nor he sought rendition, of, a decree for possession, in, pursuance to the decree, granted by this Court, while making a decision upon RSA No.159 of 1979, rather he has claimed, hence, rendition of a decree for possession, vis-a-vis, the suit khasra numbers, rather being pronounced only, vis-a-vis, him, (e) thereupon, when the afore relief, was, declined by this Court, while its making a decision, upon, RSA No.159 of 1979, by meteing the trite reason, that, in the absence of impleadment, in the previous suit, of, the closest/nearest reversioner, of, the deceased, the relief of possession being not grantable, vis-a-vis, the plaintiff therein, who is also the plaintiff hereat, (f) rather when as aforestated, it granted the apt liberty to institute, a suit, seeking therein rendition of a decree for possession only, vis-a-vis, the nearest reversioners, (g) thereupon, the dismissal of the plaintiff's suit for possession, in the absence of it being cast in the apt representative capacity, nor it standing ventilated in the relief clause qua claim, for, rendition of decree for possession, being grantable, upon, the entire body of reversioner, (h) thereupon, the plaintiff had no locus standi, within, the ambit of the previous decision, made by this Court, upon, RSA No. 159 of 1979, to institute the instant suit, and, the concurrent verdicts pronounced by both the learned Court below, (i) in the absence of Maghar and Roshan, or their successors-in-interest, being arrayed as co-plaintiffs, are also obviously in tandem therewith, (j) conspicuously when the pedegree table occurring Ex. D-1, in, tandem with the decision of this Court, rendered, upon the afore RSA, whereunder, a right to institute a suit for possession, vis-a-vis, the suit khasra number, stand, bestowed upon the reversioners next to the deceased, or who are most proximate in the line, of, the reversioners, (k) thereupon, both afore Maghar, and, Roshan and their successors-in-interest, alone were entitled to institute the suit for possession, whereas, theirs not standing arrayed as co-plaintiffs, hence, renders the plaintiff, to, hold no locus standi to maintain the instant suit.

9. 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 being based upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned Courts below have not excluded germane and apposite material from consideration. Accordingly, substantial question of law No.1 is answered accordingly.

10. In view of above discussion, there is not merit in the instant appeal and it is dismissed accordingly. In sequel, the judgment and decree impugned before this Court is 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.**

Jagan Nath and others .....Appellants/defendants.

Versus

Des Raj and others. ....Respondents/Plaintiffs.

RSA No. 634 of 2008.
Reserved on : 23rd October, 2018.
Decided on : 31st October, 2018.

**Specific Relief Act, 1963- Section 34 –** Himachal Pradesh Land Revenue Act, 1954 – Section 45 - Suit for declaration – Presumptions qua revenue entries – Earlier entries showing three brothers, 'B' 'D' and 'L' as co- tenants – Mutation conferring proprietary rights upon all of them also attested in their favour – In previously instituted suit, 'B' admitting 'D' and 'L' as co-owner in possession of land – However, pursuant to order of Director, Consolidation ownership entries of 'D' and 'L' stood deleted and 'B' shown as exclusive owner – Held, change of revenue entries in favour of 'B' entirely wrong and liable to set aside. (Paras 8 & 9).

**Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 –**Section 57 – Bar of Jurisdiction of Civil Court – Appellate arguing that suit challenging order of Director – Consolidation is barred by virtue of section 57 of Act – Held, purpose of Act is to do consolidation of land and prevention of fragmentation of agricultural holdings – Deletion of entries of ownership and substitution thereof is beyond domain of purpose embodied in Act – Illegal order of Director, Consolidation can be challenged in Civil Court. (Para 10).

For the Appellants: Mr. Rajneesh K. Lal, Advocate vice Mr. Sanjeev Sood, Advocate.

For the Respondents: Mr. Onkar Jairath and Mr. Ashok Chaudhary, Advocates.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal stands directed by the defendants against the affirmative concurrent pronouncements made by both the learned Courts below upon the plaintiffs' suit for declaration for setting aside the revenue entries appearing in the revenue records, whereunder the defendants, stood, shown to be exclusive owners-in-possession, of, the suit khasra numbers. The defendants standing aggrieved therefrom, hence, motioned the instant Court, through, the instant Regular Second Appeal.

2. Briefly stated the facts of the case are that the suit land was jointly possessed by the predecessor-in-interest of the plaintiffs, predecessor-in-interest of defendants No.1 to 3, and defendant No.4 to the extent of 1/3 share each as tenants and after coming into operation of H.P. Tenancy and Land Reforms Act they were conferred proprietary rights to the extent of 1/3 share each and mutation to this effect was also sanctioned in their favour. But subsequently jamabandi no effect was given to the said mutation and the names of the plaintiff and defendant No.4 were wrongly deleted from the record of rights. The plaintiff came to know about the wrong entries in March, 1991 and then they approached the defendants No.1 to 3 to get the revenue record corrected by they refused to do so. Hence, the plaintiffs filed a suit for declaration to the effect that they alongwith defendants No.1 to 3 and proforma defendant No.4 are owners in possession of the suit land to the extent of 1/3 share each and the revenue entries showing contrary or the revenue entries showing Sh. Banta Ram, the predecessor-in-interest of defendants No. 1

to 3 as sole tenant are wrong, illegal and having no effect on the right, title and interest of the plaintiffs and proforma defendant to own and possess the suit land jointly with defendants No.1 to 3, with a consequential relief of permanent injunction restraining defendants No.1 to 3 from ousting the plaintiffs and proforma defendant from their joint possession during the pendency of the suit.

3. The defendants No.1 to 3 contested the suit and filed written statement, wherein, they have taken preliminary objections of res judicata, jurisdiction, locus standi, limitation, maintainability and estopel. On merits, they alleged that their father was the sole tenant of the sit land and by virtue of H.P. Tenancy and Land Reforms Act, he became owner of the same and after his death the defendants are in possession of the suit land as owners while the plaintiffs and proforma defendant No.4 have no concern with the same. The defendants have denied the tenancy of the predecessor of the plaintiffs and defendant No.4 over the suit land.

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 along with the defendants have been coming in possession of the suit and, as tenants at will?OPP.
2. If issue No.1 is proved in affirmative, whether the plaintiffs are entitled to the relief of injunction prayed for? OPP.
3. Whether the suit is barred by principle of resjudicata?OPD.
4. Whether the predecessor-in-interest of the defendants was sole tenant in possession of the suit land and become owner under H.P. Tenancy and Land Reforms Act? OPD
5. Whether the civil court has got no jurisdiction to try the present suit in view of Section 57 of H.P. Consolidation Act?OPD
6. Whether the plaintiffs have no locus standi to file the present suit? OPD.
7. Whether the suit is not within time?OPD.
8. Whether the suit is not maintainable in the present form? OPD
9. Whether the plaintiffs are estopped by their act and conduct to file the present suit?
10. Relief.

5. 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 herein, before, the learned First Appellate Court, the latter Court dismissed the appeal, and, affirmed the findings recorded by the learned trial Court.

6. Now the 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 27th November, 2008, this Court, admitted the appeal instituted by the defendants/appellants, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the civil Court had the jurisdiction to try the suit challenging the order of the authorities passed under the H.P. Consolidation and Holdings Act, particularly, the order of the Director of Consolidation dated 10.04.1979 and D-2 and D-12 when the suit was barred under Section 57 of the H.P. Consolidation and Holdings Act?

b) Whether the findings of the court below are perverse, based on misreading of oral and documentary evidence as also pleadings of the parties, particularly, the judgment of the Director of Consolidation dated 10.04.1979 D-12 and D-2?

c) Whether the suit of the plaintiff was barred by the principles of resjudicata and the plaintiffs have the locus standi to file the sit in the present form?

**Substantial questions of Law No.1 to 3:**

7. In the jamabandi appertaining to the suit land, and, as comprised in Ex. D-2, and, relating to the year 1970-71, (a) a clear and candid reflection occurs, qua one Labhu Ram, Dhani Ram and Banta Ram, all real brothers, being, recorded as non occupancy tenants, vis-a-vis, the suit khasra numbers. Furthermore, in Ex.D-3, exhibit whereof, is, the jamabandi appertaining to the suit kahsra numbers, and, relates to the year 1978-79, reflections occur, in the remarks column thereof, qua the apt proprietary rights, in accordance with law, standing, conferred, upon, the aforesaid Banta Ram, Dhani Ram, and, Labhu Ram. Even after the afore reflections, as, are, carried in the afore referred revenue records, and, despite the afore entries remaining unchallenged, and, set aside, yet, in the jamabandi, borne in Ex.D-4, and, prepared during the occurrence, of, consolidation operations, in the mohal concerned, the, names of one Labhu Ram and Dhani Ram were deleted therefrom, and, only one Banta Ram, rather remained singularly recorded, as, non-occupancy tenant. The aforesaid deletion of names of Labhu Ram, and, Dhani Ram, was done, in pursuance to the apt roznamcha rapat, borne in Mark-A, wherein it stands recorded, that, in consonance with the orders, comprised, in, Ex.D-12, rendered on 10.04.1979, by the Director Land Holdings, hence, on Sh. Banta Ram, rather standing exclusively shown as non occupancy tenant, in the revenue record. The afore order, as evident, from, Ex.D-11, exhibit whereof embodies, the, judgment rendered by this Court, has, acquired affirmation, and, also conclusivity.

8. Be that as it may, even if the order, borne in Ex. D-12, has acquired conclusivity, yet per se, on anvil thereof, the, occurrence of substitution/changes, in, the earlier thereto revenue records concerned, (a) conspicuously, vis-a-vis, the afore reflection(s), borne in Ex.D-1, exhibit whereof stands prepared, prior to, the making of EX.D-12, wherein all the afore three brothers, rather are disclosed to be holding, the, conjoint status of 'gair maurusi', vis-a-vis, the suit khasra numbers, rather cannot be validated, (b) nor also the validity of reflections, occurring in the remarks column of Ex.D-3, whereunder, all the afore three real brothers are reflected to stand conferred with the apt statutory proprietary rights, vis-a-vis, the suit kahsra numbers hence can be subsumed. The reason for making the afore conclusion, is, sparked, by, the judgment embodied in Ex.P-3, judgment whereof stands rendered in a civil suit, instituted, in the capacity of, plaintiff by Banta Ram, wherein, he impleaded his brothers Dhani Ram, and, Labhu Ram, in the array of defendants, as, co-defendants No.11 and 12, rather making clear upsurgings qua Banta Ram, making an admission, vis-a-vis, his holding joint ownership and possession qua the suit khasra numbers, (c) thereupon, the aforesaid admission also invalidates the exclusivity of occurrence, of his name, in the revenue records, and, to the exclusion of his afore real

brothers, namely, one Labhu Ram and one Dhani Ram, both of whom whereof, in the revenue records, prepared prior to the rendition of the orders, borne in Ex.D-12, are, reflected along with afore Banta Ram, to acquire, in accordance with law, the apt proprietary rights, vis-a-vis, the suit khasra numbers. (d) The occurrence, of, the afore contested entries, in, the revenue records concerned, being clearly, in, departure of the conclusive verdict, borne in Ex.D-12, rendered on 10.04.1979, whereunder, a direction stood pronounced qua, the, afore three brothers, being reflected as co-tenants, vis-a-vis, the suit land, and, one Banta Ram being pronounced, to be recorded in cultivating possession of the suit land. In aftermath, the contested entries occurring in the revenue records, hence, when openly transgress, the, conclusivity, of, the mandate borne in Ex.D-12, hence renders them for being declared as null and void, as, aptly done by both the learned Courts below.

9. Even otherwise, even if, assumingly, the afore mandate, is not, borne in the conclusive mandate comprised in Ex.D-12, (i) nonetheless, with one Banta Ram, camouflaging the afore reflections, borne in Ex.D-3, whereunder proprietary rights, stood, in accordance with law, conferred, vis-a-vis, the suit khasra numbers, upon him, and his other two brothers, namely, one Dhani Ram and one Labhu Ram, (ii) besides hence appears, to, rather procure, the, afore order, by his camouflaging, the afore admission, borne in the verdict, encapsulated in Ex. P-3, as, rendered in a litigation instituted by Banta Ram, wherein, he had impleaded both Labhu Ram and Dhani Ram, in the array of defendants, as co-defendants No.11 and 12 respectively. In aftermath, even the afore order borne in in Ex. D-12, is, visibly acquired by Banta Ram, by his playing active *suggestio falsi and suppressio veri*, rendering hence the afore verdict to be both blemished and stained.

10. The learned counsel appearing for the defendants/appellants, has, contended with much vigour, that with, the, conclusive verdict rendered in Ex. D-12, hence, standing pronounced by the authority concerned, constituted, under, the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971, (hereinafter referred to as the Act), (i) and, with engraftment, of, a statutory bar under Section 57 thereof, (ii) provisions whereof stand extracted hereinafter, against the institution, of, a civil suit or proceedings, in, a Civil Court, with respect to any matter arising out, of, the consolidation proceedings or with respect to any other matter in regard to which a suit or application can be filed under the provisions of this Act, (iii) thereupon, also the verdict pronounced in Ex. D-12, was unquestionable before the civil Court, and, hence, the affirmative concurrent verdicts rendered upon the plaintiffs' suit, are amenable for interference. Section 57 of the aforesaid Act reads as under:-

> "*57, Jurisdiction of civil court barred as regards matter arising under this Act-* No person shall institute any suit or other proceedings in any civil court with respect to any matter arising out of the consolidation proceedings or with respect to any other matter in regard to which a suit or application can be filed under the provisions of this Act."

However, the aforesaid submission as addressed before this Court also cannot hold any sway, (iv) given,even if, the afore verdict has acquired conclusivity, given, this Court affirming it, yet when the authority exercising powers within the domain of, the, afore Act, is, enjoined to bear in mind, qua the exercise of jurisdiction, evidently, satiating, rather the salutary purpose, embodied in the apposite Act, (v) salutary purpose whereof stands comprised, in the occurrence, of, consolidation of land holdings, and, prevention of fragmentation, of, the agricultural holdings, (vi) whereas, the orders borne in Ex.D-12, not making any unraveling, qua, in its making, the afore holistic and salutary purpose rather standing borne, in, mind by the authority concerned, (vii) thereupon, when the order borne

in Ex.D-12, appears to be beyond the domain of the afore holistic purpose, as, embodied in the Act, (viii) in sequel hence prima facie, illegality, if any, ingraining the making of Ex.D-12, is, hence questionable, before the Civil Court, and, also the revenue entries made in purported compliance thereof, are also, amenable for being tested in a suit, cast before the civil court concerned, more so when even otherwise, the, contested entries, are, made in transgression of the mandate, borne in Ex.D-12.

11. Be that as it may, even if, assumingly the afore statutory bar, stands, attracted hereat, and, also assumingly, if the civil suit was barred to assume jurisdiction, upon, the apposite civil suit,(a) yet when the exception to the attraction of the afore express statutory bar, is, comprised in the authority concerned, in rearing the pat proceedings, it, not, adhering to the rules, of, *audi alteram partem,* and, when thereupon the rigor of the bar is relaxed, (b) AND concomitantly when hence the civil court, would hold the jurisdiction, to test the legality, of, the pronouncement, purportedly made within the domain of the Act, (c) besides when in consonance with the afore excepting principle also evidence is adduced, qua, in the proceedings drawn prior to the making of Ex.D-12, the authority concerned, rather not eliciting the presence, of, Labhu Ram, and, of Dhani Ram, against whom the purported adversarial verdict is pronounced, (d) rather begets a sequel, qua even if, assumingly the afore statutory bar is attractable hereat, yet thereupon the civil Court being not barred to assume jurisdiction, upon, the apt civil suit.

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 being based upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned courts below have not excluded germane and apposite material from consideration. Substantial questions of law are answered in favour of the the plaintiffs/respondents and against the defendants/appellants.

13. In view of above discussion, the instant appeal is dismissed. In sequel, the judgment and decree rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Sahil Sharma .....Petitioner.
Versus
State of H.P. & another ....Respondents.

Cr.MMO No. 170 of 2018.
Reserved on : 3rd October, 2018.
Decided on : 31st October, 2018.

**Code of Criminal Procedure, 1973-** Section 193- Indian Penal Code, 1860**-** Section 307- Cognizance by Session Court- Held, in case involving offence exclusively triable by Court of Session only that Court can take cognizance but on its committal by Judicial Magistrate – There cannot be taking of part cognizance by Judicial Magistrate and part cognizance by Court of Session upon committal of case by Judicial Magistrate -Order of Judicial Magistrate

issuing summons against accused for offence under Section 307 of Code set aside with direction to commit case to court of Session. (Paras-2 & 3)

***Cases referred:***
Dharam Pal vs. State of Haryana, (2014)3 SCC 306

For the Petitioner: Mr. Sudhir Thakur, Advocate.
For Respondent No.1: Mr. Hemant Vaid, Addl. A.G. with
Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. A.Gs.
For Respondent No.2: Mr. Anil Kumar God, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant petition is directed, against, the orders pronounced by the learned Judicial Magistrate 1st Class, Court No.1, Solan, on 16.11.2017, whereunder, the learned Judicial Magistrate 1st Class, Solan, hence, ordered for issuance of summons, upon, accused Sahil, vis-a-vis, commission of offence, an, punishable under Section 307 of the IPC.

2. There is no wrangle inter se the petitioner and the respondents, that, the offence punishable under Section 307 of the IPC, is, exclusively triable by the Court of Session. The learned Magistrate concerned, is, enjoined under the law to commit the afore case, exclusively triable by the court of Sessions, vis-a-vis, the Sessions Judge concerned, given the occurrence, of, a specific, and, explicit mandate, in, Section 193 of the Cr.P.C., provisions whereof stand extracted hereinafter:

> "**193 Cognizance of offences by Courts of Sessions.-** Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session Shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

(i) whereunder the Court of Session, is, barred to, vis-a-vis, any offence, exclusively triable by it, and, as a court of original jurisdiction, hence assume cognizance thereon, unless, the same is committed to it for trial, by the judicial Magistrate concerned. Consequently, the learned Judicial Magistrate concerned, was enjoined to commit the offence, constituted under Section 307 of the IPC, to the learned Sessions Judge concerned, (ii) and, the latter was alone statutorily empowered to assume jurisdiction, besides was, solitarily empowered to take cognizance thereon. Contrarily, the order impugned before this Court, whereunder, summons were ordered to be issued, upon, the accused by the learned Judicial Magistrate concerned, (iii) is, a clear display of the Magistrate concerned, vis-a-vis, an offence triable exclusively by the Court of Sessions, hence untenably assuming jurisdiction, besides taking cognizance, vis-a-vis, an offence exclusively triable by the court of Session, (iv) whereas, both assumption of jurisdiction, and, taking of cognizance thereon, was solitarily bestowed, upon, the learned Sessions Judge concerned, after, the learned Judicial Magistrate concerned committing, the, case for trial, vis-a-vis, the Sessions Judge concerned. The fallacy ingraining the impugned orders, is, encapsulated in paragraphs No.39 and 40, of, a

decision of the Hon'ble Apex Court, rendered in a case titled as ***Dharam Pal vs. State of Haryana***, reported in ***(2014)3 SCC 306***, paragraphs whereof stand extracted hereinafter:-

> "39. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there by any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Session Judge.
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> 40. In that view of the matter, we have no hesitation in agreeing with the views expressed in Kishun Singh's case {(1993) 2 SCC 16} that the Session Courts has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Session Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein"
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> (p.319-320)

(i) wherein the Hon'ble Apex Court, had, settled a clear legal principle, that, assumption of cognizance qua an offence, being permissible only once, vis-a-vis, an offence exclusively triable by the court of Sessions, (ii) and, there being, a, complete statutory interdiction, upon, the committal Magistrate, to, take part cognizance, upon, the afore offence, rather the Magistrate concerned while acting as a committal court, is, enjoined to don only, a, passive role of committal, for, trial, of the afore offence, to the Court of Sessions,(iii) than, hers as untenably done in the instant case, hence order, for, issuance of, summons upon him, for his committing, an, offence punishable under Section 307 of the IPC, otherwise, an offence exclusively triable by the Court of Session, (iv) and, thereupon, the committal Court has hence inaptly taken part cognizance thereon, and, also has inaptly partly assumed jurisdiction thereon. Consequently, the impugned order suffers from a gross perversity, and, absurdity.

3. For the foregoing reasons, the instant petition, is, allowed, and, the impugned order is quashed and set aside. Consequently, the learned Judicial Magistrate concerned, is, directed to in accordance with law, commit the case to the learned Sessions Judge concerned. The parties are directed to appear before the learned Judicial Magistrate

1st Class, Court No.1, Solan, on 20th November, 2018. All pending applications also stand disposed of. Records, if any, received, be sent back forthwith.

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

Hill View Co-operative Housing Society Ltd. .....Appellant/defendant.
Versus
Varinder Kumar .. ..Respondent/Plaintiff.

RSA No. 110 of 2008.
Reserved on : 22nd October, 2018.
Decided on : 31st October, 2018.

**Himachal Pradesh Cooperative Societies Act, 1968** - Section 76 – Filing of suit - Notice - Requirement- Held, statutory notice is required only when suit intended to be filed against Society or its officers in respect of any act touching Constitution, Management or business of Society . (Para 10)

For the Appellant: Mr. Tara Singh Chauhan, Advocate.
For Respondent: Mr. K.D. Sood, Sr. Advocate with Mr. Shubham Sood, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for specific performance of contract of sale, was, hence decreed.

2. Briefly stated the facts of the case are that the land measuring 0-17076 sq. meters as detailed iin the plaint, is, owned by defendant No.1 society. ON 15.6.1989, the society through its General Secretary Rakesh Sharma, entered into an agreement to sell the suit land to the plaintiff for consideration of Rs.24,000/-. The plaintiff paid Rs.7,000/- in advance as earnest money and promised to pay the remaining amount of Rs.17,000/- before Sub Registrar, Una, at the time of registration of sale deed. The defendant agreed to execute and register the sale deed before 31.8.1989 after the attestation of mutation in the name of society. As per agreement, it was agreed that in case the defendant failed to get the sale deed registered within the stipulated period, then the plaintiff shall be entitled to refund of Rs.7,000/-, as earnest money plus Rs.7,000/- on account of damages. On 11.8.1989, the plaintiff asked the defendant to get the sale deed registered as per terms of aforesaid agreement, but the defendant told that the mutation was not yet sanctioned, and, the sale deed will be executed and registered before 10.11.1989. A writing to this effect was executed at the back of agreement dated 31.8.1989. Thereafter, the plaintiff again approached the defendant for the purpose of execution of sale deed in his favour but he was again told that mutation was not sanctioned as yet, and sought extension of time upto 15.1.1990, and, a writing to this effect was executed on 10.11.1989. Then on 15.1.1990, the plaintiff again approached the defendant for the said purpose, but the defendant again extended time of sale deed upto 15.4.1990 on the plea that the mutation had not been

sanctioned in favour of the society. On 16.4.1990, the plaintiff again approached the defendant for execution and registration of sale deed, but the defendant again came with the same excuse. AT that time the plaintiff was having deed dated 10.11.1989 with him, but the same was taken from him by the defendant on the pretext of extension of time, and thereafter the defendant with malafide intention torn the same, and, refused to execute the sale deed. Thereafter, the plaintiff approached Sh. Hazari Lal, Advocate, Una along with Piare Lal and told him about the incident, who called defendant No.2, and, at his intervention the defendant agreed to execute and get registered the sale deed on 23.4.1990. Then the plaintiff again came to Una on 23.4.1990 alongwith balance sale consideration of Rs.17,000/- but the defendant did not turn up. It has now come to the notice of the plaintiff that the mutation had already been sanctioned in favour of the defendant on 14.12.1989 and despite that the defendant is not ready to execute the sale deed in his favour. The plaintiff is ready and willing to perform his part of the contract and to get the sale deed executed and registered in terms of agreement in question after payment of Rs.17,000/- as balance sale consideration to the defendant, but the defendant has refused to do so. Hence the suit.

3. The defendants contested the suit and filed written statement, wherein, it/he has taken preliminary objections inter alia maintainability, locus standi, cause of action, etc. On merits, It is alleged by the defendant that the plaintiff became the member of the society by purchasing a share on 19.6.1989, and thereafter he transferred his share to one Sh. Vijay Avtar Sigh on 7.12.1989, and, ceased to be the member of the society. His membership came to an end on 7.12.1989, and, he is only the past member of the society. The defendants have not denied the execution of agreement of 10.11.1989, but they alleged that neither any period was extended on 15.1.1990, as alleged by the plaintiff nor any such endorsement was made on the back of document of 10.11.1989 The mutation of the suit land of the society was sanctioned on 14.12.1989 along with other land and thereafter, the defendant asked the plaintiff so many times to get the sale deed executed in his favour, but he was reluctant and showed his inability due to lack of money. On 15.1.1990, the sale deed could not be executed as the plaintiff did not turn up to the office of Sub Registrar, Una, though the defendant remained present there upto 5 P.M. After that the Secretary of the Society informed the Managing Committee about non-execution of the sale deed as per agreement due to absence of plaintiff on 15.1.1990 and the earnest money of the plaintiff was forfeited by the Managing Committee as per terms of agreement, and, now the plaintiff has no locus standi to file the present suit as he has not performed his part of contract. It is further alleged that since the plaintiff has failed to perform his part of contract within the stipulated period, no question of readiness and willingness to perform his part of contract after the expiry of the date of execution of sale deed, does not arise at all. It is further alleged that this Court has no jurisdiction to try the present suit as the same is barred under Section 72 of the H.P. Cooperative Societies Act, 1978 nor the plaintiff can institute a suit without serving a two months notice on the Registrar as required under Section 76 of the H.P. Cooperative Societies Act, 1968.

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 has locus standi to file the suit?OPP.
2. Whether this court has no jurisdictionto try the suit? OPD
3. Whether the plaintiff was required to issue notice under Section 76 of the H.P. Co-operativeSociety Act, as alleged?OPD.
4. Whether the suit is bad for mis joinder of defendant No.2?OPD.

5.Whether the plaintiff was and is willing to perform his part of the agreement?OPP.

6.Relief.

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

6. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, 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, on 7.1.2009, admitted the appeal instituted by the defendant/appellant, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the civil court has jurisdiction to decide the matter since appellant is a Coop. Housing Society registered under the H.P. Coop. Society Act and rules in vie of Section 72 and as per section 76, no suit shall lie against the appellant without issuing the notice to society and before its expiry of two months?

b) Whether the suit can be decreed in favour of the plaintiff without proving the readiness and willingness to perform his part of contract?

**Substantial questions of Law No.1 and 2:**

7. The parties at contest do not wrangle, over the factum qua, the contract of sale, vis-a-vis, the suit land, as, embodied in Ex.P-1, being cogently proven to be validly and duly executed, inter se the contesting litigants. The imperative covenanted condition precedent for facilitating the execution, of, a registered deed of conveyance, vis-a-vis, the suit khasra numbers, is, comprised in, (a) upon, occurrence, of, attestation of mutation, vis-a-vis, suit khasra number qua the defendant, and, reinteratedly thereupon, the parties at contest being obliged to execute a registered deed of conveyance, vis-a-vis, the suit khasra numbers. (b) The afore condition precedent, for hence the contract of sale, being put, to, completest apt satisfaction by the executants thereof, rather stood satiated on 14.12.1989, thereupon, the parties at contest were enjoined to mete deference to the afore apt covenant, borne in the contract of sale. The defendant contends (c) that immediately, upon, satiation being meted, vis-a-vis, the afore condition precedent, the plaintiff was obliged to execute, the, apt registered deed of conveyance, vis-a-vis, the suit khasra numbers, whereas, his breaching his part of the apt covenanted obligation, he has hence evinced his unreadiness, and, unwillingness to perform his part of, the, apt contractual obligation, and, hence, he is defacilitated (i) to seek rendition of a decree for specific performance of contract of sale; (ii) his being disentitled to seek restoration of the forfeited amount of earnest money, comprised in a sum of Rs.7000/-. The afore contention would hold vigour, only upon, (iii) evidence being adduced qua the plaintiff being aware of hence compliance being meted, vis-a-vis, the afore condition precedent, evidence whereof may have been comprised, qua his, being provenly awakened qua hence in making(s) thereof, emergence whereof would occur, upon, his evidently visiting the office, of, the revenue officer concerned; (iv) AND/or his being provenly intimated, by, the defendants qua its making. The aforesaid evidence, is, grossly amiss hereat. Consequently, given the aforesaid condition precedent standing evidently satiated, yet mere satiation thereof, cannot marshal, an inference qua the plaintiff hence

breaching the apt contractual obligation, cast upon him, under the contract of sale. Furthermore, it cannot also be inferred qua the plaintiff hence evincing his unreadiness and unwillingness, to perform his part, of, the contractual obligation, (v) more so, when defendant No.2, in his cross-examination, rather acquiesces to a suggestion qua prior to the execution of contract of sale, the defendant purchasing land, from, the plaintiff, and, the apt sale consideration thereof, comprised in a sum of Rs.41,000/-, being in simultaneity thereof, hence, standing liquidated qua him. Reinforcingly, rather a conclusion erupts therefrom qua the plaintiff being financially empowered to liquidate the balance sale consideration to the defendant, and, obviously also qua hence his being ready and willing to perform his part, of, the apt contractual obligation. The further seuqel thereof, is that when rather the defendant, had, breached, its, part of the contractual obligation, thereupon, it being not entitled to forfeit, the, earnest money.

8. Be that as it may, a further espousal rather stands reared before this Court by the counsel, for, the aggrieved defendant/appellant, qua, (i) the stipulation borne in the apt contract of sale, whereunder, upon, breach of the contractual obligation, cast upon the defendant, the latter being entitled only for double of the amount of earnest money, whereas, his being not entitled to the primary relief, of, specific performance of contract. However, the aforesaid submission, is infirm, given, it being settled in a catena of decisions (ii) qua it being incumbent, upon, this Court, to render, the, primary decree for specific performance, of contract of sale, unless, the aforesaid sum adequately recompenses the plaintiff. Since, no evidence in consonance therewith stands adduced, thereupon, it is concluded that both the learned Courts below, did not, mis-maneuverer in law, rather in decreeing the primary relief of specific performance, of, contract of sale, vis-a-vis, the suit kahsra number, and, qua the plaintiff.

9. The learned counsel appearing for the plaintiff also has contended, that, with the statutory provisions, as, encapsulated in Section 76 of the H.P. Co-operative Societies Act (hereinafter referred to as the Act), provisions whereof stand extracted hereinafer:-

> "***76. Notice necessary in suits.***- No suit shall be instituted against a society or any its officers in respect of any act touching the constitution, management or the business of the society, until the expiration of two months after notice in writing has been delivered to the Registrar or left at his office stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."

(i) rather creating a statutory bar against the institution, of, suits against the society and its officers "in respect of any act touching the constitution, management of the business of the society, unless, and, until the expiration of two months', after, notice in writing has been delivered to the Registrar or left at his office", and, with the afore initial imperative condition rather standing ex-facie proven hereat, and, thereupon, the exception thereto, couched in the statutory phrase, "unless two months' notice being served upon the Registrar concerned", rather enjoined adduction, of, evidence in satiation thereof, (ii) whereas, the aforesaid exception remaining not proven hence, the suit entailing the fate, of, dismissal.

10. However, the aforesaid submission cannot be accepted,(a) as, given even if assumingly, no statutory notice, within the ambit of the statutory exception, standing not served upon the authority/officer concerned, yet want thereof, rather being inconsequential, (b) given satiation thereof being imperative, only upon, the, suit evidently containing a subject matter "in respect of any act touching the constitution, management or the business

of the society". (c) In aftermath, the defendant was enjoined to adduce proof, that, in the drawing, of, the apt contract of sale, the officer, who on behalf of the society executed, it, with the plaintiff, his colluding or conniving with the plaintiff, (d) or despite the fact that qua the plaintiff continuing to be the member of the society, hence, his executing the contract of sale qua any immovable property of the society, (e) obviously whereupon, his attracting culpability, vis-a-vis, embezzlement or mismanagement, of, the property of the society. However, when evidently at the relevant stage, the plaintiff was not a member of the society, and, with the defendant not adducing any cogent evidence, with, any candid display therein qua (a) the officer/official nominated by it, to, execute the contract of sale with the plaintiff rather not holding the apt bestowal/authorization; (b) or in the execution of the contract of sale, grave prejudice being visited, vis-a-vis, the assets of the society. Consequently, for want of, adduction, of, the afore evidence, vis-a-vis, the afore expostulations, (c) thereupon, it is inevitably rather concluded qua the execution of the contract of sale, in respect whereof rendition of a decree for specific performance of contract, is, claimed, rather not appertaining, to, hence any act touching, the constitution, management or the business of the society, and, thereafter no contention hence being rearable by the defendant, that, it being imperative for the plaintiff, to, prior to the institution of the suit, serve a two months' notice in writing, upon, the officer concerned.

11. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondent/plaintiff, and, against the appellant/defendant.

15. In view of the above discussion, there is no merit in the present Regular Second Appeal and it is dismissed accordingly. In sequel, the judgements and decrees, rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Shri Ravi Sharma .....Appellant.
Versus
Smt. Sumitra Devi & Others. .....Respondents.

FAO No. 365 of 2018
Decided on: 22.10.2018

**Motor Vehicles Act, 1988-Section 2(30)-"Owner"-** Held, for purposes of Act, owner of vehicle means a person registered as owner of or lessee or hypothecatee thereof (Para 2).

***Cases referred:***

Bhavnagar Municipality v. Bachubhai Arjanbhai : 1995 SCC 167 : AIR 1996 Guj 51
Godavari Finance Co. v. Degala Satyanarayanamma, (2008) 5 SCC 107 : (2008) 2 SCC (Cri) 531
Kailash Nath Kothari [Rajasthan SRTC v. Kailash Nath Kothari, (1997) 7 SCC 481
Mohan Benefit (P) Ltd. v. Kachraji Raymalji, (1997) 9 SCC 103, 1997 SCC (Cri) 610

Mukesh K. Tripathi v. LIC : (2004) 8 SCC 387 : 2004 SCC (L&S) 1128
National Insurance Co. Ltd. v. Deepa Devi, (2008) 1 SCC 414 : (2008) 1 SCC (Civ) 270 (2008) 1 SCC (Cri) 209
National Insurance Co. Ltd. v. Durdadahya Kumar Samal : (1988) 1 ACC 204
Pandey & Co. Builders (P) Ltd. v. State of Bihar (2007) 1 SCC 467
Purnya Kala Devi v. State of Assam, (2014) 14 SCC 142 : (2015) 1 SCC (Cri) 304 : (2015) 1 SCC (Civ) 251
Pushpa v. Shakuntala, (2011) 2 SCC 240 : (2011) 1 SCC (Civ) 399 (2011) 1 SCC (Cri) 682
Rajasthan SRTC v. Kailash Nath Kothari, (1997) 7 SCC 481
Ramesh Mehta v. Sanwal Chand Singhvi (2004) 5 SCC 409
State of Maharashtra v. Indian Medical Assn. (2002) 1 SCC 589 : 5 SCEC 217
T.V. Jose [(2001) 8 SCC 748 : 2002 SCC (Cri) 94] , SCC 51
U.P. SRTC v. Kulsum, (2011) 8 SCC 142 : (2011) 4 SCC (Civ) 66 : (2011) 3 SCC (Cri) 376

For the Appellant: Mr. J.L Bhardwaj, Advocate.
For the Respondents: Mr. K.R Thakur, Advocate, for respondents No.1 and 2.
Mr. Ashok Tyagi, Advocate, vice counsel for respondent No.3.
Sandhu, Advocate, for respondent No.4.
Mr. Praveen Chandel, Advocate, vice counsel
for respondent No.5.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge (oral)**

The instant appeal stands directed by one Ravi Sharma, impleaded as co-respondent No.1, in M.A.C Case No.4-S/2 of 2015, wherethrough he challenges the award pronounced by the learned Motor Accident Claims Tribunal Shimla, upon, the afore M.A.C Case, (i) whereunder the claimants were held entitled to a sum of Rs. 10 lacs, as, compensation, sparked, by, demise of one Bheem Sen, in, a road side accident involving, the, offending vehicle. The indemnificatory liability vis-a-vis the afore compensation amount stands fastened upon, the insurer of the offending vehicle.

2. The learned counsel for the appellant has canvassed with much vigor, before, this Court that the adversarial findings returned vis-a-vis the appellant, upon issue No. 3, being ingrained with a vice of infirmity. The learned counsel for the appellant has placed reliance, upon, a verdict recorded by the Hon'ble Apex Court in Case titled as Naveen Kumar versus Vijay Kumar, reported in (2018) 3 SCC 1, wherein, in, paragraphs 13 and 14 thereof, paragraphs whereof stand extracted hereinafter, (i) the Hon'ble Apex Court has expostulated a candid legal proposition that only the registered owner, of, the offending vehicle or lessee thereof or hypothecatee thereof, alone being amenable for saddling, of, the apposite indemnificatory liability.

> "13. The consistent thread of reasoning which emerges from the above decisions is that in view of the definition of the expression 'owner' in Section 2(30), it is the person in whose name the motor vehicle stands registered who, 6 Mohan Benefit (P) Ltd. v. Kachraji Raymalji, (1997) 9 SCC 103 : 1997 SCC (Cri) 610; Rajasthan SRTC v. Kailash Nath Kothari, (1997) 7 SCC 481 ; National Insurance Co. Ltd. v. Deepa Devi, (2008) 1

SCC 414 : (2008) 1 SCC (Civ) 270 : (2008) 1 SCC (Cri) 209; Mukesh K. Tripathi v. LIC : (2004) 8 SCC 387 : 2004 SCC (L&S) 1128, Ramesh Mehta v. Sanwal Chand Singhvi (2004) 5 SCC 409, State of Maharashtra v. Indian Medical Assn. (2002) 1 SCC 589 : 5 SCEC 217, Pandey & Co. Builders (P) Ltd. v. State of Bihar (2007) 1 SCC 467 and placed reliance on Kailash Nath Kothari [Rajasthan SRTC v. Kailash Nath Kothari, (1997) 7 SCC 481, National Insurance Co. Ltd. v. Durdadahya Kumar Samal : (1988) 1 ACC 204 : (1988) 2 TAC 25 (Ori) and Bhavnagar Municipality v. Bachubhai Arjanbhai : 1995 SCC OnLine Guj 167 : AIR 1996 Guj 51; Godavari Finance Co. v. Degala Satyanarayanamma, (2008) 5 SCC 107 : (2008) 2 SCC (Cri) 531; Pushpa v. Shakuntala, (2011) 2 SCC 240 : (2011) 1 SCC (Civ) 399 : (2011) 1 SCC (Cri) 682; T.V. Jose [(2001) 8 SCC 748 : 2002 SCC (Cri) 94] , SCC p. 51, para 10; U.P. SRTC v. Kulsum, (2011) 8 SCC 142 : (2011) 4 SCC (Civ) 66 : (2011) 3 SCC (Cri) 376; Purnya Kala Devi v. State of Assam, (2014) 14 SCC 142 : (2015) 1 SCC (Cri) 304 : (2015) 1 SCC (Civ) 251." for the purposes of the Act, would be treated as the 'owner'. However, where a person is a minor, the guardian of the minor would be treated as the owner. Where a motor vehicle is subject to an agreement of hire purchase, lease or hypothecation, the person in possession of the vehicle under that agreement is treated as the owner. In a situation such as the present where the registered owner has purported to transfer the vehicle but continues to be reflected in the records of the registering authority as the owner of the vehicle, he would not stand absolved of liability. Parliament has consciously introduced the definition of the expression 'owner' in Section 2(30), making a departure from the provisions of Section 2(19) in the earlier Act of 1939. The principle underlying the provisions of Section 2(30) is that the victim of a motor accident or, in the case of a death, the legal heirs of the deceased victim should not be left in a state of uncertainty. A claimant for compensation ought not to be burdened with following a trail of successive transfers, which are not registered with the registering authority. To hold otherwise would be to defeat the salutary object and purpose of the Act. Hence, the interpretation to be placed must facilitate the fulfilment of the object of the law. In the present case, the First respondent was the 'owner' of the vehicle involved in the accident within the meaning of Section 2(30). The liability to pay compensation stands fastened upon him. Admittedly, the vehicle was uninsured. The High Court has proceeded upon a misconstruction of the judgments of this Court in Reshma and Purnya Kala Devi.

14. The submission of the Petitioner is that a failure to intimate the transfer will only result in a fine under Section 50(3) but will not invalidate the transfer of the vehicle. In Dr T V Jose, this Court observed that there can be transfer of title by payment of consideration and delivery of the car. But for the purposes of the Act, the person whose name is reflected in the records of the registering authority is the owner. The owner within the meaning

of Section 2(30) is liable to compensate. The mandate of the law must be fulfilled."

3. Uncontrovertedly the appellant is neither the registered owner of the offending vehicle nor hypothecatee thereof nor lessee thereof, therefore in view of the afore-referred expostulation, of, law, the rendering, of, adversarial findings, upon issue No.3, returned against the appellant, are, amenable for interference, and, accordingly the findings recorded upon issue No.3 are quashed and set aside.

4. Since neither the claimants nor the insurer of the vehicle, have respectively reared any appeal against the award aforesaid, thereupon when the insurer of the offending vehicle stands aptly saddled with the apposite indemnificatory liability, hence the afore portion of the award is maintained and affirmed.

5. In view of the above, the present appeal is partly allowed. All pending applications stand disposed of accordingly.

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

Sh. Sanjeev Gupta .....Plaintiff.
Versus
Shri Shyam Dutt (since deceased) through his legal heirs. .....Defendants.

Civil Suit No. 97 of 2008.
Reserved on : 24th October, 2018.
Date of Decision: 31st October, 2018.

**Indian Contract Act, 1872-** Section 55**- Specific Relief Act, 1963** – Section 15 -Agreement to sell - Specific Performance- Time specified for execution, whether essence of contract ?- Parties agreed to execute sale deed within specified time - In case of breach on part of buyer, part consideration paid was to be forfeited - Buyer not fulfilling his part of agreement within time- Issuing notice to seller for execution of sale deed only thereafter- Time limit specified in unmistakable language in agreement - Held, time was essence of agreement- Specific performance after expiry of specified period cannot be ordered - Suit dismissed. (Paras 8, 11 to 15 ).

***Cases referred:***
Chand Rani (dead) by LRs. v. Smt. Kamal Rani (dead) by LRs., AIR 1993 SC 1742
Gomathinayagam Pillai others vs. Palaniswami Nadar, AIR 1967 SC 868

For the Plaintiff: Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.
For Defendants No.1(a) to 1(d) and 1(f) to 1(i): Mr. R.K. Gautam, Sr. Advocate with Ms. Megha Kapoor Gautam, Advocate.
Defendant No.1 (e) ex-parte.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The plaintiffs' case in brief is that the defendant is owner of seven plots of land measuring 9 bighas 9 biswas comprised in Khasra No.346, 347, 397, 828/399/1, 829/399/2, 400 and 409, situated, at Mauja Sheel, Tehsil and District Solan, H.P. The defendant also alleged to own Khasra No.398, measuring 16 biswas in Mauja Sheel. It has been pleaded that the deceased defendant Shayam Dutt agreed to sell above mentioned 8 plots of land, measuring 10 bighas, 5 biswas to the plaintiff for a total consideration of Rs.51,60,000/- . The agreement of sale was duly executed and signed by the parties on 19th October, 2005 incorporating the terms and conditions mutually agreed by the parties. It has been pleaded that defendant on 25th September, 2005 agreed to sell the land mentioned above alongwith some other land for a total consideration of Rs.52,00,000/- only to the plaintiff but the plaintiff later on, realizing that the defendant had no authority on behalf of his nephew Shri Chander Dutt to sell his land, therefore, asked the defendant to enter into an agreement to sale for the land owned and possessed by him. On 25th September, 2005, in pursuance to the agreement to sale, defendant received from the plaintiff a sum of Rs.2,00,000/- on as advance towards the sale consideration which at that time was agreed to be Rs.52,00,000/-. Defendant duly executed the receipt acknowledging his receiving a sum of Rs.2,00,000/- from the plaintiff in the presence of the witness. However, later on the defendant agreed to sell the aforesaid land to the plaintiff for a total sale consideration of Rs.51,60,000/- only excluding the area of 7 biswas belonging to his nephew Shri Chander Dutt as well as 1 bighas 18 biswas which was Shamlat land. It has been pleaded that the defendant on day of executing and signing the agreement of sale of 19th October, 2005, received a further sum of Rs.10,00,000/- only, through cheque No.171668 of 10th October, 2005, drawn at the Bhagat Urban Cooperative Bank Ltd., Solan towards the agreed sale consideration which was duly encashed by the defendant. The defendant in the said agreement of sale also acknowledged his having already received a sum of Rs.2,00,000/- earlier to the date of agreement of the agreement to sell. Thus, out of total sale consideration of Rs.51,60,000/-, defendants has received from the plaintiff a sum of Rs.12,00,000/- towards the sale consideration. The balance amount of sale consideration i.e. Rs.39,60,000/- was agreed to be paid to the defendant by the plaintiff at the time of execution and registration of the sale deed before the Sub Registrar. It has been pleaded that in pursuance to the agreement to sell, the plaintiff was put in possession of the land agreed to be sold with a right to develop the said land and change nature thereof. It is averred though at the time of execution of the agreement to sell, the defendant agreed to execute and get registered the sale deed in favour of the plaintiff within a period of six months but for the reasons best known to him, the defendant neither executed sale deed nor got the same registered. The defendant had been putting off the plaintiff on one pretext or the other, who had been making repeated request to the defendant to complete the transaction of sale by receiving the balance amount of sale consideration. The time was not intended to be the essence of the contract. The plaintiff was and has always been ready and willing to perform his part of the contract to pay the balance amount of sale consideration but the defendant had been putting off the matter on one pretext or the other and failed to abide by the terms of the agreement to sell. It has been pleaded that in the month of March, 2008, the plaintiff came to know that the defendant has started negotiating for the sale of the land agreed to be sold to the plaintiff, hence, the plaintiff requested the defendant to complete the sale transaction but the defendant did not accede to the request of the plaintiff. The plaintiff under compelling circumstances was constrained to issue a legal notice dated 24th March, 2008 to the defendant calling upon him to receive the balance amount of sale consideration and execute the the registered deed of conveyance on or before 28th April, 2008. It has been pleaded that the plaintiff was present on 28th April, 2008 in the office of Sub Registrar, Solan along with the balance amount of sale consideration but the defendant

did not turn up for the reasons best known to him. The defendant instead of comply with the request made by plaintiff through notice of 24th March, 2008, sent a reply taking a false and baseless stand dying the very execution of a agreement of sale. The intention of the defendant seem to have become dishonest and the defendant is trying to sell the property agreed to be sold through the agreement to sell of 19th October, 2005 to the plaintiff. The plaintiff, who had always been ready and will to perform his part of the contract has been deceived by the defendant, who has retained the amount of advance and has backed out of the terms and conditions of the agreement to sell without any justifiable cause. Cause of action stated to have arisen to the plaintiff on 25th September, 2005 when the defendant has received a sum of Rs.2,00,000/- as advance by agreement to sell the suit land to the plaintiff, thereafter alleged to arose on 19th October, 2005, when the formal agreement to sell was duly executed and defendant received a further sum of Rs.10,00,000/- as part of the sale consideration. Further the cause of action, thereafter arose one each date of demand made by the plaintiff to the defendant and the failure on the part of the defendant to comply with the request of the plaintiff to complete the transaction of sale. The cause of action further arose tot he plaintiff on 24th March, 2008, when the legal notice was got served upon the defendant, and, cause of action further arose on 28th April, 2008, the date fixed by the plaintiff for execution and registration of the sale deed as per legal notice, and, it is still continuing hence the suit is within the period of limitation.

2. The sole defendant, contested the suit, and, filed written statement, wherein he has taken preliminary objections, inter alia, that in face the alleged agreement of 19.10.2005 was not a legal agreement since the same was not executed between the parties in a lawful manner, as, the defendant who is an illiterate person was made to sign the said agreement by the plaintiff on an understanding that the sale consideration would be as per the market value prevailing at the time of sale but the plaintiff had filled up amount of consideration as per his sweet will and that the suit is maintainable in the present form as the time was an essence of the agreement and since the plaintiff has failed to get the sale deed executed within the prescribed period, therefore, he has got no cause of action and the suit deserves to be dismissed. On merits, the execution of agreement not denied. However, it is submitted that the defendant being an illiterate person was not knowing regarding the amount mentioned in the agreement by way of sale consideration, however, the replying defendant offered the plaintiff that if he desired, he could have taken back the earnest money paid by him to the defendant or to get the sale deed registered strictly as per the agreement i.e. within six months from the date of execution of the agreement which is clearly mentioned in clause-9 of the agreement. It has been submitted that the plaintiff, who is basically a property dealer was never interested to purchase the land for himself. He had executed the agreement with intention that as and when he gets more consideration from some person, he will get the sale deed registered in the name of that person and this way, he would be able to earn handsome amount out of that sale consideration, but since the plaintiff was not able to get any such better buyer and he had no money with him to pay by way of sale consideration to the defendant, he could not come forward to get the sale registered. It is denied that the plaintiff making any request to the defendant for execution of the registered sale deed, rather on the other hand, it is the defendant who has been making requests to the plaintiff to fulfill his part of the contract by making the balance payment of sale consideration and to get the sale deed executed within the prescribed period as mentioned in the agreement to sell. It is also denied that the defendant had been putting off the matter on one pretext or the other rather it is submitted that the defendant was always ready and willing to fulfill the contract as per the agreement. The defendant remained making request to the plaintiff to perform his part of contract but the plaintiff was never ready and willing to perform his part of the contract and he failed to perform his part of contract resulting in the forfeiture of the agreement as well as the earnest money. It is

also denied that the plaintiff was put in possession the suit land. The defendant has never parted with the possession of the suit land and the suit land is in the ownership and possession of the defendant. It is denied that in the month of March, 2008, the defendant had started negotiation for the sale of the suit land and that the plaintiff requested the defendant to complete the sale transaction and the defendant did not accede to the request of the plaintiff. It is submitted that the defendant was surprised to receive a notice of 24.3.2008 issued on behalf of the plaintiff calling upon him to get the sale deed executed in his favour, but since the agreement itself become non-executable in the eyes of law after expiry of six months from the date of its execution, therefore, there was no occasion for the plaintiff to ask the defendant or execution of the sale deed. It is submitted that the agreement came to an end after completion of six months from the date of its agreement and thereafter, there was no agreement or relationship of any kind including proposed purchaser and proposed seller inter se the parties at contest, and, as per the terms and conditions of the agreement, the earnest money paid by the plaintiff to the defendant automatically stood forfeited and the defendant has got no right whatsoever to demand either the earnest money or to ask the defendant for the execution of sale deed qua the suit land. With the afore averments, the defendant prayed for the dismissal of the suit.

4. On the contentious pleadings of the parties, this Court on 31.08.2009., struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff is entitled for the decree of specific performance, as prayed for? OPP.
2. Whether the plaintiff is entitled for the decree of permanent prohibitory injunction as prayed for?OPP
3. Whether the agreement was executed in the manner as alleged by the defendant in paras 5 and 8 of the written statement, if so its effect?OPD.
4. Whether the time was the essence of the agreement, and, if it is proved so whether the agreement dated 19.10.2005 has become redundant after the expiry of the time fixed for its execution?OPD.
5. Whether no cause of action arises in favour of the plaintiff to file the present suit?OPD.
6. Whether the suit is not maintainable due to wrong valuation and wrong valuation of the court fee?OPD.
7. Relief.

5. For the reasons to be recorded hereinafter, my findings on the aforesaid issues are as under:-

Issue No.1..... No.

Issue No.2.....No.

Issue No.3.....Redundant

Issue No.4.....Yes.

Issue No.5..... Yes.

Issue No.6..... No.

7. Relief..... Suit of the plaintiff is dismissed as per the operative portion of the judgment.

**Reasons for findings.**

**Issues No.1, 2 and3.**

6. All the aforesaid issues are taken up together for discussion, as they are common in nature besides common evidence thereon, stands, hence adduced by the parties.

7. The apposite agreement to sell is embodied in Ex.PW2/B. In clauses 9 & 10 thereof, clauses whereof stand extracted hereinafter:-

> "9. That the purchaser shall pay the balance amount to the seller within six months from today and shall get the sale deed executed and registered his favour or in favour of his nominee. In case the purchaser fails to make the balance payment to the seller and also fails to get the sale deed executed and registered in his favour, in that event the earnest money paid today to the seller shall stand forfeited and this agreement shall come to an end.
>
> 10. That in case the seller backs out from the agreement as detaile dabove in all respects, i.e., if he fails to execute and get the sale deed registered in favour of the purchaser or his nominee, in that event the purchaser shall be entitled to get the sale deed registered in his favour through the court of law and/or the seller shall be liable to pay three times of the earnest money to the purchaser. The option shall be that of the purchaser."

(a) a specific explicit covenant is borne therein, vis-a-vis, the plaintiff standing obliged, to, vis-a-vis, the seller hence pay balance amount of sale consideration, within, six months from the date of execution of Ex.PW2/B; (b) AND, thereupon, the defendant/seller being obliged to execute the registered deed of conveyance, vis-a-vis, the suit property; (c) upon, failure of the purchaser to make the payment, of, the balance sale consideration to the seller/defendant, within, the afore period, and, upon, failure of the plaintiff, to, execute the registered of conveyance, thereupon, the seller/defendant being entitled to forfeit, the, earnest money paid to him, and, in sequel, the contract of sale, ipso facto, hence, standing terminated or, it, coming to an end; (d) upon the seller reneging, from, the afore contractual obligation(s), thereupon, the purchaser being bestowed with an entitlement, to, obtain the registration of the sale deed, through, process of law, or the seller being contractually obliged, to, pay three times, of, the earnest money, to, the purchaser. The bestowal of the afore contractual discretion/options, upon, the plaintiff/purchaser, rather accruing, upon, apt breaches being committed by the seller, hence for, their apt recoursing(s) by him.

8. The execution of Ex.PW2/B, occurred on 19th October, 2005, (i) and, an incisive perusal, of, the afore extracted clauses, borne therein, unravel qua upon failure of the purchaser, to, liquidate the balance sale consideration to the seller, within, six months, from, the date of execution of Ex.PW2/B, (ii) and, his concomitant failure to get the sale deed executed, and, registered, vis-a-vis, the suit property, thereupon, it being covenanted therein, qua, the apt agreement ipso facto, rather coming to an end. The afore extracted clauses, prima facie beget a conclusion qua hence rather time being, the, essence of the contract. However. the learned counsel appearing for the plaintiff, has, contended with much vigour, while making much dependence, upon, Ex.PW2/F, exhibit whereof, comprises, a, reply meted by the defendant, to the plaintiff's notice, borne in Ex. PW2/E, issued upon him on 24th March, 2008, (iii) to contend that even if, the aforesaid notice stood belatedly issued, since the expiry of the period prescribed in the agreement to sell, wherewithin, the registered deed of conveyance rather stood enjoined to be executed by the plaintiff, vis-a-vis, the suit property, with the defendant/seller, (iv) yet with clause No. (2) of Ex.PW2/F also containing, a, recital (a) qua the defendant/seller immediately subsequent, to the execution

of Ex.PW2/B, offering to return, the, earnest money to the plaintiff, given, the total sale consideration qua the suit property, being a gross undervaluation, and, (b) his also voicing therein, through, his counsel, that the agreement not coming into existence, and, thereupon, the question of performance of contract, not, arising, (c) obviously facilitate him, to, rear a contention, that, the defendant/seller merely for inadequacy, and, insufficiency, of, sale consideration, hence, being unwilling to execute, and, register the deed of conveyance, vis-a-vis, the suit property, (d) and, also hence, the afore recital borne in Ex.PW 2/F, being connotative, of, implied extension of time, as, stands recited with explicity, in Ex.PW2/B. The further sequel qua the contractually fixed time of six months, since, the drawing of the agreement, being not, the, essence of the contract, and, rather the defendant/seller, being, estopped to contend, that, time being the essence of the contract of sale.

9. Bearing in mind the afore extracted recitals borne in Ex.PW2/A, (a) it is enjoined to be determined whether the recitals borne in the reply to notice, reply whereof, stands, embodied in Ex.PW2/F, (b) and, with the plaintiff instituting the instant suit, belatedly, since the drawing, of, the, agreement to sell, and, with specific afore echoing(s) rather occurring therein qua, upon, expiry of six months, since the drawing of Ex.PW2/A, (c) AND his not prma facie making any endeavour, with, the afore span, for insisting upon the defendant, to, execute the registered deed of conveyance, vis-a-vis, the suit khasra numbers, rather his belatedly since the drawing of the agreement, hence, in the year 2008, under, notice borne in Ex.PW2/E, rather, entailing upon the defendant/seller to execute the registered deed of conveyance, an adjudication, is, enjoined to be meted, whether time being the essence, of, the apt agreement to sell.

10. However, before making the afore strivings, it is also deemed imperative to bear in mind, the expostulation of law borne, in, a verdict of the Hon'ble Apex Court, rendered in a case titled as ***Gomathinayagam Pillai and others vs. Palaniswami Nadar***, reported in ***AIR 1967 SC 868,*** (i) expostulation of law whereof appertains, to, a construction being meted, vis-a-vis, the recital(s) borne in the apt contract of sale, and, as, explicitly pronounce qua time being the essence of the contract, and, theirs being hence construable nor not, to be the essence of the contract, and, stand(s) carried in paragraph No.4 thereof, para whereof stand extracted hereinafter:-

> "4. The facts which have a material bearing on the first question have already been set out. Section 55 of the Contract Act which deals with the consequences of failure to perform an executory contract at or before the stipulated time provides by the first paragraph:
>
> > "When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise if the intention of the parties was that time should be of the essence of the contract."
>
> It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is

unmistakable : it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the ,essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In Jamshed Khodaram Irani v. Burjorji Dhunjibhai, ILR 40 BOM 289: (AIR 1915 PC 83) the Judicial Committee -of the Privy Council observed that the principle underlying S. 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed :

> "Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. . . . Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in Tilley v. Thomas (1867) L. R. 3 Ch. 61:-
>
> "The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in Roberts v. Berry (1853) 3 De G. M. & G. 284), there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. of the three grounds mentioned by Lord Justice Turner express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."
>
> Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded

> by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay as its foundation. "Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified."
>
> (p.870-871)

The apt recital in a contract of sale, vis-a-vis, time being essence of the contract, and, upon breach thereof being made by the plaintiff, the latter being disentitled, to, claim the relief of specific performance, of contract of sale, (i) stands, propounded therein, to be, imperatively borne or stand couched in an unmistakable language, and, any inference(s), vis-a-vis, the afore factum, being derivable from the conduct, and, the circumstances prevailing thereat or before the contract. Furthermore, in paragraph No.5, of, Gomathinayagam Pillai case (supra), para whereof stands extracted hereinafter, it is also prescribed therein, that, the mere fixation of a period, within, which the contract is to be performed, rather not making, the stipulation qua the contractually prescribed time, rather, being the essence of the contract, rather obviously import thereof being garnered, from the afore twin conditions, being rather dis-proven/proven, by, the plaintiff. Paragraph No.5 of the case supra, reads as under:-

> "5. The Trial Court relied upon three circumstances in support of its conclusion that time was of the essence of the contract of sale : (i) though no time was prescribed by the oral agreement, in the agreements writing dated April 4, 1959 and April 15, 1959 there were definite stipulations fixing dates for performance of the contract; (ii) that the second and the third agreements contained clauses which imposed penalties upon the party guilty of default; and (iii) that appellants 1 & 2 were in urgent need of money and it was to meet their pressing need that they desired to effect sale of the property. But the agreements dated April 4 and April 15 do not express in unmistakable language that time was to be of the essence and existence of the default clause will not necessarily evidence such intention. Fixation of the period, within which the contract is to be performed does not make the stipulation as to time of the essence of the contract. It is true that appellants 1 & 2 were badly in need of money, but they had secured Rs. 3006/- from the respondent and had presumably tided over their difficulties at least temporarily. There is no evidence that when the respondent did not advance the full consideration they made other arrangements for securing funds for their immediate needs. Intention to make time of the essence of the contract may be evidenced by either express stipulations or by circumstances which are sufficiently strong to displace the ordinary presumption that in a contract of sale of land stipulations as to time are not of the essence. In the present case there is no express

> stipulation, and the circumstances are not such as to indicate that it was the intention of the parties that time was intended to be of the essence of the contract. It is true that even if time was not originally of the essence, the appellants could by notice served upon the respondent call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the requisition the contract will be treated as cancelled. As observed in Stickney v. Keeble, 1915 AC 386 where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end. In the present case appellants 1 & 2 have served no such notice; by their letter dated July 30, 1959 they treated the contract as at an end. If the respondent was otherwise qualified to obtain a decree, for specific performance, his right could not be determined by the letter of appellants 1 & 2."
>
> (p.871-872)

11. Furthermore, the Full Bench of the Hon'ble Apex Court, in, a judgment rendered in a case titled, as, ***Chand Rani (dead) by LRs. v. Smt. Kamal Rani (dead) by LRs.,*** reported in ***AIR 1993 SC 1742***, has, vis-a-vis, the afore trite conundrum, also, settled the clear expostulation of law, hence, bearing consonance with the verdict of the Hon'ble Apex Court, in ***Gomathinayagam Pillai's case*** (supra). However, in supplement, to the judgment rendered by the Hon'ble Apex Court, in, Gomathinayagam Pillai case (supra), the Hon'ble Apex Court, in, Chand Rani's case (supra) had enjoined qua apt discernments rather being made by courts of law, not only, vis-a-vis, the apt time being essence, of, the contract, but also vis-a-vis, the plaintiff being ready and willing, to, perform his/her part of contractual obligation. In Chand Rani's case (supra), the Hon'ble Apex Court, upon, a, conjoint application, of, the aforesaid principles, vis-a-vis, the facts, and, evidence prevailing thereat, (i) had, hence, concluded that both, time being, the, essence of the contract, and, with there being unreadiness, and, unwillingness, of the breaching/derelicting plaintiff, to perform her part of contractual obligation(s), hence, within, the covenanted period/time, (ii) thereupon, the fixation of time qua sale being readable, rather as time being, the essence of contract. Upon the afore submission addressed before this Court, by the learned counsel appearing for the plaintiff, hence, the expostulation of law, borne in the judgments (supra) rendered by the Hon'ble Apex Court, warrant(s) application.

12. Nowat, the afore extracted apposite recitals borne in Ex.PW2/B, do, with, in, explicit, and, unmistakable language, make clear, open, and, candid bespeaking(s) qua time being the essence of the contract. However, if subsequent thereto, the, parties yet evinced conduct, (i) wherefrom it may be inferable, qua, the apt time standing impliedly extended or the party claiming the relief, of, specific performance, not, either intentionally and deliberately, rather breaching any part of the apt contractual obligation(s), cast upon him or it, (ii) thereupon, the relief of specific performance of contract, vis-a-vis, the hereat immovable property, being not permissible, rather to be undenied, to the plaintiff. However, even though, the counsel for the plaintiff, has, vigorously assayed to make a vehement contention before this Court, (i) that, with the defendant in his reply to the legal notice issued, upon, him, reply whereof stands borne in Ex.PW2/F, hence making clear bespeaking(s) qua, his, in sequel to the drawing of Ex.PW2/B, rather his making, an, offer to the plaintiff, for the apt refund to him, of, the amount paid to him, as earnest money, and, also his making a complete denial, of, the execution of the agreement to sell, borne in

Ex.PW2/B, (ii) however, his further espousal qua thereupon the defendant/seller, openly breaching the contractual obligation(s), as, encumbered upon him, and, also hence his being estopped to contend, that, time being the essence of the contract, yet, cannot be availed by him. The reason, for, forming the aforesaid conclusion, arises, from the factum (a) that in consonance with the verdict pronounced by the Hon'ble Apex Court, in Chand Rani's case (supra), it, was rather incumbent, upon, the plaintiff to show his readiness and willingness to perform his part of the apt contractual obligation(s), within, the time fixed therein. (b) Even if, the counsel for the plaintiff contends that any conclusion qua unmistakability, of, couching, of, language, vis-a-vis, the period, within span whereof, the registered deed of conveyance, vis-a-vis, the suit khasra number, is to occur, enjoins also eruption, of, evidence (c) in consonance with the verdict(supra), rendered by the Hon'ble Apex Court in Chand Rani's case, (d) vis-a-vis, the conduct of the buyer, and, of the purchaser, and, the circumstances prevailing in simultaneity, vis-a-vis, the contractually specified time or subsequent thereto, (e) also being the relevant, and, material parameter, for determining, whether there is, hence deemed, implied extension of time, (f) and, hence, the parties being barred to insist, upon, the relevant deference being meted qua any clause existing in the contract, of, sale, wherewithin, even in unmistakable language, a, specific time is prescribed, and, for further determining qua, hence time being the essence of the contract. However, the aforesaid submission, cannot be accepted by this Court, (a) as the defendant's written statement to the plaint, is contrary to the echoing(s), hence, occurring in the apt reply, to the notice, reply whereof, is, borne in Ex.PW2/F, (b) and, vigour thereto stands garnered by the factum, of the plaintiff, in his cross-examination, rather making a clear admission qua his omitting, to, within six months, prescribed in the contract to sell, make any endeavour to perform his part of the contractual obligation, (c) sequel whereof being qua the plaintiff, not within, the time prescribed in the contract of sale, evincing rather his readiness and willingness to perform, his part of the contractual obligation, (d) rather his belatedly therefrom hence after three years expiring, since, the drawing of Ex.PW2/B, his making endeavours, upon, the defendant to execute the registered deed of conveyance, vis-a-vis, the suit khasra numbers. The afore belated endeavour of the plaintiff, when stand construed, with his omission, to, within the time prescribed, in, the contract of sale, make endeavours to get the sale deed executed, vis-a-vis, the suit khasra numbers, (e) begets an inevitable conclusion qua the plaintiff being estopped to contend, that, there was any implied or deemed extension of time, given, the afore echoings standing borne in the defendant's reply to the notice, as, embodied in Ex.PW2/F, (f) conspicuously when the defendant's written statement to the plaint rather constitutes, the, material document, besides when the contract of sale is proven to be validly executed, and, also when, the, afore deposition, borne, in the cross-examination, of, the plaintiff, wherein, he candidly echos qua his, not, within the period of six months, since the drawing, of, the, agreement to sell, hence making any endeavour, for, executing the registered deed of conveyance, qua the suit land, (g) thereupon, the attending circumstances, existing, in, contemporaneity to the termination of Ex.PW2/B, and/or, prevailing, in, spontaneity thereto, do not marshal any affirmative conclusion, vis-a-vis, the plaintiff, qua his evincing any conduct, wherefrom it being garnerable qua his being ready and willing, to, perform his part of the apt contractual obligation. The further corollary is (h) that when in Chand Rani's case (supra), the Hon'ble Apex Court, upon, a conjoint construction, of, the afore prime parameters, for, hence determining, whether, time being essence of the contract, had, concluded that the evident factum of unreadiness or unwillingness of the plaintiff, to perform his part of contractual obligation, (i) hence, fostering a conclusion qua his being disentitled to the relief, of specific performance, also when time prescribed in the contract of sale, is, given its being concluded to be construable to be essence of the contract, (j) thereupon, hence no waiver and estoppel can be fastened, upon, the defendant, merely, upon, afore recitals, occurring in the reply to

the notice, as, embodied in Ex.PW2/F, reiteratedly when rather the plaintiff was enjoined, to, lend affirmative proof, qua, the afore twin parameters.

13. For the foregoing reasons this Court is constrained to hold with formadibility that the time, is, the essence, of, the contract of sale, borne in Ex.PW2/B, hence, issues No.1, 2 and 4 are answered in favour of the defendants and against the plaintiff.

**Issue No.3.**

14. In view of findings upon afore issues No. 1, 2 and 4, issue No.3 has become redundant and decided accordingly.

**Issue No. 5:**

15. In view of findings upon issues No.1, 2 and 3 above, the plaintiff has no cause of action, hence, the issue No.5 is decided iin faovur of the plaintiff and against the defendants.

**Issue No.6.**

16. There exists no evidence on record to show that as to how the plaintiff's suit is not maintainable, hence, issue No. 6 are decided in favour of the plaintiff and against the defendant.

**Relief.**

17. In sequel to findings on issues aforesaid, the plaintiff's suit is dismissed. No costs. Decree sheet be prepared accordingly. All pending applications also stand disposed of.

**********

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

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

Cr. M.P. (M) No. 1301 of 2018
Date of Decision: 29.10.2018

**Narcotic Drugs and Psychotropic Substances Act, 1985 –** Section 2 (viia), (xxiiia) – Small Quantity or Commercial Quantity – Determination – Whether weight of pure contents of prohibited substance to be considered or aggregate thereof ? – Bail - Recovery of 1015 tablets of Alprazolam – Pure contents (4.90 grams) making recovery in less than commercial quantity, but aggregate weight bringing it in commercial quantity – Held, when Narcotic drug and Psychotropic Substance is mixed with one or more neutral substances, then for purposes of imposition of sentence, only pure contents of prohibited stuff are to be considered - Pure contents of recovered stuff bring it to in category of less than commercial quantity – Bail granted subject to conditions – (Paras 5 to 7). E Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau (2008) 5 SCC 161, relied upon.

***Cases referred:***

E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau, (2008)5 SCC 161
Harjit Singh vs. State of Punjab, (2011)4 SCC 441
Hira Singh & Anr. vs. Union of India, Cr. Appeal No. 722 of 2017
Mohd. Sahabuddin another vs. State of Assam, (2012) 13 SCC 491

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| For the Petitioner: | Mr. O.C Sharma, Advocate. |
| For the Respondent: | Mr. Hemant Vaid, Addl.A.G with Desh Raj Thakur, Addl. A.G and Mr. Vikrant Chandel, Dy.A.G. |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge (oral)**

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

2. In FIR No. 82 of 2018, registered against accused/petitioner herein, the FSL concerned (i) qua 1015 tablets of Alprazolam, allegedly recovered, from, the exclusive and conscious possession of petitioner herein, has opined, that the quantity, of, the purified content, of, the aforesaid psychotropic substance, as found, in the exhibit, carrying a weight, of, 4.90 grams, hence, prima-facie, the pure content thereof, of, the aforesaid psychotropic substance, as extracted from the bulk thereof, falls within, domain, of, less than, the commercial quality thereof, (ii) yet the aggregate weight, of, the psychotropic substance, as, recovered from the exclusive possession of the accused, without segregating therefrom, the pure contents, thereof renders, the apposite haul, to fall, within, the domain, of it being construable to be categorized, as, more than commercial quantity, of alprazolam tablets (iii) thereupon reiteratedly also an adjudication, is to be meted qua any of the apt pure contents thereof, hence, comprising the apt parameter(s).

3. Mr. O.C Sharma, learned counsel appearing, for the petitioner, contends, that, with hence Alprazolam,occurring at serial No.178 of, the table appended, with, the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act), and, with a clear, and, candid prescription, borne therein, wherein rather 5g, is specified, as, small quantity thereof, (i) hence, the aggregate quantum, only of, Alprazolam, as, borne in the seized narcotic substance, alone, being construable, to be the apt reckonable principle, for making the further determination, vis-a-vis, the psychotropic substance recovered, from the exclusive and conscious possession, of the accused, dehors, the total bulk of Alprozolam tablets, hence, falling or not falling, within the domain, of, small or more than small or commercial quantity thereof, (ii) specifically, when the table, with, clear explicitly hence refers to Alprazolam, and, omits to make any explicit reference therein, vis-a-vis, the other part of the psychotropic substance/neutral substance, carried in the seized Alprazolam tablets, rather, being also reckonable, nor , with, the total or aggregate, whereof, of, the entire milli-gram, carried in the seized alprazolam tablets, being mandated

to comprise, the justifiable principle, hence, for making, the apt reckoning qua, the entire seizure hence falling within the domain of small quantity or more than small or commercial quantity thereof.

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

> "16. On going through Amarsingh case (2005)7 SCC 550, we do not find that the Court was considering the question of mixture of a narcotic drug or psychotropic substance with one or more neutral substance/s. In fact that was not the issue before the Court. The black-coloured liquid substance was taken as an opium derivative and the FSL report to the effect that it contained 2.8% anhydride morphine was considered only for the purposes of bringing the substance within the sweep of Section 2(xvi)(e) as `opium derivative which requires a minimum 0.2% morphine. The content found of 2.8% anhydride morphine was not at all considered for the purposes of deciding whether the substance recovered was a small or commercial quantity and the Court took into consideration the entire substance as an opium derivative which was not mixed with one or more neutral substance/s. Thus, Amarsingh case (supra) cannot be taken to be an authority for advancing the proposition made by the learned counsel for the respondent that the entire substance recovered and seized irrespective of the content of the narcotic drug or psychotropic substance in it would be considered for application of Section 21 of the NDPS Act for the purpose of imposition of punishment. We are of the view that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance/s, for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration. "
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> (p.170-171)

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

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

> "11. The submission of the learned counsel for the appellants was that the content of the codeine phosphate in each 100 ml. bottle if related to the permissible dosage, namely, 5 ml. would only result in less than 10 mg. of codeine phosphate thereby

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

(a)wherein it stands expostulated, qua, for the bail applicant concerned, deriving, the benefits, of, notifications respectively issued, on 14.11.1985, and, on 29.1.1993, it being incumbent, for them to establish (a) the twin conditions qua the contents of narcotic substances imperatively, not, exceeding 100 mg per dose unit, (b) and with a concentration of, not, more than 2.5% in undivided preparation, and, apart therefrom, the other condition, of, it being evidently transported, only for therapeutic practice i.e. for contributing to cure of disease, also, necessitating, its, imperative satisfaction. However, the reliance placed thereupon, is inapt, for the reasons (i) the counsel not bearing in mind the trite factual matrix, as, appertaining to the case supra, as, occurs in preceding paragraph No.10 thereof, wherein, there is a trite display, of the apt recovery, effectuated, from, the accused therein, being vis-a-vis bottles of Phensedyle cough syrup, whereinwithin existed, hence, 183.15 to 189.85 mg of codeine phosphate, and, each 100 ml bottle of Recodex cough syrup, also, contained 182.73 mg of codeine phosphate, (ii) AND obviously, even after, multiplying the aforesaid quantum of codeine phosphate, as, carried in each 100 ml., bottle(s) of Phensedyle cough syrup, and, of Phensedyl, with the respective numerical strength, of, the respective cache, of, bottles, thereupon, also the level of the banned narcotic drug, namely, codeine

phosphate, being, in a quantum, whereupon, obviously the carrying thereof, of, even pure contents of codeine phosphate, as, borne in the cache, of, seized bottles, of, Phensedyle cough syrup, and, of Recodex cough syrup, is rendered hence, to fall within the ambit, of, commercial quantity thereof, (iii) hence, in succeeding paragraph No.12, the Hon'ble Apex Court, had propounded that, yet, with a notification of 14.11.1985, and, of 29.1.1993, enjoining upon the accused, to satisfy the aforesaid twin conditions, and, the material thereat also evidently, bearing out, qua its being transported, for therapeutic practice, thereupon, alone all the benefit(s) thereof, being accruable, vis-a-vis, the accused. Contrarily, obviously the level or extent or quantum, of the pure content, of the banned narcotic drug(s), namely, codeine phosphate, as, carried, in each, of the seized bottles, after, segregating therefrom hence the contents of the other part of the mixture, borne in each of the bottle(s), renders, the, apt quantum thereof, to, fall within small quantity thereof, (iv) thereupon, hence the ratio decidendi, propounded, in the aforesaid case, being unavailable for bestowal upon the accused herein, (v) more so when neither the notifications alluded therein, are, espoused hereat, for deriving, the, apposite benefits thereof, nor the twin conditions embodied, therein, are, hereat propagated nor when the extant cache, is, espoused, to be transported, only for therapeutic use, rather is a narcotic drug, than a psychotropic substance, as was thereat. Consequently, reliance upon the case supra, is, inaptly placed. Contrarily, the factual scenario prevailing hereat, is, covered by the pronouncement, made, in E. Micheal's case (supra), given the afore verdict answering with aplomb the conundrum qua (a) upon any narcotic drug or psychotropic substance being found standing mixed with one or more neutral substance/s, thereupon for the purpose of imposition of punishment, the pure content of the narcotic drug or psychotropic substance, alone comprising the apt reckonable parameter, b) AND when hereat, the, resin content is the apposite pure content of psycotropic substance, thereupon the afore pure content, is, the apt reckonable parameter, for granting bail .

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

> "21. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 1018(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and Clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice.

> For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry No.92 becomes totally redundant. Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry No.93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry No.92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity."

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

7. The learned Addl. Advocate General submits, that with notification bearing S.O.2941(E) of 18.11.2009 whereunder Note 4 in the table, at the end of Note 3, is added, (i) with a prescription therein, qua the quantum or the level of presence, of, the pure banned narcotic drug, in, the seized cache, being the singular, reckonable parameter, for making an apt determination, of, quantification thereof, thereupon, the espousal addressed before this Court, by the counsel for the petitioners, hence, rather warranting rejection. The aforesaid submission, is anvilled, upon, a verdict pronounced by the Hon'ble Apex Court in ***Cr. Appeal No. 722 of 2017, titled as Hira Singh & Anr. vs. Union of India***, decided on 3.07.2017, whereunder, the hereinafter extracted questions, stand referred, for determination, by a larger Bench of the Hon'ble Apex Court, and, more particularly with the apt reference, appertaining, vis-a-vis, the legal expostulation settled by the Hon'ble Apex Court in E. Micheal Raj's case (supra), being or not being per incuriam, vis-a-vis, the notification of 19.10.2001, rather hence awaiting rendition thereon, thereupon, the benefits of all the trite expostulations, borne in, E. Micheal Raj's Case (supra) being not affordable, to the bail petitioners,

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

preparation in totality or on the basis of the actual drug content of the specified narcotic drug?

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

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

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

larger Bench, of the Hon'ble Apex Court, upon, a reference made vis-a-vis it, only, vis-a-vis E Micheal's case. Consequently, the petition is allowed, and, the bail petitioner is ordered to be released, on bail, subject to his complying with the following conditions:

(21) that the bail applicant shall furnish personal bond in the sum of Rs.2,00,000/- with two sureties in the like amount to the satisfaction of the learned Special Judge, Solan.

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

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

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

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

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

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

**********

**BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.**

Mohan Lal .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 502 of 2017
Reserved on: 12.10.2018
Decided on: 05.11.2018

**Indian Evidence Act, 1872-** Section 3- Circumstantial evidence – Evidentiary value - Held, each and every circumstance is required to be proved by prosecution and circumstances as a whole have to make out chain in manner that only conclusion is that accused has committed offence. (Para-7) (D.B.)

**Indian Evidence Act, 1872-** Sections 3 & 45- Expert evidence – Strangulation – Proof – Held, mere fact that hyoid bone and thyroid cartilage not found fractured, itself does not prove that death was not due to strangulation – Appearance of neck can vary depending upon means adopted and used – Ligature since below level of thyroid cartilage, it did not lead to fracture of hyoid bone and thyroid cartilage. (Para-33) (D.B.)

**Indian Evidence Act, 1872-** Section 8 - Motive – Evidentiary value- Held, motive can give persuasive value to evidence but non-existence of evidence qua motive behind crime cannot provide any help to accused. (Para-36) (D.B.)

**Indian Penal Code, 1860-** Sections 201 & 302- Murder – Proof – Circumstantial evidence- Accused allegedly strangled his wife and scattered things lying in room including almirah etc. for showing as it were case of death-cum-robbery – Trial Court convicting accused on basis of circumstantial evidence – Appeal against – On facts, death of deceased on account of strangulation, relation of accused and deceased strained because of demand of dowry, no evidence of forced entry into room of deceased or presence of tool marks on latches and metallic loop – Evidence indicating entry of known person into room on opening of door by deceased - Theory of burglary inherently improbable and pretentious - Recovery of rope used in crime and ornaments of deceased at instance of accused, absence of accused from his work place during relevant period and failure to prove plea of alibi– Held, accused proved to have committed aforesaid offences – Appeal of accused dismissed – Conviction and sentence upheld. (Paras-33 to 46) (D.B.)

***Cases referred:***

Padala Veera Reddy vs. State of Andhra Pradesh and others, AIR 1990 SC 79
Ponnusamy vs. State of Tamil Nadu (2008) 5 SCC 587
Rajdev alias Raju & another vs. Stae of H.P., Criminal Appeal No. 288 of 2015
Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 SC 1622
State of H.P. vs. Sunil Kumar, Criminal Appeal No. 326 of 2011
State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 SCC 551

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| For the appellant: | Mr. Jeevesh Sharma and Ms. Richa Thakur, Advocates. |
| For the respondent/State: | Mr. J.S. Guleria, Deputy Advocate General. |

The following judgment of the Court was delivered:

**Chander Bhusan Barowalia, Judge.**

The present appeal is maintained by the appellant/accused/convict (hereinafter referred to as "the accused"), laying challenge to judgment dated 18.02.2017, passed by learned Additional Judge (II), Kangra at Dharamshala, H.P., in Sessions Trial No. 1-D/VII/2015, whereby the accused was convicted and sentenced for the commission of offences punishable under Sections 302 and 201 of Indian Penal Code, 1860 (for short "IPC").

2. The facts giving rise to the present case can succinctly be encapsulated as under:

On 24.07.2014 Smt. Renuka Devi (deceased) was found dead on the floor of her room. The door of her room was ajar, almirah and trunk were open and the things were found scattered. This unfortunate scene was first witnessed by Shri Ramesh Chand, father-in-law of the deceased, who in turn, telephonically informed Shri Subhash Chand, father of the deceased. Shri Subhash Chand hotfooted to the scene of occurrence alongwith his relatives and noticed blood on the front side of the mouth of the deceased. In the interregnum, Shri Jagpal Singh, Pradhan, Gram Panchayat, Samela, informed the police and the police on reaching the spot recorded the statement of the father of the deceased, which formed basis for registration of FIR under Section 302 IPC. Thereafter, the investigation ensued. The scene of crime was photographed and spot map was prepared. Forensic team visited the spot and collected the blood lying on the spot, seized a bed-sheet, pillow cover and scarf of the deceased. Inquest papers were filled in and the corpse was sent

to Dr. Rajinder Prasad Government Medical College, Tanda, for post mortem examination. Police recorded the statements of the witnesses and inquires were made from the husband of the deceased (accused), who divulged that on 23.07.2014, at about 05:30 p.m., he started to his home from Pinjaur on motorcycle, having registration No. HP-40-A-5214, and reached at about 10:30 p.m. He has further divulged that in the bed room he had fracas with the deceased and strangulated her. Subsequently he opened the almirah and trunk and scattered the things in the room and around 01:30 a.m. he left the scene of crime. The accused has further divulged to the police that he took the ornaments as also the rope, which was used for strangulating the deceased, and hid the same in his room at Pinjaur. The accused took the ornaments and scattered the things so as to give the incident, shape of robbery. As a sequel to the statement made by the accused, police got recovered gold ornaments, rope, allegedly used for strangulating the deceased, and mobile of the accused from his room at Pinjaur. As per the final opinion of the Medical Officer, which was given after receipt of RFSL report, it was opined that the deceased died due to homicidal fatal pressure over neck consistent with strangulation by ligature. After completing all the formalities, *challan* was presented in the Court.

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

4. The learned Trial Court, vide impugned judgment dated 18.02.2017, convicted the accused for the offence punishable under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life and to pay fine of Rs.50,000/-. In default of payment of fine, the accused was further ordered to undergo rigorous imprisonment for a period of one year. The accused was also convicted under Section 201 IPC and sentenced to undergo rigorous imprisonment for seven years and ordered to pay fine of Rs.50,000/-. In default of payment of fine, the accused was ordered to undergo rigorous imprisonment for a period of six months, hence the present appeal maintained by the appellant (accused/convict).

5. The learned counsel for the accused/appellant has argued that the learned Trial Court has wrongly appreciated the facts and law and the conviction has been based only on surmises and conjectures. He has further argued that there is nothing against the accused and he has been falsely implicated. The learned Trial Court has also failed to appreciate that there are major lacunae in the material available on record and the accused cannot be deprived the benefit of doubt, so the appeal be allowed and the accused be acquitted by setting aside the judgment of the learned Trial Court. Conversely, the learned Deputy Advocate General has argued that the learned Trial Court has correctly appreciated the material, which has come on record and the judgment, as rendered by the learned Trail Court, is after appreciating the facts and law to their right and true perspective. He has further argued that there is reliable evidence against the accused and he has been rightly convicted by the learned Trial Court, so the judgment of acquittal needs no interference and the appeal be dismissed.

6. In rebuttal, the learned counsel for the accused has argued that after re-appreciating the evidence, the accused be acquitted by setting aside the judgment of the learned Trial Court, as the prosecution has failed to prove the guilt of the accused.

7. The edifice of the prosecution story rests upon circumstantial evidence and the Hon'ble Apex Courts as also this High Court in catena of judgments settled the law qua the same. In nitty-gritty, the law with respect to circumstantial evidence is that each and every circumstance is required to be proved by the prosecution and the circumstances, as a

whole, have to make out a chain in a manner that the only conclusion is that the accused has committed the offence, as alleged by the prosecution. The law on the point of circumstantial evidence is considered and settled by the Hon'ble Courts in the following judgments:

1. *State of H.P. vs. Sunil Kumar, Criminal Appeal No. 326 of 2011, decided on 15.06.2017;*
2. *Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 Supreme Court 1622;*
3. *Padala Veera Reddy vs. State of Andhra Pradesh and others, AIR 1990 Supreme Court 79;*
4. *State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 Supreme Court Cases 551, &*
5. *Rajdev aliasRaju & another vs. Stae of H.P., Criminal Appeal No. 288 of 2015.*

8. In ***State of H.P. vs. Sunil Kumar, Criminal Appeal No. 326 of 2011, decided on 15.06.2017,*** this Court has held as under:

> "13. It is more than settled that in case of circumstantial evidence, the circumstances from which interference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and there be a complete chain of evidence consistent only that the hypothesis of guilt of the accused and totally inconsistent with his innocence and in such a case if the evidence relied upon is capable of two inferences then one which is in favour of the accused must be accepted. It is clearly settled that when a case rests on circumstantial evidence such evidence must satisfy three tests:
>
> i) The circumstance from which an inference of guilt is sought to be drawn must cogently and firmly established.
>
> ii) Those circumstances should be of a definite tendency un-erringly pointing out towards the guilt of the accused.
>
> iii) The circumstances taken cumulatively, should form a complete chain so that to come to the conclusion that the crime was committed by the accused.
>
> 14. Equally well settled is the proposition that where the entire prosecution case hinges on circumstantial evidence the Court should adopt cautious approach for basing the conviction on circumstantial evidence and unless the prosecution evidence point irresistible to the guilt of the accused, it would not be sound and safe to base the conviction of accused person.

15. In case of circumstantial evidence, each circumstances must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypothesis and should be consistent that only the guilt of the accused (See: Lakhbir Singh vs. State of Punjab, 1994 Suppl. (1) SCC 173)."

9. The Hon'ble Supreme Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 Supreme Court 1622,*** has held as under:

*"48.* Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it.

… … … … … …

150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are

complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

... ... ... ... ... ...

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

159. If these conditions are fulfilled only then a Court can use a false explanation or a false defence as an additional link to lend an assurance to the Court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal's case (AIR 1981 SC 765) (supra) where this Court observed thus:

"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."

160. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case (supra). Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances

and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General."

10. The Hon'ble Supreme Court in ***Padala Veera Reddy vs. State of Andhra Pradesh and others, AIR 1990 Supreme Court 79,*** has held as under:

"12. There are certain salient and material features in the present case which are not controverted; they being that A-1 to A-3 and the deceased lived under a common roof, that the deceased had instituted a civil suit against her father, PW-8 and brother PW-9 claiming exclusive possession of the disputed land, that the deceased was found dead on the morning of 7.9.85 and that there were certain visible injuries such as abrasions, nail marks and contusions on the part of the nose, upper lip, chin and neck etc. as noted by the Medical Officers (PWs 5 and 6) in the post-mortem report Ex. P. 9. The appellate Court on the strength of the opinion given by the Medical Officers (PWs 5 and 6) has agreed with the view of the Trial Court that the death of the deceased was of homicidal one and not suicidal and held "therefore suicidal is ruled out." We also very carefully went through the evidence of the Medical Officers and found that the prosecution has convincingly established that the death of the deceased was due to forcible administration of poison and smothering. Hence we are in full agreement with the concurrent findings of the Courts below that it is a clear case of murder.

... ... ... ... ... ...

15. While considering the above circumstances, the appellate Court has expressed its view that the explanation given by the accused that they were at the marriage house of PW-1 throughout the night is nothing but a false explanation and that the culprits who ever they might have been should have administered the poison to the victim and thereby caused her death and that there is very strong suspicion against the accused persons

but the prosecution cannot be said to have established the guilt of the accused decisively since the suspicion cannot take the place of legal proof. The relevant portion of the final conclusion of the appellate Court reads thus:

> "There is no evidence whatsoever either from the neighbours or from others to show that the accused at any time ill-treated the deceased or treated her cruelly. In these circumstances, it is not possible to hold that the prosecution has established the guilt on the part of A. 1 to A. 3. Thus, there is no conclusive evidence that the accused committed the offence of murder. It is an unfortunate case where cold-blooded murder has been committed and it is difficult to believe that no inmate of the house had any hand in the offence of murder. But that will be only a suspicion which cannot take the place of proof."

16. We, in evaluating the circumstantial evidence available on record on different aspects of the case, shall at the foremost watchfully examine whether the accused 1 to 3 had developed bad-blood against the deceased to the extent of silencing her for ever, that too in a very inhuman and horrendous manner. The appellant wants us to infer that the deceased should have been subjected to all kinds of pressures and harassments and compelled to institute the suit against her father and brother claiming exclusive right over the landed property in order to grab the said property, that this conduct of the accused should have been resented by the deceased and that on that score the accused should have decided to put an end to her life. In our view, this submission has no merit because there is no acceptable evidence showing that there was any quarrel in the family and that the deceased was ill-treated either by her husband or in-laws. The appellate Court while dealing with this aspect of the case has observed that there is no evidence that the accused ill-treated the deceased, which observation we have extracted above. Hence, we hold that there is no sufficient material to warrant a conclusion that the accused had any motive to snatch away the life threat of the deceased. There is no denying the

fact that the deceased did not accompany her husband and in-laws to attend the marriage celebrated in the house of PW-1 and remained in the scene house and that she has been done away with on the intervening night of 6th/7th September, 1985. From this circumstance, the Court will not be justified in drawing any conclusion that the deceased was not leading a happy marital life. As observed by the appellate Court, the explanation offered by accused 1 to 3 that they remained in the house of PW 1 throughout the night is too big a pill to be swallowed. But at the same time, in our view, this unacceptable explanation would not lead to any irrestible inference that the accused alone should have committed this murder and have come forward with this false explanation. We have no hesitation in coming to the conclusion that it is a case of murder but not a suicide as we have pointed out supra. The placing of the tin container with the inscription 'Democran, by the side of the dead body is nothing but a planted one so as to give a misleading impression that the deceased had consumed poison and committed suicide. But there is no evidence as to who had placed the tin container by the side of the dead body. Even if we hold that the perpetrators of the crime whoever might have been had placed the tin, that in the absence of any satisfactory evidence against the accused would not lead to any inference that these accused or any of them should have done it. It is the admitted case that the first accused handed over three letters Ex. P. 6 to P. 8 alleged to have been written by the deceased to the Investigating Officer. The sum and substance of these letters are to the effect that the deceased had some grouse against her parents and that the accused were not responsible for her death. The explanation given by accused No. 1 in this written statement is that by about the time of the arrival of the police, one Sathi Prasad Reddy handed over these letters to him saying that he (Reddy) found them near the place where the dead body was laid and that he (A-1) in turn handed over them to the police. PWs 8 and 9 have deposed that these letters are not under the hand writing of the deceased. But the prosecution has not taken any effort to send the letters to any hand-writing export for comparison with the admitted writings of the

deceased with the writings found in Ex. P. 6 to P. 8. Under these circumstances, no adverse inference can be drawn against accused No. 1 on his conduct in handing over these letters.

17. No doubt, this murder is diabolical in conception and cruel in execution but the real and pivotal issue is whether the totality of the circumstances unerringly establish that all the accused or any of them are the real culprits. The circumstances indicated by the learned Counsel undoubtedly create a suspicion against the accused. But would these circumstances be sufficient to hold that the respondents 2 to 4 (accused 1 to 3) had committed this heinous crime. In our view, they are not.

… … … … … …

22. We are of the firm view that the circumstances appearing in this case when examined in the light of the above principle enunciated by this Court do not lead to any decisive conclusion that either all these accused or any of them committed the murder of the deceased, Vijaya punishable under Section 302 read with Section 34 of I.P.C. or the offence of cruelty within the mischief of Section 498-A I.P.C. Hence, viewed from any angle, the judgment of the appellate Court does not call for interference."

1. The Hon'ble Supreme Court in ***State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 Supreme Court Cases 551,*** has held as under:

"12. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this Court. In State of U.P. v. Satish, it was noted as follows:

"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused

and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."

13. In Ramreddy Rajesh Khanna Reddy v. State of A.P., it was noted as follows:

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration."

(See also Bodhraj v. State of J&K, (2002) 8 SCC 45)

14. A similar view was also taken in Jaswant Gir v. State of Punjab, 2005 12 SCC 438. Factual position in the present case is almost similar, so far as time gap is concerned.

15. Out of the circumstances highlighted above really none is of any significance. Learned Counsel for the appellant-State highlighted that the extra judicial confession itself was sufficient to record the conviction. On a reading of the evidence of CW-1 it is noticed that accused Ram Balak did not a say a word about his own involvement. On the contrary he said that he did not do anything and made some statements about the alleged act of co-accused. Additionally, in his examination under Section 313 of Code, no question was put to him regarding his so called extra judicial confession. To add to the vulnerability, his statement is to the effect that after about 11 days of the incidence the extra judicial confession was made. Strangely he stated that he told the police after three days of the incidence about the extra judicial confession. It is inconceivable that a person would tell the police after three days of the incidence about the purported extra judicial confession which according to the witness himself was made after eleven days. Learned Counsel for the State submitted that there may be some confusion. But it is seen

that not at one place, but at different places this has been repeated by the witness.

16. Learned Counsel for the appellant also refers to a judgment of this Court in Abdul Razak Murtaza Dafadar v. State of Maharashtra, more particularly para 11 that the Dog Squad had proved the guilt of the accused persons. In this context it is relevant to take note of what has been stated in para 11 which reads as follows: (SCC pp. 239-40)

> "11. It was lastly urged on behalf of the appellant that the lower courts ought not to have relied upon the evidence of dog tracking and such evidence was not admissible in order to prove the guilt of the appellant. The evidence of tracker dogs has been much discussed. In Canada and in Scotland it has been admitted. But in the United States there are conflicting decisions:
>
> 'There have been considerable uncertainty in the minds of the Courts as to the reliability of dogs in identifying criminals and much conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases however, reveals that most Courts in which the question of the admissibility of evidence of-trailing by blood-hounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the person trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime.' (para 378, Am. Juris. 2nd edn. Vol. 29, p. 429.)
>
> There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross- examination, the dog s human companion must go into the box and report the

dog s evidence, and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value. In R. v. Montgomery,1866 NI 160 a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards the police got them on a nearby road. About an hour and half later the police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off and tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been stealing the wire was inconclusive and that the evidence of the behaviour of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog s reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in traffic case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog s evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of

> dog tracking, even if admissible, is not ordinarily of much weight.
>
> It is submitted by learned Counsel for the appellant that in the said case this Court had upheld the conviction. Though in the said case the conviction was upheld, but that was done after excluding the evidence of Dog Squad. This Court found that the rest of the prosecution evidence proved the charges for which the appellants therein had been convicted."

12. This Court in ***Rajdev alias Raju & another vs. State of H.P., Criminal Appeal No. 288 of 2015,*** decided on 30.05.2016, has held as under:

> 51. It is settled position of law that suspicion however strong cannot be a substitute for proof. In a case resting completely on the circumstantial evidence the chain of circumstances must be so complete that they lead only to one conclusion, that is the guilt of the accused. In our opinion, it is not safe to record a finding of guilt of the accused Manoj Sahani and the accused Manoj Sahani is entitled to get the benefit of doubt."

13. After touching the different facets relating to the law laid down by Hon'ble Courts on the subject of circumstantial evidence, the testimonies of the prosecution witnesses need discussion and analysis. So, in order to appreciate the rival contentions of the parties we have gone through the record carefully.

14. In the present case, testimony of PW-1 is very vital. PW-1, Shri Subhash Chand (complainant), father of the deceased, deposed that on 24.07.2014, at about 07:30 a.m., Shri Ramesh Chand, father-in-law of the deceased, telephonically informed him that the deceased had died. He has further deposed that Shri Ramesh Chand also informed him that the deceased was murdered by burglars, so he rushed to the scene of crime. On reaching the spot of occurrence, he saw lock of almirah was broken, a trunk was also open and the clothes were scattered. The deceased was lying dead on the floor and there was blood in front of her nose, blackish injury marks by the side of both the eyes near temple region and ligature mark around her neck. Subsequently, the police came on the scene of crime and he had suspicion qua the burglary, so he got his statement recorded with the police, which is Ex. PW-1/A. Police collected the blood from the spot and put the same in a plastic container, which was sealed in a cloth parcel. Police also seized a bed-sheet, pillow cover and *dupatta* lying on the bed. The corpse was sent for post mortem examination and inquest forms, Ex. PW-1/B and Ex. PW-1/C, were filled in. As per the complainant, the accused, while in police custody, voluntarily stated that he can get the ornaments recovered, which were stolen from the almirah. The accused has further stated that he had concealed a rope, which was used for strangulating the deceased, and he can also get the same recovered. Accused also divulged that he can also get his mobile phone recovered from his room at Pinjaur. Thus, the police recorded disclosure statement of the accused, which is Ex. PW-1/D. As a sequel to the disclosure statement, so made by the accused, he led the police to the spot of occurrence and got it identified, whereupon police prepared memo, Ex. PW-1/E. This witness, in his cross-examination, has deposed that he did not narrate to the police that there was forcible entry in the room of the deceased, so he had a suspicion over

the family of in-laws of the deceased. He has admitted that the relation between the deceased and the accused were affable and there was no family dispute. He has further deposed that after the marriage the deceased started residing with the accused at Pinjaur. As per the testimony of this witness, on 24.07.2014 the accused was not in the home and he only came when the corpse was taken for postmortem examination. The father of the accused disclosed that accused is at Baddi and he had informed him qua the occurrence. PW-1 specifically denied that the accused was at Baddi on 23.07.2014 and 24.07.2014, as he made call to the employer of the accused and it was informed that since 23.07.2014 the accused is not coming for work. However, he did not divulge this fact to the police. This witness denied that when he entered the room it appeared that theft had taken place and voluntarily deposed that entire scene seemed fabricated. This witness denied that he pressurized the investigating agency, as it failed to nab the actual culprit, so the police foisted a false case on the accused. PW-1 was re-examined on the application of the prosecution. He identified ornaments of the deceased, Ex. P12 to Ex. P18. As per his testimony, gold chain, Ex. P14 and gold ring, Ex. P15, were gifted by him to the deceased during the time of her marriage. He has further deposed that the deceased used to wear gold tops, gold ear rings, gold nose ring and gold *tikka*, Ex. P12, Ex. P13, Ex. P17 and Ex. PW-18, respectively. During the course of his cross-examination, he admitted that police showed him ornaments and he did not give any receipt qua the ornaments.

15. PW-2, Shri Vijay Kumar, Pradhan of Gram Panchayat, deposed that on 24.07.2014, in his presence, police lifted blood from the spot of occurrence and the same was preserved in a plastic container and sealed in a cloth parcel. He has further deposed that in his presence police took into possession bed sheet, Ex. P1, pillow cover, Ex. P2 and *dupatta,* Ex. P3, from the spot of occurrence and all these articles were sealed in a cloth parcel, Ex. P4, and taken into possession vide seizure memo, Ex. PW-2/A.

16. PW-3, Shri Pankaj Kumar (brother of the deceased), deposed that when he reached the spot, his sister, Smt. Monika Devi, told him that no burglary took place and the entire scene is fabricated by the in-laws of the deceased and the deceased was murdered in a preplanned manner. He has further deposed that his sister also told him that she saw blood oozing out of the nose of the deceased, blackish injury mark by the side of both the eyes near temple region and a ligature mark around her neck. Smt. Monika further told to PW-3 that 10-15 days prior to the incident she visited the house of the deceased and the deceased divulged to her that the accused subjects her to cruelty. Smt. Monika Devi, raised strong suspicion that the accused killed the deceased.

17. In the wake of testimony of PW-3 (brother of the deceased), which mainly revolves around what has been divulged to him by PW-4 (sister of the deceased), the testimony of PW-4, Smt. Monika Devi, becomes vital. PW-4 deposed that on 24.12.2014 her sister-in-law, Smt. Pabna, made a telephonic call and told her to immediately come at Kot Kwalla, as her sister is indisposed. So, she hurriedly rushed to Kot Kwalla, wherefrom she alongwith other relatives went to the matrimonial home of her sister at Samela. When they reached Samela, they found corpse of the deceased lying on the pyre in the veranda and her father told her that the accused killed the deceased and threw her on the floor, which caused bleeding from her lips and her tongue had come out. This witness has further deposed that on 28.06.2014, she went to the house of the deceased and the deceased narrated that the accused gave beatings to her and demanded money. This witness, in her cross-examination, was confronted with her statement given to the police wherein she did not state that on 28.06.2014 the deceased divulged to her that the accused raised demand of money and gave beatings to her. She also did not state to the police that her father told her that the accused killed the deceased. She deposed that no previous incident of cruelty

was every reported to anyone. She voluntarily deposed that she asked the deceased to report the matter to the police, but she refused to do so.

18. PW-5, Constable Parveen Dutt, deposed that vide memo, Ex. PW-5/A, motorcycle, having registration No. HP-40A-5214, was taken into possession alongwith its documents and it was unearthed that the accused used it for his journey from Kiratpur to Samella and back. This witness, in his cross-examination, has deposed that he neither conducted any investigation in the case, nor remained associated in the investigation, except for the recovery of the motorcycle.

19. PW-6, HHC Vijay Krishan, deposed that on 24.07.2014 SI Narinder brought motorcycle, having registration No. HP-40A-5214, which was parked in Police Station Haripur and it remained there till 30.07.2014. Vide memo, Ex. PW-5/A, the motorcycle was handed over to SHO, Police Station, Kangra, alongwith its documents and a General Diary entry, Ex. PW-6/A, was made qua deposit of motorcycle at Police Station, Haripur. This witness, in his cross-examination, has admitted that he did not mention anything why the motorcycle was not handed over to SHO, Police Station, Kangra, for six days. However, he voluntarily deposed that SHO himself communicated that he will himself come to take the motorcycle.

20. PW-7, HC Shashi Pal, deposed that on 24.07.2014, Inspector/SHO Mohinder Singh deposited with him two parcels. The parcels contained bed sheet, pillow cover, *dupatta* and socked blood of the deceased. He has further deposed that vide entry, Ex. PW-7/A, he stored the parcels in the *malkhana.* On 26.07.2014 HHC Onkar Chand deposited with him parcels containing viscera, clothes etc. of the deceased and he, made entry, Ex. PW-7/B, in the *malkhana* register to this effect. On 28.07.2014, Inspector/SHO Mohinder Singh deposited with him cloth parcels, which contained ornaments, cell phone and plastic rope and the same were taken in *malkhana* through memo, Ex. PW7/C. He has deposed that on 31.07.2014, vide RC Ex. PW-7/D, he sent these parcels, except the parcels containing the gold ornaments and cell phone of the accused, through constable Gulshan Kumar to RFSL, Dharamshala, for chemical examination. This witness, in his cross-examination, has denied that the case property was tampered with.

21. PW-8, Constable Manoj Kumar, deposed that photographs, Ex. PW-8/A-1 to Ex. PW-8/A-22, of the scene of crime, were clicked by him and videography was also done by him at the place of recovery at Kiratpur. He prepared CDs Ex. PW-8/B1 and Ex. PW-8/B2. He, in his cross-examination, has admitted that he is not a professional photographer. PW-9, Constable Gulshan Kumar, is a formal witness, as he only took the case property for forensic examination to RFSL, Dharamshala. PW-10, HC Surjeet Singh, deposed that on 23.07.2014 FIR, Ex. PW-10/A, was registered on the anvil of the statement of Shri Subhash Chand, complainant (PW-1). As per the testimony of this witness, on 24.07.2014 he received the statement and by mistake he had mentioned the date in his examination-in-chief as 23.07.2014.

22. PW-11, Shri Jagpal, the then Pradhan of Gram Panchayat, Samella, deposed that on 24.07.2014 Shri Ramesh Chand called and told him that his daughter-in-law (deceased) has died. As per the version of this witness, Shri Ramesh Chand also told him that someone committed theft in his house and also killed the deceased. He has deposed that at about 07:45 a.m. he informed the police and the police took the corpse for postmortem examination. He deposed that he does not know who murdered the deceased. This witness was exhaustively cross-examined and he denied that on the subsequent day he came to know that the deceased had been killed by the accused and thereafter the accused fled away to Baddi on his motorcycle. He, in his cross-examination, has admitted that no

complaint had been received in Panchayat against the accused. As per this witness, Harishta, daughter of the deceased, is residing with her grand parents.

23. PW-12, Dr. Rahul Gupta, the then Registrar Forensic Medicine, Dr. RPGMC, Tanda, deposed that on 24.07.2014 he alongwith Dr. Vijay Arora, on application, Ex. PW-12/A, moved by SHO, Police Station, Kangra, conducted post mortem of the deceased and issued report, Ex. PW-12/B. He has further deposed that he handed over viscera, clothes etc. of the deceased to the police for forensic examination and after the receipt of forensic report, Ex. P-A, they opined that the deceased died due to homicidal fatal pressure over neck consistent with strangulation by ligature. As per this witness, injury of ligature mark on the person of the deceased is possible with ligature material Ex P5 and it was sufficient in the ordinary course of nature to cause death of a person. This witness, in his cross-examination, has admitted that words *"sufficient in ordinary course of nature"* did not mention in the PMR. He has voluntarily deposed that instead of words *"sufficient in ordinary course of nature"* it was mentioned *"fatal pressure over neck".* He has further admitted that hyoid bone and thyroid cartilage were intact, but denied that in all cases where throttling is there, there is possibility of fracture of hyoid bone. He has voluntarily deposed that in the instant case ligature did not lead to fracture of hyoid bone and thyroid cartilage, as ligature was below the level of thyroid cartilage.

24. PW-13, Shri Kaka Singh, Hardware shop owner at Kiratpur, deposed that about one and half years ago, police alongwith 10-15 persons came to his shop and on that day he did not see the accused. He has further deposed that police inquired from him that whether he sold rope to any person and he denied that he had sold any rope to anyone. As per this witness, police did not show him any rope on that day. This witness did not support the prosecution case, so he was exhaustively cross-examined. He, in his cross-examination, deposed that his statement was not recorded on the day of the visited of the police. He denied that he had divulged to the police that accused had bought a rope from him some days back. He has specifically denied that rope Ex. P5 was sold by him to the accused.

25. PW-14, Shri Karam Singh, Pradhan, Gram Panchayat, Kholmola, deposed that on 27.07.2014 he went to his in-laws' house at Kiratpur. He has further deposed that when he reached Kiratpur, police alongwith Pradhan, Jasvinder Singh and accused were there. As per this witness, accused was tenant of his father-in-law, Shri Telo Singh and when he arrived in the premises, police alongwith Pradhan and accused were already in the room. As per the testimony of this witness, some gold ornaments were lying on the bed of the accused and the police sealed them in a white cloth parcel. He feigned ignorance about the description of the ornaments. He has deposed that police also seized a mobile phone, but he does not know whom that phone belonged. Nothing else was recovered by the police in his presence and the accused did not divulge anything to the police in his presence. As this witness did not support the prosecution case, he was also exhaustively cross-examined at length. During the course of his cross-examination he denied all the suggestions connecting the accused with the recovery of the ornaments, mobile and rope. When he was confronted with his earlier statement given to the police, which was also videographed and a CD was prepared, he deposed that his previous statement that the police, accused and Pradhan were already present inside the room is not correct, as he made it mistakenly. Thereafter, this witness prayed for pardon that he previously stated wrong. As per the deposition of this witness, rope Ex. P5, was taken out by the accused from his bag and handed over to the police. He further deposed that his earlier statement that rope was not recovered at the instance of the accused is false. The accused also gave his mobile phone to the police. This witness, during his cross-examination on behalf of the accused, deposed

that when the accused took out a cloth pack containing jewelry from the cup of the ceiling fan, he was not inside the room and standing on the door.

26. PW-15, Dr. S.K. Pal, the then Assistant Director (Biology & Serology Division), RFSL, Dharamshala, deposed that on 24.07.2014 he, alongwith scientific team, visited and examined the scene of crime in order to obtained clues and to gather evidences. As per this witness, they found a dead body of 27 years' old female wearing green full sleeved shirt and pink *salwar* lying on a mat in prone position on the floor of bedroom near double bed. He noticed dark red discoloration on both eyes of the deceased. There was light brown ligature mark/impression around the neck. He has further deposed that an iron almirah was lying on a side of the room near double bed and the door of that almirah was open. As per this witness, no tool marks were observed on the outer door and chest of the almirah. Lock and unlock mechanism of the lock was checked and it was found in order. There was a small iron box lying on the big iron box in the room. The small iron box was found in open condition. One *Harrison* make lock and two keys were found lying near the box. Lock and unlock mechanism of lock was in order. They did not observe tool marks on the iron box, latch and metallic loop/*kunda*. The spot was photographed and he prepared report qua scene of occurrence, which is Ex. PW-15/A. After examining the articles sent by SHO, he issued report, Ex. PW-15/B. This witness, in his cross-examination, admitted that when he reached the spot, the police party was already present there. He has also admitted that relatives of the deceased had already visited the room, where the corpse was lying. He has deposed that he did not lift finger prints from the door, almirah etc. and also did not lift any skin tissues from the corpse where the ligature marks were present. When they visited the spot, the spot was not cordoned off or preserved.

27. PW-16, Shri Jaswinder Singh, deposed that on 27.07.2014, when the police arrived, Shri Telu Singh called him to his house. He has further deposed that when he reached there, police personnel and accused were sitting in the first room of Telu Singh and police informed him that search of the room of the accused has to be conducted. As per the testimony of this witness, accused opened the lock of his room, went inside the room and took out a cloth piece *(gathri)* from the upper cap of ceiling fan by climbing on a stool. The said *gathri* was opened and it was found to have contained gold ornaments, i.e., a nose ring, a gold necklace, a pair of ear rings (tops), another pair of ear rings *(jhumka),* a pair of silver anklet, a gent's ring, Ex. P12 to P18, respectively, and vide memo, Ex. PW-14/A, police seized the aforesaid articles. He has further deposed that a mobile was also found lying on the bed of the accused, which was also seized by the police. As per the deposition of this witness, a rope was also found lying by the side of the bed and the same was seized by the police. The accused did not disclose how he came into possession of the aforesaid articles, i.e., rope and ornaments. This witness was cross-examined at length by the learned Public Prosecutor and during his cross-examination, he denied that the accused disclosed that he had purchased the rope from the shop of Kaka Singh (PW-13) at Kiratpur. This witness also denied that accused disclosed that on 23/24.07.2014, he had gone to his house at village Samela and killed his wife by strangulating her with the help of rope and thereafter he had returned to Kiratpur alongwith ornaments of his wife. This witness, during his cross-examination conducted on behalf of the accused, denied the suggestions contrary to his version given in his examination-in-chief.

28. PW-17, Shri Daveshawar Sharma, Human Resource Specialist of Gillete India Ltd., deposed that on application, Ex. PW-17/A, moved by the police, he supplied attendance charge, Ex. PW-17/B, w.e.f. 22 to 25 July, 2014, pertaining to the accused. As per the record, the accused was absent from his duty w.e.f. 23.07.2014 to 25.07.2014. This witness, in his cross-examination, has deposed that presence in the attendance register was

not marked in his presence, but the same is marked by Security Guard attending the inflow and outflow on the gate of the company. He has further deposed that he did not physically verify the presence of the employee of the company on the given date.

29. The last witness in the instant case is PW-18, Deputy Superintendent of Police Mohinder Manhas, who is Investigating Officer. He deposed that on 24.07.2014, at 08:35 a.m., Shri Jagpal Singh, Pradhan Gram Panchayat Samella, telephonically informed qua the murder of the deceased and to this extent GD entry, Ex. PW-18/A, was made. He has further deposed that thereafter he alongwith police officials went to the spot, where he recorded the statement of the complainant (PW-1, Shri Subhash Chand), who was having suspicion that the deceased, who was his daughter, had been murdered by some unknown person. Subsequently, he sent the said statement to Police Station, Kangra, for registration of FIR. He conducted inquest proceedings and filled forms, Ex. PW-1/B and Ex. PW-1/C. Photographs, Ex. PW-8/A13 to Ex. PW8/A2 were clicked by him, the scene of crime was videographed and to that extent CD, Ex. PW-18/D, was prepared. He has deposed that articles in the room were found lying scattered and the corpse of the deceased was lying on floor besides the bed. Almirah and trunks were found open. He prepared spot map, Ex. PW-18/B and the blood, which was lying near the dead body, was lifted with the help of thread and dried, thereafter it was put in a small plastic container, which was sealed in a parcel. This witness has further deposed that a bedsheet, pillow cover, which was lying on the bed, and a *duptta,* which was lying on the back side of the bed, Ex. P1 to Ex. P3, respectively, were sealed in another parcel and taken into possession vide memo, Ex. PW-2/A. Application, Ex. PW-12/A, was moved for post mortem examination of the corpse and report, Ex. PW-12/B was obtained. As per the version of this witness, on 25.07.2014, the accused was interrogated and arrested. On 26.07.2014 the accused led a police party to his house at place Samela, where he identified the place where he had killed his wife by strangulating her with a rope and to this effect he prepared identification memo, Ex. PW-1/E. Spot map, Ex. PW-18/E was prepared. This witness has further deposed that on the same day the accused, while in police custody, made disclosure statement, Ex. PW-1/D, that the rope, which he used for strangulating the deceased, and her ornaments taken out from almirah and cell phone, which was used by him on the said day, have been kept concealed by him in his quarter at Kiratpur and he is having exclusive knowledge of the same and could get the same recovered. On 27.07.2014 the accused led him to the house of one Telu Singh at Kiratpur, where he was residing at the time of occurrence. As per this witness, Shri Karam Singh, Pradhan Gram Panchayat Khola Mola and Shri Jaswinder Singh, Ex Pradhan Gram Panchayat, Kiratpur, were associated in the investigation and in their presence the accused led the police party to his quarter and went inside after opening its lock. The accused took out a cloth pack, which was kept concealed in the cup of ceiling fan, and it was handed over to police. On opening, the said pack contained a pair of gold tops, a pair of gold ear rings, gold chain, gold gent's ring, a pair of silver anklets, a gold nose ring and a gold *tikka,* which are Ex. P12 to Ex. P18, respectively, and the accused divulged that he brought the ornaments from the almirah of the deceased. He sealed and seized these ornaments and also seized cell phone, i.e., Sony xperia, which was lying on the bed, having SIM No. 080597-29077 and 090177-14055. He has deposed that the accused took out a rope lying beneath the bed and handed the same to him and all these articles were seized vide seizure memo, Ex. PW-14/A. As per this witness, he prepared spot map, Ex. PW-18/J, and during the course of investigation the accused disclosed that rope, Ex. P5, was purchased by him from the shop of one Shri Kaka Singh at Kiratpur and he identified the shop. On 30.09.2014 application, Ex. PW-17/A, was moved by him to Manager Gillette India Ltd., Baddi, and attendance summary, Ex. PW-17/B, was procured. He, vide memo, Ex. PW-5/A, took into possession motorcycle, having registration No. HP-40A-5214. Statements of the witnesses were recorded under Section 161 Cr.P.C. After receipt of

forensic report, Ex. PA and Ex. PW-15/B, he procured final opinion with respect to cause of death of the deceased. This witness has further deposed that he procured opinion, Ex. PW-12/B, qua possibility of strangulation with rope, Ex. P5. After completion of investigation, he presented the police report in the Court on 25.09.2014. This witness, in his cross-examination, has deposed that at the time of inquest, the father of the deceased did not raise any suspicion on anyone. He has deposed that when RFSL team came on the scene of crime, the corpse had already been sent to hospital for post mortem examination. He admitted that no person from the neighbourhood of the scene of crime was associated as a witness. He deposed that there is only one barrier en-route Kangra and Kiratpur and it has come in his investigation that two wheelers do not get through the barriers where CCTV cameras are installed, but they pass by the side of the road, as they do not pay for the toll tax. He feigned ignorance as to the subscriber of the SIM numbers which were recovered from the cell phone of the accused.

30. After exhaustively discussing the evidence, it would be apt to meticulously examine the same in order to arrive on a conclusion qua the innocence or guilt of the accused. As per the prosecution case, on 23.07.2014, at 05:30p.m., the accused on motorcycle, having registration No. HP-40-A-5214, started to his home at Samela from Pinjaur. The accused reached his house around 10:30 p.m. and in the intervening night of 23/24.07.2014 he entered in the room of the deceased. The accused had an altercation with the deceased and he strangulated her. Thereafter, he opened the almirah and trunk lying in the room and took ornaments. He scattered the things in the room so as to make a pretentious appearance of robbery and in that incident the deceased was killed. In contrast to the allegations of the prosecution, the accused, in his statement recorded under Section 313 Cr.P.C., alleged that in the intervening night of 23/24.07.2014 he did not come to Samela, but to give lateral support to his line of defence he did not lead any evidence to prove alibi. Though, he has taken special plea that he was not at Samella in the intervening night of 23/24.07.2014. Now, we have to see by examining the prosecution evidence whether in the intervening night of 23/24.07.2014 the accused came to his house at Samela or not and he killed the deceased, as he was having hostile relations with her.

31. After threadbare scrutiny of the testimonies of the prosecution witnesses and hearing the learned counsel for the accused and also learned Additional Advocate General, following circumstances need to be proved so as to arrive on a conclusion qua innocence or guilt of the accused:

1. Whether the deceased died homicidal death within one and half year of her marriage;
2. Whether the accused was having motive, as he had hostile relation with the deceased;
3. Whether the deceased was found lying dead inside the room of the matrimonial home and there is no sign of forced entry;
4. Whether pretentious appearance was given to the spot of occurrence, so as to mislead that the deceased was killed during burglary;
5. Whether recovery of ornaments of the deceased and rope used for strangulation was effected at the instance and from the possession of the accused;

6. Whether the accused offered no explanation as to how he was in possession of the ornaments of the deceased; &

7. Whether the accused was found absent from his place of work at the relevant time and his plea of alibi stands disproved.

32. Avowedly, the marriage between the deceased and the accused was solemnized on 30.01.2013 and the deceased died on the intervening night of 23/24.07.2014.

33. In homicidal death cases medical and forensic evidence always prove valuable assistance to the Courts in reaching a most probably conclusion. The learned counsel for the accused tried to create a doubt in the mind of this Court that the deceased did not die due to strangulation. He has highlighted that Dr. Rahul Gupta (PW-12) specifically admitted that the hyoid bone and thyroid cartilage of the deceased were intact. So, in every probability the deceased did not die due to strangulation. As per textbook, Medical Jurisprudence and Toxicology by Modi, 24th Edition, the appearance of neck can vary depending upon the means adopted and used. PW-12, Dr. Rahul Gupta, observed as under:

"Injuries on body surface:

Mark of ligature

Pressure abrasion 0.5cm in width, shallow with red and soft base, running transversally over the neck below the thyroid cartilage (vocal box) extending from mid line towards side of neck, nape and reaching on the right side of neck to a point 6 cm away from mid line. Base of the ligature mark was showing very fine pattern. On neck dissection, floor of the mouth in sub-mental area (2x1cm), short head of right sub-mandibular gland, deep cervical lymph nodes above ligatutre marks were haemorrhagic. Sub capsular and interstitial haemorrhage in thyroid gland was present. Mucosal surface of spiglottis and larynx was ecchymosed."

In post mortem report, Ex. PW-12/B, is affirmative as to the cause of death and the fact that autopsy did not find fracture of the hyoid bone and thyroid cartilage does not prove that the death was not due to strangulation. The Hon'ble Supreme Court in ***Ponnusamy vs. State of Tamil Nadu (2008) 5 SCC 587,*** quoted the following portion from Taylor's Principles and Practice of medical Jurisprudence, 13th Edition, at pages 307 and 308, which is germane in the facts and circumstances of the case:

"23. In Taylor's Principles and Practice of Medical Jurisprudence, Thirteenth Edition, pages 307-308, it is stated:-

"The hyoid bone is 'U' shaped and composed of five parts : the body, two greater and two lesser horns. It is relatively protected, lying at the root of the tongue where the body is difficult to feel. The greater horn, which can be felt more easily,

> lies behind the front part of the strip-muscles (sternomastoid), 3 cm below the angle of the lower jaw and 1.5 cm from the midline. The bone ossifies from six centres, a pair for the body and one for each horn. The greater horns are, in early life, connected to the body by cartilage but after middle life they are usually united by bone. The lesser horns are situated close to the junction of the greater horns in the body. They are connected to the body of the bone by fibrous tissue and occasionally to the greater horns by synovial joints which usually persist throughout life but occasionally become ankylosed.
>
> Our own findings suggest that although the hardening of the bone is related to age there can be considerable variation and elderly people sometimes show only slight ossification.
>
> From the above consideration of the anatomy it will be appreciated that while injuries to the body are unlikely, a grip high up on the neck may readily produce fractures of the greater horns. Sometimes it would appear that the local pressure from the thumb causes a fracture on one side only.
>
> While the amount of force in manual strangulation would often appear to be greatly in excess of that required to cause death, the application of such force, as evidenced by extensive external and soft tissue injuries, make it unusual to find fractures of the hyoid bone in a person under the age of 40 years.
>
> As stated, even in older people in which ossification is incomplete, considerable violence may leave this bone intact. This view is confirmed by Green. He gives interesting figures : in 34 cases of manual strangulation the hyoid was fractured in 12 (35%) as compared with the classic paper of Gonzales who reported four fractures in 24 cases. The figures in strangulation by ligature show that the percentage of hyoid fractures was 13. Our own figures are similar to those of Green."

After combined reading of medical evidence and aforesaid quoted text, it is clear that the deceased died due to strangulation, which is possible with rope, Ex. P5. Moreover, PW-12, Dr. Rahul Gupta, in his testimony categorically made it lucid that the ligature in the instant case had not led to fracture of hyoid bone and thyroid cartilage, as ligature was below the

level of thyroid cartilage. He has also mentioned this in his report, Ex. PW-12/B. So, it stands established that the deceased died only due to homicidal fatal pressure over the neck consistent with strangulation by ligature.

34. Next circumstance which the prosecution needs is to prove is that the accused was having strained relations with the deceased. In order to fortify this circumstance the depositions of PW-3, Shri Pankaj Kumar, brother of the deceased, and PW-4, Miss Monika, sister of the deceased are vital. Both these witnesses have deposed that the relation between the accused and the deceased were strained. PW-4 in categorical terms deposed that on 28.06.2014, during her visit to the matrimonial home of the accused, the deceased started crying and told her that the accused gave beatings to her and raised demand of money. Nothing is emanating from the record, which could even subtly, provide any reason for this witness to falsely implicate the accused, especially in the wake of the fact that the family of the deceased had no grudge against the accused, as PW-1, Shri Subhash Chand (father of the deceased) deposed that the relation *inter se* the accused and the deceased were affable. Undoubtedly, the only incident of cruelty was confidentially reported by the deceased to PW-4 and it cannot be said that the deceased could have highlighted it to many other persons. Even a solitary incident of cruelty is sufficient to infer that the accused was having strained relations with the deceased, as there is nothing which could establish it otherwise.

35. The learned counsel for the accused has tried to convince this Court that on the solitary deposition of PW-5, Smt. Monika, motive of the accused for killing the deceased could be established. It is well settled that in cases of circumstantial evidence motive could be considered as a circumstance, which is relevant for the purpose of examining the evidence, as held in ***R. Shaji vs. State of Kerala, (2013) 14 SCC 266.*** However, motive cannot be adequate for commission of crime and in the absence of clear cut evidence qua motive behind the crime, the Courts can, after meticulously examining the material, convict the accused. Motive can give persuasive value to the evidence, but non-existent of evidence qua the motive behind the crime, cannot provide any help to the accused. In the instant case, the testimony of PW-4, Smt. Monika, is credible and it is not marred with contradictions and discrepancies. Her deposition lucidly proves that accused gave beatings to the deceased and demanded money from her. Thus, the only conclusion is that the accused was having hostile relations with the deceased, which propelled him to kill the deceased.

36. The Hon'ble Supreme Court in ***State of Uttar Pradesh v. Kishan Pal & Ors., (2008) 16 SCC 73***, observed as under:

> ".....the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one....."

37. Another leg of circumstances relates to scene of crime. As per the prosecution, there is no forced entry in the room, where the deceased was killed and later

found dead. In this context, the testimony of PW-15, Dr. S.K. Paul, the then Assistant Director (Biology & Serology Division), RFSL, Dharamshala, is relevant. This witness, being forensic expert, visited and inspected the spot. This witness in his report, Ex. PW-15/A, stated that no tool marks were observed on the latch, metallic loop/*kunda* and bold, which clearly suggests that no forced entry was made in the room of the accused. The room was opened by the deceased for a known person, otherwise the deceased could have raised alarm on seeing a burglar. The entry was made during night hours, so there is likelihood that the deceased opened the room for known person. All the above circumstances, in juxtaposition, compels this Court to hold that there was no forced entry in the room of the deceased and the deceased opened the door of the room for a person well known to her. Thus, the stand of the accused that the deceased was killed by a burglar in an incident of burglary is highly imaginative and pretentious.

38. The case of the prosecution is further based on a circumstance that the ornaments of the deceased and rope used for strangulation were recovered at the instance and from the possession of the accused. No doubt, the recovery of ornaments and rope, allegedly used by the accused in strangulating the deceased, is very strong circumstance. However, it is to be seen whether recovery of these articles is established and the same is not marred with discrepancies. PW-1, Shri Shubhash Chand, deposed that the accused, while in police custody, made a disclosure statement, Ex. PW-1/D, that he knows about the ornaments of the deceased and the rope, which was used by him in the commission of the crime. The learned counsel for the accused argued that disclosure statement, Ex. PW-1/D, is doubtful, as it was scribed in presence of PW-1 (complainant), who, being father of the deceased, is interested witness, so the same cannot be relied. He has further argued that another witness to Ex. PW-1/D, Shri Ashwani Kumar, was not examined by the prosecution and no plausible explanation for his non-examination has come. After threadbare examination of the testimony of PW-1 it is clear that he is not interested in getting the accused convicted, instead he deposed that the accused and the deceased had cordial relations. In a nut shell the testimony of PW-1 nowhere reflects that he is interested witness. Disclosure statement of the accused was recorded on the subsequent day of his police remand, so there is nothing suggestive of the fact that his statement was got recorded by the police through unlawful means.

39. The genuineness and veracity of disclosure statement, Ex. PW-1/D, is fortified by the fact that it led to subsequent recovery of ornaments of the deceased (Ex. P12 to Ex. P18) and also rope, i.e., Ex. P5, which was used by the accused in strangulating the accused. The depositions of PW-18, Investigating Officer, PW-14, Shri Karam Singh and PW-16, Jaswinder Singh, witnesses to recovery of ornaments and rope from the rented room of the accused, are in consonance with each other and there is nothing to doubt the recovery of these articles from the possession of the accused. Noticeably, the ornaments were concealed by the accused in the cup of ceiling fan. This fact cannot at all be overlooked; it raises suspicion and clearly rules out any possibility of false implication of the accused. Accused had exclusive knowledge of the ornaments and in fact he had hidden them with a clear objective of depriving anyone else to be aware about the same. Acceptably, initial testimony of PW-14, Shri Karam Singh, is slippery, as he deposed that when he reached the rented premises of the accused, police alongwith Pradhan and the accused was there and some gold ornaments were lying on the bed. However, this witness, in his cross-examination by the learned Public Prosecutor, deposed that accused opened the door of the room in his presence and took out a cloth pack, which contained gold ornaments and the cloth pack was taken out from the cup of ceiling fan. This witness tendered apology with folded hands for his wrong statement. Thus, the learned Trial Court issued show cause notice to this witness calling his explanation as to why he is not to be proceeded in terms of

Section 340 or 344 of the Code of Criminal Procedure, 1973, for giving false evidence. So, the relevant excerpts of this witness can be safely accepted.

40. Another ancillary, but strong circumstance which establishes that the accused perpetrated the crime is that ornaments, Ex. P12 to Ex. P18, were identified by the complainant (PW-1) to be that of the deceased. PW-1 has categorically deposed that he gifted gold chain, Ex. P14 and gold ring, Ex. P15, to the deceased, at the time of her marriage. He has further deposed that the deceased used to wear gold tops, Ex. P12 and gold ear ring, Ex. P13, and gold nose ring, Ex. P17, and gold *tikka,* Ex. P18, and he had seen her wearing them. Thus, in ratiocination, all the above material cumulatively proves that ornaments, Ex. P12 to Ex. P18, belonged to the deceased and the accused took them after committing her murder. The accused concealed the same inside the upper cup of the ceiling fan of which he had exclusive knowledge. The accused also got recovered rope, Ex P5, which was used by him for strangulating the deceased. Therefore, disclosure statement, Ex. PW-1/D, made by the accused in police custody, and the recovery of ornaments and rope have been fully established by the prosecution.

41. The prosecution has further tried to connect the accused with another circumstance that the accused failed to offer any acceptable explanation as to how he came in possession of ornaments of the deceased. As discussed hereinabove, it stands fully established that ornaments of the deceased were recovered from the exclusive and conscious possession of the accused. Therefore, it is incumbent upon the accused to come with plausible and acceptable explanation that how he came in possession of ornaments of the deceased, but the accused did not offer any explanation, what to say plausible and acceptable explanation. The accused instead maintained silence that how he came in possession of ornaments and rope and he, while answering question No. 15 in his statement recorded under Section 313 Cr.P.C. and simply said ***"it is incorrect that these ornaments were recovered from his possession".*** Now, keeping in view the fact that recovery of ornaments and ropes stands fully proved, so the accused's offering no explanation to the fact that how he came in possession of the ornaments of the deceased further aggravates the circumstances against him.

42. The penultimate circumstance which the prosecution has tried to build is that that the accused tried to give the scene of crime the shape of burglary and the deceased was pretentiously shown to be killed by some burglar. In this context, the statement of PW-15, Dr. S.K. Pal, is very important. PW-15, after conducting spot inspection submitted report, Ex. PW-15/A, which clearly shows that almirah was open and no took marks were observed on its outer door and chest, locking and unlocking mechanism of its locks were found to be in order. The report further demonstrates that small iron box was lying open inside the room, having a lock of Harison, whose keys were lying beside, on checking it was found its locking and unlocking mechanism was in order. This witness did not observe took marks on the iron box, latch and metallic loop/*kunda.* So, it is crystal clear that the almirah and box were not broke open and instead they were unlocked with keys. Another strong contributing circumstance is that gold ear rings, ear tops, nose pin and silver anklets were found on the persons of the deceased. Now this clearly shows that the accused just tried to portray the incident as robbery and in his attempt virtually he failed, as if it is assumed for a moment that some burglar committed burglary and also killed the deceased, then he would have definitely taken the ornaments of the deceased, which she was wearing at that time.

43. The above all circumstances only go to show that chief object of the accused was to eliminate the deceased and not the robbery. However, a pretentious appearance had been given to the scene of occurrence just to mislead and circumvent the investigation.

44. The final circumstance which emerges from the prosecution evidence is that when the occurrence alleged to have taken place the accused was found absent from his work place, so the same disproves the plea of alibi, as taken by the accused. In this context, the testimony of PW-17, Shri Deveshar Sharma, HR Specialist, Gillete India Limited, deposed that on application of police, Ex. PW-17/A, he supplied record of monthly attendance chart qua the accused. As per this witness, copy of record is Ex. PW-17/B and name of accused is written at Sr. No. 6. The accused, as per this record, was absent from his duty w.e.f. 23.07.2014 to 25.07.2014. Avowedly, the accused, in his statement recorded under Section 313 Cr.P.C., answered questions No. 20 and 21 as under:

> "Q.20 It has further come in the prosecution evidence led against you that on 23.07.2014and 24.07.2014 you were found absent from your job at Gillette India Ltd. Baddi. What you have to say about it?
>
> Ans. It is incorrect.
>
> Q.21 It has further come in the prosecution evidence led against you that the motor cycle No. HP40A-5214 used by you for traveling from Kiratpur to Samela and back on the intervening night of 23/24.07.2014 was taken into possession by the police from HHC Vijay Kirshan of P.S. Haripur vide seizure memo Ex. PW-5/A, in presence of witnesses. The I.O. also recorded statements of witnesses Parveen Kumar, Vijay Krishan and Pawan Kumar under Section 161 Cr.P.C. What you have to say about it?
>
> Ans. It had not come to Samela on the intervening night of 23/24.07.2014. Rest I do not know."

The above answers of the accused clearly show that the accused took the plea of alibi. Therefore, the accused is saddled with onus to prove his plea, but he did not even attempt to prove it. On the contrary, it stands established that on 23.07.2014 and 24.07.2014 the accused was absent from his duty. Moreover, even if it is assumed for a moment that during the intervening night of 23/24.07.2014 the accused was not at Samela, then it is astonishing that what prevented the accused to lead evidence to prove that on that night where he was. Certainly, the accused could have offered plausible and acceptable explanation by leading evidence, but he simply took a bald plea of alibi without placing any material to prove the same. Thus, the prosecution has successfully proved the final circumstance against the accused.

45. In view of what has been discussed hereinabove, in a nut shell it can be said safely that the instant case is based on circumstantial evidence and the prosecution has successfully proved all the circumstances, which clearly show that during the intervening night of 23/24.07.2014 the accused killed his wife and tried to fabricate the scene of crime. There is no missing link in the chain of circumstances, so the only conclusion is that the prosecution has successfully proved the guilt of the accused conclusively and beyond the shadow of reasonable doubt. Therefore, the only conclusion is that the learned Trial Court has rightly appreciated the evidence to its true and correct perspective and rightly convicted and sentenced the accused. We find no reason to reverse the findings rendered by the learned Trial Court. The appeal, which sans merits, deserves dismissal and is accordingly dismissed, as the prosecution has proved the guilt of the accused conclusively and beyond

the shadow of reasonable doubt and there is no occasion to interfere with the findings recorded by the learned Trial Court.

46. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of.

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**BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.**

Rajesh Thakur ...Petitioner.
Versus
Central Bureau of Investigation & others ...Respondents.

Cr. Revision No. 252 of 2017
Reserved on: 04.10.2018
Date of Decision: November 5, 2018

**Code of Criminal Procedure,1973-** Sections 306(4) &306(5)(a)(i)- Grant of pardon- Procedure thereafter, when case not triable exclusively by Special Judge/Session Court – Whether case still requires to be committed to Court of Session ? – Held - No - Special Judicial Magistrate (Designated Magistrate for CBI Cases) since authorized to conduct trial for offences involved, not required to commit case to any other Court for trial as specified in Section 306(5)(a)(i) of Code – Contention of accused that Special Judicial Magistrate after granting pardon ought to have committed case to Court of Session for trial and for want of compliance of these provisions accused entitled for acquittal, rejected – Order of Special Judicial Magistrate rejecting application of accused praying for their acquittal upheld. (Paras-7 & 12)

***Cases referred:***

A. Devendran vs. State of T.N., (1997) 11 SCC 720
Bawa Faqir Singh Versus Emperor, AIR 1938 Privy Council 266
Dilesh Kumar vs. Central Bureau of Investigation & others, Criminal Revision No.168 of 2014
Dilip Sudhakar Pendse & another Versus Central Bureau of Investigation, (2013) 9 SCC 391
Harshad S. Mehta and others vs. State of Maharashtra, (2001) 8 SCC 257
Rajendra Singh vs. State of Rajasthan, 2002 SCC OnLine Raj 471
Sitaram Sao alias Mungeri Versus State of Jharkhand, (2007) 12 SCC 630
State through Central Bureau of Investigation, Chennai vs. V. Arul Kumar, (2016) 11 SCC 733
Suresh Chandra Bahri Versus State of Bihar, AIR 1994 SC 2420
V.P. Alhuwalia Versus State of H.P. & others, judgment dated 03.05.2012 in CWP No.6453 of 2010

For the Petitioner: Mr.K.S. Thakur, Advocate, for the petitioner.
For the Respondent: Mr.Anshul Bansal, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

**Sanjay Karol, Judge.**

In terms of the impugned order dated 24.04.2017, passed by the Chief Judicial Magistrate, Shimla, H.P., in Cr.MA No.13-4 of 2015, titled as *Central Bureau of Investigation vs. Rajesh Thakur,* petitioner's application filed under Section 306 (5) of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C.), seeking acquittal from the charges framed under the provisions of Sections 420, 467, 468 and 471 read with Section 120-B of the Indian Penal Code, against the several persons, including the present petitioner, stands rejected.

2. The trial Judge dismissed the application holding that similar payer made by a co-accused, namely, Dilesh Kumar, stands considered and rejected by this Court vide judgment dated 15.09.2014, passed in Criminal Revision No.168 of 2014, titled as *Dilesh Kumar vs. Central Bureau of Investigation & others,* as also the application is misconceived inasmuch as the trial Judge is the Special Judicial Magistrate, a designated Court, for the Central Bureau of Investigation (CBI).

3. The brief background leading to the filing of challan is as noticed in *Dilesh Kumar* (supra), is reproduced as under:-

> "On 22.04.2010 a complaint came to be lodged with the Superintendent of Police, State Vigilance and Anti Corruption Bureau, Dharamshala, District Kangra. In crux, a grievance was made out that Rajesh Thakur, Director, Thakur College of Education, Kangra, H.P., sought job at Government College, Dhaliara (H.P.) on the basis of false/forged certificates of Magadh University Bodh Gaya. Also his family members obtained forged certificates from the Bihar Intermediate Education Council Patna, used again for seeking employment with the Government of Himachal Pradesh. On the asking of the original complainant, this Court vide judgment dated 03.05.2012 in CWP No.6453 of 2010, titled as *V.P. Alhuwalia Versus State of H.P. & others*, directed the investigation to be conducted by the Central Bureau of Investigation. Accordingly regular case FIR No.RC0962012S0007 dated 06.06.2012 was registered with the Central Bureau of Investigation, Shimla Branch. With the completion of investigation, final report dated 15.05.2013 was presented before the Court of Chief Judicial Magistrate, Shimla-cum-Special Judicial Magistrate, CBI, Shimla naming the present petitioner Dilesh Kumar to be one of the accused persons. Allegedly he is the kingpin and issued/procured fake and forged degrees and certificates in favour of gullible persons of the State. On 24.10.2013, Court of Chief Judicial Magistrate, Shimla, in an application filed under Section 306 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.), for grant of tender of pardon, passed order(s) in favour of applicants, accused Mohd. Mazahar and Lal Bihari Singh (Annexures P-3 and P-4). Applicants were examined on oath by the concerned Magistrate at the time of grant of tender of pardon.
>
> 2. Subsequently on 25.10.2013, supplementary final report was filed by the Investigating Agency, specially recording grant of tender of pardon in favour of accused Mohd. Mazahar and Lal Bihari Singh. It appears that perhaps this fact escaped attention of the Court and as such on 29.10.2013, the concerned Court also took cognizance, amongst others, against them. As such, cognizance against all eleven accused persons was

> erroneously taken, which mistake was subsequently rectified with the passing of order dated 12.11.2013, when names of the approvers (Mohd. Mazahar and Lal Bihari Singh) were deleted from the column of accused persons who were then added as witnesses in the column of witnesses. Noticeably there was no challenge to this order. Also propriety and legality of such order is not a subject matter of challenge in these proceedings."

4. Comng to the instant case, trial Judge has also observed that the instant petitioner Rajesh Thakur, had submitted false and forged documents and in connivance with the officers/officials of NCTE, Jaipur, managed to get recognition for 100 seats of B.Ed and 25 seats for M.Ed Course – 2007-08, in its educational institution by the name of Thakur College of Education.

5. It is also not in dispute that with the registration of FIR No.RC0962011A0002 dated 08.03.2011, challan was presented in the Court and charges framed on 20.12.2013, whereafter, 19 witnesses stand examined by the trial Court. During trial, plea of one of the co-accused, namely, Mohd. Mazahar, for grant of pardon, was accepted with the passing of order dated 24.10.2013.

6. Noticeably, contentions raised by the petitioner herein, are similar to the one raised in *Dilesh Kumar* (supra). In fact, present petition stands filed and pursued by the very same counsel. Relevant portion of the judgment rendered in *Dilesh Kumar* (supra) is reproduced as under:-

> "6. Mr. K.S. Thakur, learned counsel for the petitioner, has urged that (1) Under Section 306(5) (a) (i) Cr.P.C. when cognizance is taken by the Chief Judicial Magistrate, case has to be committed for trial to the Court of Sessions, irrespective of the fact whether it is triable as a warrant trial or a Sessions trial. (2) Under sub clause (a) of Section 306(4) Cr.P.C. at the time of taking cognizance by the Court below, both the approvers were required to be examined with an opportunity afforded to the accused, for cross-examination. This was not done in the present case. Thus according to the learned counsel trial stands vitiated. In support, he refers to decision reported in *Bawa Faqir Singh Versus Emperor,* AIR 1938 Privy Council 266; *Suresh Chandra Bahri Versus State of Bihar,* AIR 1994 SC 2420 and *Sitaram Sao alias Mungeri Versus State of Jharkhand,* (2007) 12 SCC 630.
>
> 7. Mr. Sandeep Sharma, learned Senior counsel appearing on behalf of Central Bureau of Investigation, vehemently opposed the petition and invited my attention to the decision in *Dilip Sudhakar Pendse & another Versus Central Bureau of Investigation*, (2013) 9 SCC 391.
>
> 9. Dealing with the first contention, it be only observed that in the present case, only the Chief Judicial Magistrate, Shimla is the concerned designated Court to hear and try matters arising out of investigation conducted by the Central Bureau of Investigation. Thus Mr. Sandeep Sharma, learned Senior counsel is right in contending that in the given facts and circumstances, relevant provisions applicable are sub-Section 5(b) of Section 306 Cr.P.C, for in the instant case, Chief Judicial Magistrate, being the designated Court alone had the jurisdiction to conduct the trial. Neither the matter was triable by the Court of Sessions nor was cognizance taken by any Magistrate. In the instant case question of committal does not arise. The apex Court in Dilip Sudhakar (supra) has also dealt with the issue holding that :-

> "12. Mr. Rakesh K. Khanna, learned Additional Solicitor General appearing for the respondent, on the other hand, contended that under sub-section (5)(a)(i) two options were available. He submitted that the matter has to be committed to the Court of Sessions undisputedly if the offence was triable exclusively by that court. He, however, maintained that even if the matter was not exclusively triable by the Court of Session, it could still be committed to that court, if the cognizance is taken by the Chief Metropolitan Magistrate. In the facts of the present case, the charges which are leveled against the appellants are all triable by the Magistrate's court, and there is no dispute about that, the cognizance is taken by the Additional Chief Magistrate and not by the Chief Metropolitan Magistrate. That being so, it is not possible to accept this submission of Mr. Khanna."
>
> (Emphasis supplied)

7. It be only observed that trial is being conducted by a Magistrate, who stands designated to deal with the cases of CBI. Such officer is otherwise designated as the Chief Judicial Magistrate and as such, authorized to conduct trial and as is so argued, is not required to commit the case for trial to any other Court, as specified under sub-Section 5 of Section 306 of Cr.P.C.

8. In *Harshad S. Mehta and others vs. State of Maharashtra,* (2001) 8 SCC 257, the Apex Court observed as under:-

> "61. The Full Bench accordingly held that the Special Magistrate could try the case himself even after grant of pardon and it does not follow that the absence of power to commit the accused to the Court of Session or the High Court would show that the Special Magistrate has no power to tender pardon. The position here also is almost identical. To the extent the provisions of sub-sections (4) and (5) of Section 306 cannot be followed by the Special Court, they are not required to be followed. As already held these sub-sections do not control the power to grant pardon. Under these circumstances, Mr. Jethmalani contended that the minority opinion expressed by Mukherji, J. in the Full Bench decision lays down the law correctly. For the reasons already indicated, we do not agree. The majority decision of the Full Bench, with which we are in agreement, is almost a complete answer to the submissions of Mr. Jethmalani. It has held the field for more than half a century. It seems evident that the power to tender pardon stands alone and others are matter of procedure. If in such situation, the matters of procedure are not applicable, it would not negate the power to grant pardon. Insofar as procedural matters are concerned, it would only mean that the same apply to the extent applicable. We are, therefore, unable to accept the contention that there was any implied repeal. It is also not possible to accept that it was intended by necessary implication that the Special Court under the Act shall not have the power to grant pardon. All powers of Sections 306 to 308 to the extent applicable and can be complied are available to the Special Court under the Act. The provision of the Act and the Code can stand together. There is no inconsistency. The two statutory provisions can harmoniously operate without causing any confusion or resulting in absurd consequences and the scheme of Code can, without any difficulty, fit in the scheme of the Act.

In the end, we may also note that jurisdiction to try a case is conferred on the Special Court not by committal but by the statute which has established that court.

62. Our conclusion, therefore, is that the Special Court established under the Act is a court of exclusive jurisdiction. Sections 6 and 7 confer on that court wide powers. It is a court of original criminal jurisdiction and has all the powers of such a court under the Code including those of Section 306 to 308."

9. Further in *State through Central Bureau of Investigation, Chennai vs. V. Arul Kumar,* (2016) 11 SCC 733, under somewhat similar circumstances, following observations were made by the Apex Cort:-

"21. Sub-section (1) of Section 5, while empowering a Special Judge to take cognizance of offence without the accused being committed to him for trial, only has the effect of waiving the otherwise mandatory requirement of Section 193 of the Code. Section 193 of the Code stipulates that the Court of Session cannot take cognizacne of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Thus, embargo of Sectino 193 of the Code has been lifted. It, however, nowhere provides that the cognizance cannot be taken by the Magistrate at all. There is thus, an option given to the Special Judge to straightaway take cognizance of the offences and not to have the committal route through a Magistrate. However, normal procedure prescribed under Section 190 of the Code empowering the Magistrate to take cognizance of such offence, through triable by the Court of Sessions, is not given a go-by. Both the alternatives are available. In those cases where charge-sheet is filed before the Magistrate, he will have to commit it to the Special Judge. In this situation, the provisions of Section 306 of the Code would be applicable and the Magistrate wold be empowered to exercise the power under the said provisions. In contrast, in those cases where Special Judge takes cognizance of offence directly, as he is authorized to do so in view of Section 5(2) of the PC act, 1988, Section 306 of the Code would get bypassed and as the Special Judge has taken cognizance, it is Section 307 of the Code which would become applicable, Sub-section (2) of Section 5 of the PC Act, 1988 makes this position clear by prescribing that it is the Special Judge who would exercise his powers to tender of pardon as can clearly be spelled out by the language employed in that provision. Section 5(2) is to be read in conjunction with Section 5(1) of the PC Act, 1988. The aforesaid legal position would also answer the argument of the learned counsel for the respondent based on the judgment of this Court in *A. Devendran vs. State of T.N.,* (1997) 11 SCC 720. In that case, this Court held that once the proceedings are committed to the Court of Session, it is that court only to which commitment is made which can grant pardon to the approver. The view taken by us is, rather, in tune with the said judgment.

22. We, therefore, do not find merit in the aforesaid contention of the learned counsel for the respondent. For these reasons, we also do not agree with the view taken by the Rajasthan High Court in *Rajendra Singh*

*vs. State of Rajasthan,* 2002 SCC OnLine Raj 471 and overrule that judgment."

(Emphasis supplied)

10. Learned counsel have referred to several other decisions, which though reflective of their industry, are not being referred to for being not relevant for adjudication of the present petition.

11. Further, Mr.Anshul Bansal, learned counsel, argues that by virtue of sub-Section (g) of Section 460 of Cr.P.C., irregularities, if any, would not vitiate the proceedings more so on the ground that the concerned Magistrate is not otherwise empowered in law.

12. Hence, for all the aforesaid reasons, present petition, being devoid of any merit, is dismissed, so also pending application(s), if any.

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**BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE, CHANDER BHUSAN BAROWALIA, J.**

ITA No. 11 of 2012 alongwith
ITA No. 30 of 2014.
Judgment reserved on: 25.10.2018.
Date of Decision : November 5 , 2018

1. ITA No. 11 of 2012
M/s J.M.J. Essential Oil Company … Appellant
Versus
Commissioner of Income Tax, Shimla …Respondent
2. ITA No. 30 of 2014
M/s J.M.J. Essential Oil Company … Appellant
Versus
Commissioner of Income Tax, Shimla …Respondent

**Income Tax Act, 1961 -** Sections 44AA and 44B- Income from business or profession – Computation – Requirements of maintaining account books and audition thereof – Held, every person carrying on business or profession is required to keep and maintain such books of account and other documents as may enable Assessing Officer to compute total income in accordance with provision of Act and get such accounts audited. (Para-11) (D.B.)

**Income Tax Act, 1961 -** Sections 140A, 142 & 143- Assessment of income for taxation- Held, return can be processed and income assessed on basis of self assessment in terms of Section 140A- However, Assessing Officer authorized and empowered under Section 142 of Act may call upon assessee asking him to produce such accounts or documents as may be so required for completing proceedings – By virtue of Section 143(3) of Act, Assessing Officer empowered to assess and pass an order on evidence so produced by an assessee. (Paras-12 & 13) (D.B.)

**Income Tax Act, 1961 -** Section 68- Assessment of income from business or profession- Cash credit, when can be taken as income of assessee ? – Requirements – Held, in order to invoke Section 68 of Act, it is necessary that (i) sum is found credited in books of assessee (ii) for which assessee offers no explanation about nature and source thereof (iii) explanation

offered if any, in opinion of Assessing Officer not satisfactory (iv) then sum so credited may be charged to income tax as income of assessee in relevant year. (Para-16) (D.B.)

**Income Tax Act, 1961 -** Sections 68 & 143- Cash credit – Assessed as income of assessee- Validity –After perusing account books of petitioner, Assessing Officer ordering cash sales made across the counter as income of assessee chargeable to income tax on his failure to give satisfactory explanation for such sales – Order upheld by Commissioner Income Tax (Appeals) Shimla and Income Tax Appellate Tribunal – Petition against – Petitioner contending that unless books of accounts are rejected by Assessing Officer, he cannot assess income under Section 143(3) of Act as income of assessee and in his case, books of accounts never rejected by Assessing Officer- Held, it is not mandate of Section 143 of Act that Officer must reject books of accounts maintained by assessee –Falsification of books of accounts is one thing and not furnishing explanation with respect to entry made therein, is another thing - Certain entries reflected in books of accounts which on basis of explanation furnished by assessee not found satisfactory - Assessing Officer authorized to carry out assessment under Section 143(3) of Act– Appeal dismissed. (Paras-19, 20 & 39) (D.B.)

**Income Tax Act, 1961 -** Section 68- Expression "in the opinion of Income Tax Officer" – Meaning – Held, formation of opinion even though is subjective process, yet circumstances upon which such an inference based must be demonstrable. (Para-26) (D.B.)

***Cases referred:***

Commissioner of Income Tax vs. P. Mohanakala, (2007) 6 SCC 21

Commissioner of Income Tax, Ahmedabad vs. Reliance Petroproducts Private Limited, (2010) 11 SCC 762

Dhanalakshmi Pictures vs. Commissioner of Income-Tax, Madras, (1983) 144 ITR 452

M/s. Lakhmichand Baijnath vs. Commissioner of Income Tax West Bengal, AIR 1959 SC 341

Roshan Di Hatti vs. Commissioner of Income Tax, Delhi, (1977) 2 SCC 378

R.B. Jessaram Fatehchand (Sugar Dept.) vs. Commissioner of Income Tax, Bombay City- II, (1970) 75 ITR 33

Sumati Dayal vs. Commissioner of Income Tax, Bangalore, 1995 Supp (2) SCC 453

| | | |
|---|---|---|
| For the appellants | : | Ms. Vishal Mohan, Mr. Sushant Keprate and Mr. Aditya Sood, Advocates, for the appellant(s). |
| For the respondents | : | Mr. Vinay Kuthiala, Senior Advocate with Mr. Diwan Singh Negi, Advocate, for the respondent(s). |

The following judgment of the Court was delivered:

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**Sanjay Karol, Judge.**

The appeals stand admitted on the following substantial questions of law:

ITA No. 11 of 2012:

"(a) Whether the Ld. Income Tax Appellate Tribunal is right in law in upholding the addition made under Section 68 of the Income Tax Act of Rs. 3.12 crores when the books of accounts had been accepted and as such the provisions of Section 68 of the Income Tax Act, 1961 were not attracted?

(b) Whether the Ld. Income Tax Appellate Tribunal is right in law in upholding that the assessee had failed to discharge his

burden of proof in proving the cash credits when the books of account alongwith supporting vouchers had been accepted coupled with the fact that the purchases against the said sales stands accepted?

(c) Whether the addition sustained by the Ld. Income Tax Appellate Tribunal qualifies for deduction under Section 80 IC of the Income Tax Act, 1961?"

ITA No. 30 of 2014:

"(a) Whether the Ld. Income Tax Appellate Tribunal is right in law in upholding the addition made under Section 68 of the Income Tax Act of ` 1.94 crores when the books of accounts had been accepted and as such the provisions of Section 68 of the Income Tax Act, 1961 were not attracted?

(b) Whether the Ld. Income Tax Appellate Tribunal is right in law in upholding that the assessee had failed to discharge his burden of proof in proving the cash credits when the books of account alongwith supporting vouchers had been accepted coupled with the fact that the purchases against the said sales stands accepted?

(c) Whether the addition sustained by the Ld. Income Tax Appellate Tribunal qualifies for deduction under Section 80 IC of the Income Tax Act, 1961?

(d) Whether the Ld. Income Tax Appellate Tribunal is right in law in holding that the interest earned/accrued was not attributable to the Manufacturing Activity of the appellant?

(e) Whether the Ld. Tribunal is right in law in holding that the entire interest income did not qualify for deduction under Section 80 IC of the Income Tax Act and no expenditure was to be allowed in respect of the same?"

2. In relation to the assessee's returns filed with respect to the Financial Year 2006-07 [Assessment Year 2007-08], the Assessing Officer passed order dated 24.12.2009, under Section 143(3) of the Income Tax Act, 1961 (hereafter referred to as the Act), holding the assessee not to have sufficiently explained the cash sales amounting to `3.12 crores effected only in one month i.e. September of the year, 2006. Consequently the same was added into the total income of the assessee and charged to income tax with further initiation of resultant proceedings of imposition of penalty.

3. Such order dated 24.12.2009 (Annexure A-1) stands affirmed both by the Commissioner of Income Tax (Appeals) Shimla [Order dated 3.12.2010 (Annexure A-2)] and the Income Tax Appellate Tribunal [Order dated 19.10.2011 (Annexure A-3)], subject matter of ITA No. 11 of 2012.

4. Similar is the position with regard to the next Financial Year i.e. 2007-08 (Assessment Year 2008-09), subject matter of ITA No. 30 of 2014, where cash sales amounting to `1,94,37,600/- effected only in one month of the year, 2007, were found unexplained and as such, charged to income tax with the initiation of consequential proceedings for imposition of penalty.

5. According to the assessee, with the introduction of new product *Pan Shamama,* process of retail counter sale on test market basis was introduced and the

product sold as over the counter sale. For the Financial Year 2006-07, 2.5 tons of the produce was sold in the packaging of drums of 25 – 50 kilograms, at the sale price of `12,000/- per kilogram and with respect to Financial Year 2007-08, 1557.50 kilograms of such sales were effected.

6. The Authorities below, after considering the factual matrix, rejected such explanation resulting into the filing of present appeals.

7. Inviting our attention to the findings returned by the Authorities below, terming them to be absolutely erroneous, Sh. Vishal Mohan, learned counsel contends that in the absence of rejection of the books of accounts, the authorities erred in assessing the amount of sales as an income of the assessee. In support, he seeks reliance upon ***M/s. Lakhmichand Baijnath vs. Commissioner of Income Tax West Bengal,*** **AIR 1959 SC 341;** ***Roshan Di Hatti vs. Commissioner of Income Tax, Delhi,*** **(1977) 2 SCC 378; and** ***R.B. Jessaram Fatehchand (Sugar Dept.) vs. Commissioner of Income Tax, Bombay City- II,*** **(1970) 75 ITR 33** (Bom).

**8.** On the other hand Mr. Vinay Kuthiala, learned Senior Advocate, contends that findings of fact are based on full appreciation of cogent material and that there being no illegality or perversity therein, no interference is warranted. He refers to and relies upon the following decisions rendered by the Apex Court in **Sumati Dayal *vs. Commissioner of Income Tax, Bangalore,* 1995 Supp (2) SCC 453;** ***Commissioner of Income Tax vs. P. Mohanakala,*** **(2007) 6 SCC 21; and** ***Commissioner of Income Tax, Ahmedabad vs. Reliance Petroproducts Private Limited,*** **(2010) 11 SCC 762.**

9. For answering the questions we find it prudent to refer to certain provisions of the Act.

10. The Act is divided into several Chapters containing several Sections.

11. Chapter IV deals with the computation of total income and in terms of Section 44AA thereof, subject to exceptions contained therein, every person carrying on business or profession, is required to keep and maintain such books of account and other documents as may enable the Assessing Officer to compute the total income in accordance with the provisions of the Act. Every person falling within the ambit of Section 44B is required to have such accounts audited. There is no dispute that such provisions of the Act stand complied with by the assessee.

12. Chapter XIV of the Act deals with the procedure for carrying out assessments. By virtue of Section 139 falling within the said Chapter, subject to the conditions contained therein, every person is obliged to furnish return of his income in the prescribed format and manner. The return can be processed and income assessed on the basis of self assessment, in terms of Section 140A. However, by virtue of Section 142, the Assessing Officer is authorized and empowered to call upon the assessee, asking him to *inter alia* produce such accounts or documents as may be so required for completing the proceedings. Section 143 of the Act prescribes how the return filed or information furnished under Section 142 is to be processed. Total income or loss, as the case may be, is required to be computed after accounting for and making adjustments, *inter alia* of incorrect claims apparently emanating from the information furnished in the return [Section 143(1)(a)(ii)].

13. By virtue of sub-Section (3) of Section 143, the Assessing Officer is empowered to assess and pass an order on the evidence so produced by the assessee in relation to the queries put by the Officer or other material on record. The order has to be in

writing, indicating the assessment of total income or loss of the assessee, after determining the sum payable by him or refund of amount due, if any, on the basis of such assessment.

14. We notice that failure of any person in filing the return under Section 143 of the Act or complying with the notice under Section 142(1) or terms thereof, so issued under sub-Section (2) of Section 143, the Assessing Officer, after accounting for all the relevant material which can be gathered, carry out assessment on the basis of what is commonly termed as Best Judgment Assessment. [*Dhanalakshmi Pictures vs. Commissioner of Income-Tax, Madras,* (1983) 144 ITR 452 (Madras)]

15. Chapter VI of the Act specifically deals with aggregation of income; set off and carry forward. How the income or the loss in the relevant assessment year is required to be computed stands specified therein. Cash credit; unexplainable investment; unexplainable money; investments not disclosed in the books of account; unexplained expenditure or amount borrowed or paid on 'hundi' are relevant factors for consideration. All this is required to be carried out by the authority, in the manner specified therein. Under the said Chapter, Section 68 categorically deals with the issue of cash credit with which we are concerned, relevant portion whereof, we reproduce as under:

> "68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."

16. The said Section mandates fulfillment of the following essential ingredients: (a) A sum is found credited in the books of the assessee (b) for which the assessee offers no explanation about the nature and source thereof (c) the explanation offered if any, (d) is not (e) in the opinion of the Assessing Officer, (f) satisfactory (g) then the sum so credited may be charged to income tax as income of the assessee in the relevant year.

17. In the instant case, undisputedly, in the relevant year(s) there has been cash sales made across the counter, which was credited in the books of accounts maintained for the relevant year(s). Further the assessee was asked to furnish information regarding the nature and source thereof, which he did so, but in the opinion of the Assessing Officer was found to be not satisfactory and as such, the said sum was charged to the income of the assessee in the relevant year(s).

18. The core issue which arises for consideration is as to whether explanation offered by the assessee with respect to the nature and source thereof, was in the opinion of the Assessing Officer satisfactory or not?

19. To contend that in the absence of rejection of books of accounts, the Assessing Officer erred in carrying out the assessment under Section 143(3) of the Act, in our considered view is legally unsustainable. Section 68 categorically does not refer about rejection of books of accounts. In fact it is also not the mandate of chapter XIV containing Section 143, that the Officer must reject the books of accounts maintained by the assessee. It is not a case of Best Judgment Assessment. In the instant case, certain entries reflected in the books of accounts, which on the basis of explanation furnished by the assessee were found not to be satisfactory, the Assessing Officer carry out the assessment under sub-Section 3 of Section 143 of the Act.

20. Falsification of books of accounts is one thing and not furnishing explanation with respect to the entry made therein is another thing. [*Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai and another,* (2007) 6 SCC 329]

21. Two more issues arise for consideration. The first being as to whether is it open for us to go into the explanation furnished by the assessee and the second as to whether the explanation furnished in the opinion of the Assessing Officer is satisfactory or not. Here only we may observe that we are dealing with a case where we are required to answer the substantial questions of law but not of fact, hence, required to deal only with the second issue.

22. What is 'opinion' and what is 'satisfactory' or so to say satisfaction of the Assessing Officer are the terms which require examination.

23. In *P. Mohanakala* (supra) the Apex Court while dealing with the true nature and scope of Section 68 of the Act has held that the opinion of the assessing officer for not accepting the explanation offered by the assessees as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The court further held that the opinion of the assessing officer is required to be formed objectively with reference to the material available on record. Hence, application of mind is *sine qua non* for forming the opinion.

24. The Apex Court in *CIT v. McMillan & Co.*, 1958 SCR 689 : AIR 1958 SC 207 : (1958) 33 ITR 182 while dealing with section 13 of the Income Tax Act, 1922 (11 of 1922), inter alia, observed that the words "in the opinion of the Income Tax Officer" are not to be construed in the sense of a mere discretionary power; but in the context of the words used in the proviso to Section 13 they impose a statutory duty on the Income Tax Officer to examine in every case the method of accounting and to see whether or not it is regularly employed and to determine whether the income, profits and gains can properly be deduced therefrom.

25. In *CIT v. A. Krishnaswami Mudaliar*, (1964) 7 SCR 776 : AIR 1964 SC 1843 : (1964) 53 ITR 122 the Hon. Supreme Court while interpreting the expression "in the opinion of the Income Tax Officer" reiterated at para 10 its earlier view taken in *CIT v. McMillan & Co* (supra).

26. The observations made in *Barium Chemicals Ltd. v. Company Law Board*, 1966 Supp SCR 311 : AIR 1967 SC 295 that even if the formation of opinion is a subjective process, the existence of the circumstances upon which such an inference is based must be demonstrable stood reaffirmed in *Rohtas Industries Ltd. v. S.D. Agarwal,* (1969) 1 SCC 325.

27. The Apex Court in *Dalgobinda Paricha v. Nimai Charan Misra*, 1959 Supp (2) SCR 814 : AIR 1959 SC 914 defined opinion to mean something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question.

28. In *Rajesh Kumar v. CIT*, (2007) 2 SCC 181, the Hon. Apex court while interpreting and examining the application of Section 142(2-A) of the Act held that formation of opinion of the assessing officer must be on the premise that while exercising his power regard must be had to the factors enumerated therein and therefore formation of opinion indisputably must be based on objective consideration.

29. In *Sahara India (Firm) (1) v. CIT*, (2008) 14 SCC 151 while dealing with Section 142(2-A) of the Act, the Apex Court held that opinion required to be formed by the

assessing officer for exercise of power under the said provision must be based on objective criteria and not on the basis of subjective satisfaction.

30. The Apex Court in *CIT v. Calcutta Knitwears*, (2014) 6 SCC 444 held that for the purpose of Section 158-BD of the Act a satisfaction note is sine qua non and must be prepared by the assessing officer before he transmits the records to the other assessing officer who has jurisdiction over such other person.

31. In *S.R. Bommai v. Union of India*, (1994) 3 SCC, while construing the expression "if the President… is satisfied" under Article 356(1) the Court at para 74 held that it is not the personal whim, wish, view or opinion or the ipse dixit of the President dehors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose.

32. In fact, decision rendered in *M/s. Lakhmichand Baijnath* (supra) clarifies the position in law in the following terms:

> "10. The position may thus be summed up: In the business accounts of the appellant we find certain sums credited. The explanation given by the appellant as to how the amounts came to be received is rejected by all the Income-tax authorities as untenable. The credits are accordingly treated as business receipts which are chargeable to tax. In V. Govindarajulu Mudaliar v. Commissioner of Income-tax, Hyderabad, Civil Appeals Nos. 41 to 43 of 1957 D/- 24-9-1958 : (AIR 1959 SC 248) this Court observed :
>
> > "There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amounts of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature."
>
> That is precisely what the Income-tax authorities have done in the present case, and we do not find any grounds for holding that their finding is open to attack as erroneous in law."
>
> (Emphasis supplied)

33. As much emphasis is laid by the assessee on paragraph – 11 of the said report, as such, we also reproduce the same:-

> "11. (3) Lastly, the question was sought to be raised that even if the credits aggregating to Rs. 2,30,346 are held to be concealed income, no levy of excess profits tax can be made on them without a further finding that they represented business income, and that there is no such finding. When an amount is credited in business books, it is not an unreasonable inference to draw that it is a receipt from business. It is unnecessary to pursue this matter further, as this is not one of the questions referred under S. 66 (2)."

34. Noticeably issue which the assessee wants to raise, of inference in the affirmative, to be drawn of the amount credited in the business books as receipt from business was left open by the Apex Court.

35. Similarly in *Roshan Di Hatti* (supra) the Apex Court in paragraph – 6 of the report has held that "The burden of accounting for the receipt of these assets was clearly on the assessee and if the assessee failed to prove satisfactorily the nature and source of these assets, the Revenue could legitimately hold that these assets represented the undisclosed

income of the assessee", which in the instant case we find the assessee not to have explained to the satisfaction of the Assessing Officer.

36. Reliance on *R.B. Jessaram Fatehchand* (supra) in our considered view is equally of no help, for in the said case the Tribunal found the Assessing Officer to have adopted the perverse approach in rejecting the entries of cash in books of accounts on the basis of surmises and conjectures, which is not the case in hand, for all the authorities have found the assessee to have not sufficiently explained the source of income.

37. In *Sumati Dayal* (supra) the Apex Court observed that "It is no doubt true that in all cases in which a receipt is sought to be taxed as income the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. [See: Parimisetti Seetharamamma v. CIT, (1965) 57 ITR 532; AIR 1965 SC 1905]. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut, the said evidence being unrebutted, can be used against him by holding it was a receipt of an income nature".

38. The Apex court in *Reliance Petroproducts Private Limited* (supra) explained the difference between concealment of income and furnishing of inaccurate particulars in the context of Section 271 of the Act which we find to be applicable in the instant case.

39. Applying the aforesaid principles, we notice that the authorities below found the explanation furnished by the assessee not to be satisfactory. What was found peculiar, which fact remains unexplained, as to why and how should be their transactions, in cash, only in a particular month of the only two years. Such transactions are of huge amount. Assuming that they were sold across the counter on test market basis, even then such sales ought to have been spread throughout the year. It is not the case of the assessee that the product was manufactured or sold for seasonal consumption or that such sales could have been affected only in the particular months of the respective years. The satisfaction of the officer no doubt has to be based on the material so placed by the parties, which in the instant case is there. Formation of opinion has to be after accounting for all the factors and that too on objective consideration of which we have no doubt.

As such, the questions of law answered accordingly and we find no merit in the present appeals which are disposed of in the aforesaid terms. Pending applications, if any, also stand disposed of accordingly.

**********

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

RFA No. 125 of 2015 along with RFA Nos. 346 of 2014, 12, 13, 201, 202 and 124 of 2015
Date of decision: 5.10.2018

1. RFA No. 125 of 2015
Land Acquisition Collector, Parvati Hydro Electric Project, Larji. ...Appellant
Versus

Manohar Lal & others. ...Respondents

2. RFA No. 346 of 2014
Land Acquisition Collector, Parvati Hydro Electric Project, Larji. ...Appellant
Versus
Smt.Kishi & others. ...Respondents

3. RFA No. 12 of 2015
Land Acquisition Collector, Parvati Hydro Electric Project, Larji. ...Appellant
Versus
Tikkam Ram & others. ...Respondents

4. RFA No. 13 of 2015
Land Acquisition Collector, Parvati Hydro Electric Project, Larji and Another.
...Appellants
Versus
Meharu Devi & Another. ...Respondents

5. RFA No. 124 of 2015
Land Acquisition Collector, Parvati Hydro Electric Project, Larji. ...Appellant
Versus
Rajender Kumar & others. ...Respondents

6. RFA No. 201 of 2015
Land Acquisition Collector, Parvati Hydro Electric Project, Larji. ...Appellant
Versus
Narkali & Another. ...Respondents

7. RFA No. 202 of 2015
Land Acquisition Collector, Parvati Hydro Electric Project, Larji & Another.
...Appellant
Versus
Jagdish Chand & others. ...Respondents

**Land Acquisition Act, 1894 -** Sections 18 & 23 - Acquisition of land for public purpose – Reference– Market value - Determination – Held, once fair compensation under Act determined judiciously all land owners whose land was taken away by same notification should become beneficiary thereof – Different treatment to identically situated persons would amount to discrimination. (Para 7)

***Cases referred:***
Narendera and others Vs. State of Uttar Pradesh and others, (2017) 9 SCC 426

For the Appellants: Mr. C.N. Singh, Advocate.
For the Respondents: Mr.Shiv Pal Manhans & Mrs.Rameeta Kumari, Additional Advocate Generals with Mr.Raju Ram Rahi, Deputy Advocate General for the respondents-State.

Mr.Naveen K. Bhardwaj, Advocate, for private respondents in all appeals except FRA No. 202 of 2015.
Mr.Raman Jamalta, Advocate, vice Mr.Sunil Mohan Goel, Advocate, for respondents in RFA No. 202 of 2015.

The following judgment of the Court was delivered:

**Vivek Singh Thakur Judge (oral)**

These appeals arising out of common award dated 17.7.2014 passed by learned Additional District Judge, Kullu, H.P. (herein after referred to as Reference Court) in Reference Petition Nos. 58 of 2014(2013), 57 of 2014 (2013), 56 of 2014(2013), 53 of 2014(2013), 3 of 2014(2013), 54 of 2014(2013) and 52 of 2014(2013), are being decided by this common judgment, as common question of law and fact, to be considered on the basis of common evidence led in lead case Reference Petition No. 58 of 2014(2013) Manohar Lal & others Vs. Land Acquisition Collector, Parvati Hydro Electric Project, Larji, is involved.

2. Government of Himachal Pradesh has acquired land in village Phati Ralia Kothi Bhallan, District Kullu for public purpose i.e. for establishment of Parvati Hydro Electric Project, by resorting to the provisions of Land Acquisition Act, 1894 (herein after referred to as the Act).

3. Being aggrieved by and dissatisfied with amount of compensation determined by Land Acquisition Collector, land owners had preferred reference petitions under Section 18 of the Act, wherein Reference Court has awarded uniform rate of compensation at the rate of `19,580/- per biswa on the basis of another award dated 3.4.2013 (Ex. PW-1/D) passed by Reference Court with respect to the same village i.e. Phati Ralia Kothi Bhallan, District Kullu with respect to for land acquired for the same purpose i.e. establishing Parvati Hydro Electric Project.

4. Present appeals have been preferred against enhancement awarded by Reference Court solely on the ground that Reference Court has committed a mistake by relying upon award Ex. PW-1/D for enhancement of compensation as before passing of impugned award on 17.7.2014 by Reference Court, the award Ex. PW-1/D had already been set aside by this High Court in RFA No. 4144 of 2013, titled Collector Land Acquisition Vs. Surat Ram and others and connected matters remanding the matter to the Reference Court for deciding afresh.

5. Learned counsel for the respondents-claimants submits that now case related to award Ex. PW-1/D has also been decided afresh vide award dated 25.11.2014 passed by Reference Court after remand and value of land as determined earlier in Ex. PW-1/D, has been maintained and he has also placed on record certified copy of award dated 25.11.2014, passed by Reference Court afresh in Reference Petition No. 2 of 2012 (33 of 2014) and connected Reference Petitions, after remand by this High Court in cases remanded in RFA No. 4144 of 2013.

6. Learned counsel for the appellant has not disputed the passing of fresh award by Reference Court, placed on record, rather has submitted that the said award also stands complied with, whereby Reference Court has again determined the value of acquired land at the rate of `19,580/- per biwas on the date of notification of Section 4 of the Act. It is also undisputed that the land subject matter in Reference Petition No. 2 of 2012, decided vide award dated 25.11.2014 and also in present appeals was acquired for one and the same purpose and is also situated in the same village, having the same nature and potentiality.

7. The Apex Court in ***Narendera and others Vs. State of Uttar Pradesh and others,*** reported in ***(2017) 9 SCC 426*** has held that once a fair compensation under the Act is determined judiciously, all land owners whose land was taken away by the same notification should become the beneficiary thereof and a different treatment to the identically situated persons would amount to discrimination.

8. In aforesaid facts and circumstances, I find that there is no ground for interference in the impugned award, as the value of land as determined by the Reference Court in award Ex. PW-1/D with respect to the same village qua the land acquired for the same purpose having the same nature and potentiality also stands reaffirmed after remand and has been accepted and implemented by the appellants.

9. In view of above discussion, impugned award passed by Reference Court is upheld and appeals are dismissed along with pending application(s), if any.

**********

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

RFA No. 164 of 2012 along with RFA Nos. 516 to 531, 551 to 557 of 2011, 79 to 82, 105 to 110 of 2012 & CO No. 1010 of 2012 in RFA No. 106 of 2012.
Judgment Reserved on: 29.8.2018
Date of Decision: 28.9.2018

**1.** RFA No. 164 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Smt. Soma Devi and others. ...Respondents.

2. RFA No. 516 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Neelam. ...Respondent.

3. RFA No. 517 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Vinod Kumar. ...Respondent.

4. RFA No. 518 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Balwant Singh. ...Respondent.

5. RFA No. 519 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Vinod Kumar. ...Respondent.

6. RFA No. 520 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Maado. ...Respondent.

7. RFA No. 521 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Smt.Parmila Beg and others. ...Respondents.

8. RFA No. 522 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Neesha. ...Respondent.

9. RFA No. 523 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh.Mangat Ram. ...Respondent.

10. RFA No. 524 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Khem Lata. ...Respondent.

11. RFA No. 525 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Jitender Kumar. ...Respondent.

12. RFA No. 526 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh.Rashid and others. ...Respondents.

13. RFA No. 527 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Vinod Kumar & others. ...Respondents.

14. RFA No. 528 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Sidhart Kaushik & others. ...Respondents.

15. RFA No. 529 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Gulam Sabar & others. ...Respondents.

16. RFA No. 530 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Munna Khan & others. ...Respondents.

17. RFA No. 531 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Munni Lal & others. ...Respondents.

18. RFA No. 551 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Shanti Devi. ...Respondent.

19. RFA No. 552 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Soma Devi. ...Respondent.

20. RFA No. 553 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Smt. Lajja & others. ...Respondents.

21. RFA No. 554 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Shri Desh Raj Sharma. ...Respondent.

22. RFA No. 555 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Shakuntla. ...Respondent.

23. RFA No. 556 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sukhvinder & others. ...Respondents.

24. RFA No. 557 of 2011
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Deepak Kumar & others. ...Respondents.

25. RFA No. 79 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Maya Ram. ...Respondent.

26. RFA No. 80 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Hussan Pal. ...Respondent.

27. RFA No. 81 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Tinku Ram. ...Respondent.

28. RFA No. 82 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Pritam Singh. ...Respondent.

29. RFA No. 105 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Smt.Ajmero Devi & others. ...Respondents.

30. RFA No. 106 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Smt. Satya Devi & others. ...Respondents.

31 RFA No. 107 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Smt. Asgari & others. ...Respondents.

32. RFA No. 108 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Sabar. ...Respondent.

33. RFA No. 109 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Ram Rattan ...Respondent.

34. RFA No. 110 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Sh. Hukam Singh. ...Respondent.

35. Cross-objection No. 1010 of 2012 in RFA No. 106 of 2012
H.P. Housing and Urban Development Authority (HIMUDA) & another.
...Appellants.
Versus
Smt.Satya Devi & Others. ...Cross-objectors/Respondents.

**Land Acquisition Act, 1872**- Sections 18, 19 & 23– Acquisition of land for public purpose – Reference - Compensation – Market value –Determination - Negotiations before Land Acquisition Collector (LAC)- Evidentiary value- Price for land offered by Department at time of negotiations before LAC, not accepted by Land owners- On evidence of official of Department, reference Court enhancing market value of land to price initially offered by

Department at time of negotiations – Court also granting statutory benefits- RFA - Department contending that initial offer for compensation was in lump sum inclusive of all statutory benefits and said amount could not be basis for determination of compensation with further statutory benefits- Held, offer made by beneficiary at time of negotiations, since not accepted by landowner, cannot be made basis for determining amount of compensation. (Para 11)

**Land Acquisition Act, 1872**- Sections 18, 23 & 25–Acquisition of Land for public purpose – Compensation – Market value – Determination - Exemplar sales- Held, exemplar transactions determining value of land at rate lower than rate awarded by LAC, cannot be considered being violative of Section 25 of Act. (Para 18 )

**Land Acquisition Act, 1872**- Sections 18 & 23 - Acquisition of land for public purpose - Compensation- Market value - Determination-Exemplar sale- Exemplar sale of fairly big chunk of land with factory over it, can be taken to have already been developed capable of fetching higher price than land yet to be developed–Said sale also being pursuant to public auction, not voluntary transaction –Cannot be relied upon for determining market value. (Para 28 )

***Cases referred:***

Bhupal Singh and others Vs. State of Haryana, (2015) 5 SCC 801
H.P. Housing Board Vs. Bharat S. Negi and others, (2004) 2 SCC 184
Inderaj Singh Vs. State of Haryana, 2013 14 SCC 491
Narendra and others Vs. State of Uttar Pradesh and others, (2017) 9 SCC 426
Trishala Jain Vs. State of Uttaranchal, (2011) 6 SCC 47
Union of India Vs. Raj Kumar Baghal Singh (Dead) through Legal Representatives and others, (2014) 10 SCC 422
Viluben Jhalejar Contractor (Dead) by LRs. Vs. State of Gujarat, (2005) 4 SCC 789
Wave Industries Private Limited Vs. Atar Singh and others, (2011) 14 SCC 745

For the Appellant(s): Mr.Bhupinder Gupta, Senior Advocate, with Ms.Poonam Gehlot, Advocate, except in RFA No. 79 to 82 of 2012.

For the Respondent(s): Mr.Deepak Kaushal, Advocate for private respondents/cross-objectors.
Mr.Shiv Pal Manhans and Ms.Rameeta Kumari, Additional Advocate Generals, with Mr.Raju Ram Rahi, Deputy Advocate General for respondent-State.

The following judgment of the Court was delivered:

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**Vivek Singh Thakur, Judge**

All these appeals arising out of awards dated 11.7.2011 and 15.11.2011 passed by learned District Judge, Sirmaur, District at Nahan (herein after referred to as the Reference Court) in land Reference Petition Nos. 6-LAC/4 of 2008, 23-LAC/4 of 2008, 20-LAC/4 of 2008, 29-LAC/4 of 2008, 22-LAC/4 of 2008, 26-LAC/4 of 2008, 40-LAC/4 of 2008, 24-LAC/4 of 2008, 28-LAC/4 of 2008, 25-LAC/4 of 2008, 21-LAC/4 of 2008, 1-LAC/4 of 2008, 17-LAC/4 of 2008, 3-LAC/4 of 2008, 15-LAC/4 of 2008, 2-LAC/4 of 2008, 4-LAC/4 of 2008, 31-LAC/4 of 2008, 32-LAC/4 of 2008, 33-LAC/4 of 2008, 34-LAC/4 of 2008, 30-LAC/4 of 2008, 35-LAC/4 of 2008, 10-LAC/4 of 2008, 12-LAC/4 of 2008, 16-LAC/4 of 2008, 9-LAC/4 of 2008, 11-LAC/4 of 2008, 7-LAC/4 of 2008, 13-LAC/4 of 2008, 14-LAC/4 of 2008, 8-LAC/4 of 2008, have been heard together and are being decided by this common

judgment, as common question of fact and law, to be considered on the basis of common evidence, is involved.

2. State of Himachal Pradesh, for public purpose, i.e. for establishing Colony for industrial workers through Himachal Pradesh Housing and Urban Development Authority (hereinafter referred to as 'HIMUDA' for short), had initiated acquisition proceedings under Land Acquisition Act, 1994 (herein after referred to as the 'Act' for short) to acquire land in village Moginand, Tehsil Nahan, District Sirmour, H.P. by issuing notification dated 1.12.2005 under Section 4 of the Act, which was published in Rajpatra on 8.12.205 and in daily newspapers on 22.12.2005 and a public notice of the said notification was also circulated through Tehsildar, Nahan on 4.12.2005. After completing the proceedings under the Act, Land Acquisition Collector assessed uniform value of land under acquisition at the rate of `4,85,234/- per bigha irrespective of nature and classification of the land vide award No. 1 of 2007 announced on 1.2.2007.

3. Being aggrieved and dissatisfied with value of acquired land determined by Land Acquisition Collector, land owners had preferred Reference Petitions for enhancement under Section 18 of the Act, which have been decided by the Reference Court vide awards dated 11.7.2011 and 15.11.2011, by awarding uniform rate of `6,66,000/- per bighas, of the acquired land, irrespective of nature and classification of the land.

4. Beneficiary HIMUDA, being aggrieved by the enhancement awarded by the Reference Court, has preferred these appeals.

5. Vide award dated 11.7.2011, Reference Court has decided Reference Petition Nos. 1, 2, 3, 4, 15, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41-LAC/4 of 2008 and 1-LAC/4 of 2009, enhancing the compensation to `6,66,000/- per bigha on the basis of evident led in lead case LAC Petition No. 1-LAC/4 of 2008, titled Rashid Vs. HIMUDA and others. Appeals arising out of these Reference Petitions are RFA Nos. 516 to 531 and 551 to 557 of 2011.

6. Vide award dated 15.11.2011 Reference Court has decided land reference petition Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 16-LAC/4 of 2008, awarding compensation on the same rate relying upon the award Ex. PX passed in LAC Petition No. 1-LAC-4 of 2008 Rashid Vs. HIMUDA and others. In these petitions, evidence was lead only in one lead case i.e. LAC Petition No. 5-LAC/4 of 2008 Ram Rattan Vs. State of H.P. Appeals arising out of these reference petitions are RFA Nos. 79 to 82 and RFA Nos. 105 to 110 of 2012.

6. Except one, none of the land owners have preferred cross-objections. Cross-objection No. 1010 of 2012 has been preferred in RFA No. 106 of 2012, which is an appeal in the set of cases decided on the basis of Rashid's case, wherein further enhancement of the compensation on the basis of evidence led in Ram Rattan's case (RFA No. 109 of 2012) has been claimed. In Ram Rattan's case except, Ex. PX passed in Rashid's case (RFA No. 164 of 2012) rest evidence is the same. Therefore, this cross-objection is also to be considered along with these appeals.

7. Acquisition proceedings in all appeals were initiated by one and the same notification issued under Section 4 of the Act with respect to the land pertaining to one and the same village i.e. village Moginand and amount of compensation was also determined by Land Acquisition Collector vide common award No. 1 of 2007 announced on 1.2.2007. Evidence in Rashid's case, basis for awarding uniform rate in the cases under consideration in appeals, therefore, fate of Rashid's case will determine the amount of compensation payable in all cases. Thus it would be appropriate to evaluate the evidence in Rashid's case first of all.

8. In reference petitions, prayer for determining the amount of compensation at the rate of `20,00,000/ per bigha along with consequential statutory benefits was made on behalf of land owners/claimants. To substantiate their claim, land owners have examined four witnesses. PW-1 Pardeep Kumari Junior Engineer of HIMUDA at Nahan has proved on record that at the time of negotiation with land owners, an offer of `6,66,000/- was made to land owners-claimants, but the same was not accepted by them. PW-2 Vikram Gautam one of the land owners has reiterated claim on behalf of land owners, PW-3 Rajesh Malhotra is Patwari of the area concerned and PW-4 Kuldeep Singh is Economic Investigator, serving in the office of Principal Secretary of Single Window, Redressal of Grievances System, Kala Amb. Reliance has been put by land owners on sale deeds Ex. PW-2/B dated 29.9.2004, Ex. PW-2/C dated 31.5.2006, Ex. PW-2/D dated 29.4.2006, Ex. PW-2/E dated 24.5.2006 and Ex. PW-2/F dated 18.3.2006 pertaining to the same village i.e. village Moginand.

9. Beneficiary HIMUDA has examined five witnesses to rebut the claim of land owners. RW-1 Smt.Manna Devi Registration Clerk has produced sale deeds Ex. RW-1/A dated 19.7.2005, Ex. RW-1/B dated 30.11.2004, Ex. RW-1/C dated 29.10.2004, Ex. RW-1/D dated 30.11.2004 and RW-1/D dated 15.9.2004, pertaining to the land of the same village i.e. village Moginand. RW-2 Rasal Singh, Office Kanungo, has proved average value of land and jamabandi produced by HIMUDA with sale deeds Ex. RW-1/A to Ex. RW-1/E. RW-3 Chandershakher, Accounts Officer of HIMUDA has placed on record abstract of development cost Ex. RW-3/A, incurred by HIMUDA for developing the plots before putting them on sale. RW-4 Sunder Singh, Assistant Engineer HIMUDA has deposed with regard to work undertaken by HIMUDA for development of plots. RW-5 Diwan Chand Sharma, Architect HIMUDA has placed on record layout plan Ex. RW-5/A with respect to proposal of development of the acquired land for creation of colony.

10. It is contended by Mr.Bhupinder Gupta, Senior Advocate that the Reference Court, for awarding the compensation at the rate of `6,66,000/- per bigha, has wrongly relied upon the deposition of PW-1, Pardeep Kumari, wherein she deposed that during negotiation held with the villagers under Section 19 of the Act, Chief Executive Officer-cum-Secretary HIMUDA, in presence of Deputy Commissioner, Sirmaur and LAC HIMUDA had offered rate of `6,66,000/- per bigha to the villagers for all kinds of land, but the same was declined by land owners. It is further contended that even if her statement with regard to offer of `6,66,000/- per bigha is considered to be correct, then also the Reference Court has committed an error considering the said amount as the base amount, as any such offer was in lump sum, inclusive of all statutory benefits and therefore, the said amount cannot be made basis for determination of compensation with further statutory benefits under the Act. On this issue, reliance has also been put on ***H.P. Housing Board Vs. Bharat S. Negi and others, (2004) 2 SCC 184,*** wherein it has been held that such an offer made by beneficiary was consolidated inclusive of solatium and interest. It is further contended that there is only one sale deed Ex. PW-2/B produced by land owners, which pertains to the period proximate in time to the notification under Section 4 of the Act, whereas other sale deeds are post notification in time. Further that in sale deed Ex. PW-2/B, land measuring 6-06 bighas was sold for a consideration of `55,00,000/- and the land involved in the said sale deed was developed one, whereupon a structure of factory was already existing at the time of sale. In that sale deed value of land comes to be `8,73,015/- per bigha and as the land under acquisition is undeveloped land and therefore, in case Ex. PW-2/B is to be made basis for determining the value of land under acquisition, a deduction of at least 40% is necessary to arrive at correct value of the said land, which according to him comes to `5,23,809/- per bigha. For substantiating claim for deduction, he has relied upon ***Viluben Jhalejar Contractor (Dead) by LRs. Vs. State of Gujarat, (2005) 4 SCC 789; Trishala***

***Jain Vs. State of Uttaranchal, (2011) 6 SCC 47; Wave Industries Private Limited Vs. Atar Singh and others, (2011) 14 SCC 745; Inderaj Singh Vs. State of Haryana, 2013 14 SCC 491; Union of India Vs. Raj Kumar Baghal Singh (Dead) through Legal Representatives and others, (2014) 10 SCC 422 and Bhupal Singh and others Vs. State of Haryana, (2015) 5 SCC 801.***

11. It is true that the Apex Court in *Bharat Sing Negi's case* referred supra, has observed that offer of `80,000/- per bigha made by Housing Board was as consolidated amount, inclusive of solitum and interest, but the same was not taken into consideration as it had not been accepted by claimants. Therefore, in present case also the offer of `6,66,000/- made by beneficiary HIMUDA at the time of negotiations, which was not acceptable to the land owners, cannot be made basis for determining the amount of compensation.

12. Learned counsel for the land owners have contended that land under acquisition was situated in an area abutting to the National Highway as well as developed industrial area in the village Moginand and no deduction as is being pleaded by beneficiary HIMUDA is permissible in present case and also for the reason that keeping in view the location of the acquired land, the same had potential of being utilized by land owners themselves for raising construction for letting out or selling for residential purpose to the employees/workmen serving in the adjacent industrial area. It is further contended that PW-1 Pardeep Kumari, who happens to be Junior Engineer with beneficiary HIMUDA, the plots created and developed on the acquired land were sold at the uniform rate of `3000/- per square meter, irrespective of category of land used to create those plots. As this rate, value of acquired land is at the rate of `24,00,000/- per bigha and even if 50% amount is deducted from the said value for incurring expenses to create and develop the plots, then also the value of undeveloped land becomes to `14,00,000/- per bigha and after deducting 75%, it comes to `7,00,000/- per bigha and therefore, instead of determining the value of land at the lower rate than the rate awarded by the Reference Court, it would be in the interest of justice to award the compensation at least at the rate of `7,00.000/- per bigha by exercising power of the Court under Order 41 Rule 33 C.P.C., for determining just and fair value of the land under acquisition, as it is the prime duty of the Court to award just and fair compensation. Reliance has been put on ***Narendra and others Vs. State of Uttar Pradesh and others, (2017) 9 SCC 426***, wherein in para 8, it has been held as under:-

> *"8. The purpose and objective behind the aforesaid provision is salutary in nature. It is kept in mind that those landowners who are agriculturist in most of the cases, and whose land is acquired for public purpose should get fair compensation. Once a particular rate of compensation is judicially determined, which becomes a fair compensation, benefit thereof is to be given even to those who could not approach the court. It is with this aim the aforesaid provision is incorporated by the legislature. Once we keep the aforesaid purpose in mind, the mere fact that the compensation which was claimed by some of the villagers was at lesser rate than the compensation which is ultimately determined to be fair compensation, should not be a ground to deny such persons appropriate and fair compensation on the ground that they claimed compensation at a lesser rate. In such cases, strict rule of pleadings are not be made applicable and rendering substantial justice to the parties has to be the paramount consideration. It is to be kept in mind that in the matter of compulsory acquisition of lands by the Government, the villagers whose land gets acquired are not willing parties. It was not their voluntary act to sell off their land. They were compelled to give the land to*

*the State for public purpose. For this purpose, the consideration which is to be paid to them is also not of their choice. On the contrary, as per the scheme of the Act, the rate at which compensation should be paid to the persons divested of their land is determined by the Land Acquisition Collector. The Scheme further provides that his determination is subject to judicial scrutiny in the form of reference to the District Judge and appeal to the High Court, etc. In order to ensure that the landowners are given proper compensation, the Act provides for "fair compensation". Once such a fair compensation is determined judicially, all landowners whose land was taken away by the same notification should become the beneficiary thereof. Not only it is an aspect of good governance, failing to do so would also amount to discrimination by giving different treatment to the persons through identically situated. On technical grounds, like the one adopted by the High Court in the impugned judgment, this fair treatment cannot be denied to them."*

13. There is no quarrel with respect to the ratio of law laid down by the Apex Court in *Narendra's* case supra and therefore, all these appeals arising out of one and the same notification, have been taken together for hearing and are being decided with common judgment by awarding the same rate of compensation to all similarly situated land owners.

14. It is further contended that even if the amount of compensation is not to be determined at the rate of `6,66,000/- on the basis of offer made by beneficiary HIMUDA, the value of acquired land can be determined on the basis of sale deeds produced by land owners, particularly sale deed Ex. PW-2/B, wherein 6-06 bighas of land was sold for `55,00,000/-. According to the said sale deed, the value of land comes to `8,73,015/- per bigha and as no deduction is warranted towards development charges, the land owners may be awarded compensation at the rate of `8,73,015/- per bigha. Referring statement of PW-3 Rajesh Kumar Patwari, it is contended that land under acquisition was at a distance of 250-300 meters from National Highway and there were about 70 industries running around the said land. It is further contended that in Satya Devi's case (RFA No. 106 of 2012), the land owner has preferred Cross-objection for further enhancement of amount and determined enhanced value of land in her case is to be applied in all cases, as it is settled law that equal compensation should be paid to all whose land in the same village is acquired for one and the same purpose, particularly under the one and the same notification under Section 4 of the Act.

15. Plea of beneficiary HIMUDA that `6,66,000/- per Bigha was an offer of lump sum value of land including statutory benefits etc. is also rebutted by pointing out that beneficiary HIMUDA has failed to brought on record any cogent and reliable evidence to prove that the said offer was inclusive of all statutory benefits and further that there is no cross-examination to witness PW-1, Pardeep Kumari on this count.

16. Sale deeds Ex. PW-2/C to Ex. PW-2/F have been executed and registered during 18.3.2006 to 31.5.2006, i.e. after issuance of notification dated 1.12.2005, under Section 4 of the Act and also after 22.12.2005, the date of last publication thereof and thus have rightly been ignored by the Reference Court. Transaction Ex. PW-2/B is dated 29.9.2004, which has taken place prior to issuance and publication of notification under Section 4 of the Act. According to this transaction land in village Moginand along with structure standing thereon was sold for `1,24,00,000/- only. The said document Ex. PW-2/B also contains a specific clause, wherein out of total sale consideration of `1,24,00,000/-, value of land and structure thereupon has been reflected separate, which reads as under:-

(a) For land: Rs.55,00,000/-

(6.06 Bigha)

(b) Building: Rs.69,50,000/-

Aforesaid transaction determines the value of land at the rate of `8,73,015/- per bigha.

17. It is true that fact stated in deposition of PW-1 Mrs.Pardeep Kumari that at the time of negotiation during proceeding under Section 19 of the Act a rate of `6,66,000/- per bigha was offered to villagers, has not been questioned in her cross-examination nor any evidence denying the said fact has been produced by beneficiary HIMUDA. However, it is also a fact that nowhere in the statement of PW-1, Pardeep Kumari, it has come that said value was basic value for determining the compensation after adding statutory benefits thereon. Further no evidence has been placed on record on behalf of beneficiary HIMUDA to establish that the said offer was inclusive of statutory benefits. Be that it may be. In absence of evidence in favour of either side, an offer of `6,66,000/- per bigha cannot be made basis for determining the value of land, particularly when the said offer was declined by land owners and also when the exemplar transaction Ex. PW-2/B having close proximity with respect to time of notification under Section 4 of the Act as well as location is available on record. As per sale deeds Ex. RW-1/A, Ex. RW-1/B, Ex. RW-1/C and Ex. RW-1/D, relied upon by beneficiary HIMUDA, value of land comes to be `1,96,000/-, `1,57,895, `1,45,455/- and `20,000/- per bigha. On the basis of these sale deeds, average value of land comes to `5,19,350/- per bigha. Out of these sale deeds, one sale deed Ex. RW-1/A dated 19.5.2005 has been executed within a year from the date of issuance of notification under Section 4 of the Act and rest of three sale deeds dated 30.11.2004, 29.10.2004 and 15.9.2004 have been executed on a date beyond one year from the date of notification under Section 4 of the Act, therefore, sale deeds Ex. RW-1/B, Ex. RW-1/C and Ex. RW-1/D are not proximate in time of notification under Section 4 of the Act. Even if, all these sale deeds are taken into consideration with sale deed Ex. PW-2/B relied upon by the land owners, the average value of land comes to `2,78,473/- per bigha, which is less than `4,86,234/- per bigha, the value determined by Land Acquisition Collector.

18. Exemplar transactions RW-1/A to Ex. RW-1/D relied upon by beneficiary HIMUDA, determines the value at a rate, which is lower than the rate awarded by the Land Acquisition Collector and therefore, the said exemplar deeds are not to be considered for determining the value of acquired land as the value determined on the basis of these exemplar transactions will be violative of provisions of Section 25 of the Act, which provides that the Court cannot determine the value of acquired land lesser than the value determined by Land Acquisition Collector.

19. Plea of beneficiary HIMUDA that for admission of PW-1 Pardeep Kumari in her cross-examination that compensation at the rate of `4,68,234/- per bigha was given rightly after considering the relevant factors, is also not tenable for the reasons that PW-1 is not the land owner, but an employee of beneficiary HIMUDA and thus her deposition justifying the value of land determined by Land Acquisition Collector cannot be basis for arising value of acquired land ignoring other relevant evidence on record, but has to be considered as a whole along with other evidence.

20. As per deposition of RW-4, Sunder Singh, after acquiring the land, HIMUDA has developed it by creating plots, constructing roads, providing water supply, coverage, septic tank, pump house and electricity etc. which was not existing thereon at the time of acquisition and further that acquired land is not touching National High Way and beneficiary HIMUDA has constructed a link road to connect the acquired land with National High Way. He has further stated that industries are also decreasing in the area, as the tax

free period provided by State to industry is over and therefore, market value of properties has also decreased in the area. He has further deposed that industrial area is at Kala Amb, which is about six kilometers away from village Moginand. Despite lengthy cross-examination, no where denial the development work carried out by the beneficiary HIMUDA as deposed by this witness in his examination-in-chief, has been suggested. The trend of cross-examination is to question the quantum of development work undertaken by the beneficiary HUMUDA on the spot.

21. RW-3 has deposed that beneficiary HUMUDA has incurred estimated cost for developing the plot at the rate of `2,956/- to `3,000/- per square meters. Suggestion that abstract of cost (tentative) for developing the plots Ex. RW-3/A, has been prepared on the basis of bogus figure, has been denied by this witness. In rest of cross-examination, the expenses mentioned under various heads under RW-3/A have been put to this witness, which have been admitted by him.

22. RW-5 Diwan Chand is Architect of beneficiary HIMUDA, who has proved the layout Ex. PW-5/A prepared by him with respect to acquired land with further deposition that 50% of acquired land was kept for development, amenities etc. and only 50% land was to be utilized for construction of houses and there is also Low Tension (L.T.) line in the land in question and land beneath the said line is also not useable for any purpose. He has also stated that to connect the acquired land with National Highway a link road was constructed by beneficiary HIMUDA.

23. RW-2, Rasal Singh was Kanungo at the time of acquisition of land. He has reiterated the average value and jamabandies enclosed with sale deeds Ex. RW-1/A to RW-1/E. In his cross-examination he has stated that at the time of acquisition, value of land was `20-25 lacks per bigha. His statement is contrary to the documents prepared and proved by him and there is also no other corroborative evidence substantiating the version of this witness.

24. PW-2 Vikram Gautam, land owner in his examination-in-chief has tendered his affidavit Ex. PW-2/A in evidence and has reiterated the claim of land owners as detailed supra. Nothing material favourable to beneficiary HIMUDA has come on record in his cross-examination.

25. PW-3 Rajesh Kumar Patwari has deposed that acquired land is at a distance of 250-300 meters from National Highway and there are about 70 industries near village Moginand. However, he has further clarified that this number includes industries of village Jaton and Ogli also. He has deposed that 10+2 school, Central Bank etc. are also there in village Moginand and at a distance of 2-2.5 kilometers there are Law College, B.Ed. College and IIT and area of village Moginand to Kala Amb is a developed area. He has also deposed that land under acquisition is irrigated cultivable land. In cross-examination, he has admitted that acquired land is not abutting to the National Highway. Rest of the suggestions, disputing his statement made in examination-in-chief, have been denied by him. So far admission with regard to distance from National High Way is concerned, i.e. also not contrary to his examination-in-chief, wherein he has stated that acquired land is situated at distance of 250-300 meters from National Highway.

26. PW-4 Kuldeep Singh has placed on record the list of industries Ex. PW-4/A situated in village Moginand, Ogli, Main Thapal, Shoro and Kala Amb. In cross-examination, he has expressed his ignorance about the number of industries in working condition and number of closed industries.

27. From above discussion, it is clear that Ex. PW-2/B is only relevant exemplar transaction to be taken into consideration, wherein the land involved therein was also having structure of factory standing thereon, meaning thereby that the said land had been already been developed for establishing the factory and thus was capable of fetching higher price than the land yet to be developed. However, it is also to be taken in mind that buyer may also have to incur some expenditure for altering in existing structure for making it suitable for his purpose and thus factor is also relevant to be considered for determining percentage of deduction on account of development charges. On this count, buyer definitely may have agreed to settle the sale consideration on lesser value. Further Ex. PW-2/B is in pursuant to auction and is not a transaction with free will of previous owner, but under duress. It has also been proved on record that beneficiary HIMUDA had undertaken number of developmental work like construction of road, arrangement for water and electricity supply, sewerage facility etc. and leveling plots to develop and utilize the land as a residential colony for workers and substantial amount has also been spent by beneficiary HIMUDA for the said purpose. Further the amount so spent is not to be reimbursed from the land owners, as the land has not been developed for use of land owners and further they are not having any share in the amount fetched by the beneficiary HIMUDA after selling the plots. Fixing the price for selling the plots is in the domain of beneficiary HIMUDA, in which the land owners have no role to play. However, right of land owners is only to have the fair compensation for their land. So far as deduction of development charges is concerned, the same is also permitted in certain cases to determine the fair value of land with reference to the purpose of acquisition of land and development expenditure incurred for utilization of land for the said purpose and where no such development work is necessary like construction of road and acquired land is to be used, as it is existing at the time of acquisition, no development charges are permitted to be deducted. But at the same time, it is to be kept in mind that deduction on account of development charges is not a reimbursement of such expenses to beneficiary from land owners, but is a factor to be considered for arriving at just and fair value of acquired land with reference to potential of the said land and thus entire expenses are not to be taken in to consideration for deduction, as the entire development cost is not to be recovered from the land owners, rather the land owners are to be paid just and fair compensation.

28. In present case the land under acquisition is not totally undeveloped or far away from the National Highway. It was surrounded by industries and having potential for developing it privately also by land owners. Keeping in view facts and circumstances discussed supra, deduction of 1/3 amount from the value of land arrived at on the basis of exemplar sale deed Ex. PW-2/B would be excessive in present case. Therefore, keeping in view the entire evidence on record and the various pronouncement of the Courts, to determine the value of acquired land on the basis of exemplar sale deed Ex. PW-2/B after deducting 25% amount for development charges, which comes to be `6,54,761/- say `6,55,000/-. Therefore, award passed in RFA No. 526 of 2011, titled Rashid and another along with connected matter, deserves to be modified to the aforesaid extent.

29. In case of Ram Rattan (RFA No. 109 of 2012) and its connected matters, the Reference Court has determined the value of land relying upon the award Ex. PX i.e. award passed by Reference Court in Rashid's case. It is undisputed that except the award Ex. PX, rest entire evidence in Ram Rattan's case is identical to the Rashid's case, which has already been discussed hereinabove and on the basis of which land owners in Rashid's case and its connected matters have been found to be entitled for compensation at the rate of `6,55,000/- per bigha. Therefore, land owners in these appeals are also entitled for the same compensation.

30. The cross-objections are also based on identical evidence discussed herein supra, therefore, the same is also disposed of in term of the appeals.

31. Accordingly, appeals filed by beneficiary HIMUDA are allowed in the aforesaid terms and cross-objection is dismissed. Therefore, land owners in all these appeals/cross-objector are held to be entitled for compensation at the rate of `6,55,000/- per bigha along with statutory benefits. No order to costs. Record be sent back.

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

RFA No. 370 of 2014 along with
RFA Nos. 371 to 380 of 2014 and
RFA Nos. 94 and 95 of 2015
Judgment Reserved on: 5.9.2018
Date of Decision: 2.11.2018

1. RFA No. 370 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Sh.Surender Singh and others. ...Respondents.

2. RFA No. 371 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Sh.Roop Singh & Another. ...Respondents.

3. RFA No. 372 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Sh.Rajinder Kumar & Another. ...Respondents.

4. RFA No. 373 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Smt.Anita and others. ...Respondents.

5. RFA No. 374 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Sh.Mata Ram and Another. ...Respondents.

6. RFA No. 375 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Sh.Tara Chand and others. ...Respondents.

7. RFA No. 376 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Sh. Bodh Singh and Another. ...Respondents.

8. RFA No. 377 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Sh.Manga Ram & Another. ...Respondents.

9. RFA No. 378 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Sh.Rikhi Ram & Another. ...Respondents.

10. RFA No. 379 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Sh. Munia & Another. ...Respondents.

11. RFA No. 380 of 2014
The Renuka Dam Project and another ...Appellants.
Versus
Sh.Surender Singh and others. ...Respondents.

12. RFA No. 94 of 2015
The Renuka Dam Project and another ...Appellants.
Versus
Sh.Uma Dutt through LRs and others. ...Respondents.

13. RFA No. 95 of 2015
The Renuka Dam Project and another ...Appellants.
Versus
Smt. Gulabi Devi and others. ...Respondents.

**Land Acquisition Act, 1872- Sections 18 & 23** - Acquisition of land for public purpose – Compensation- Market value- Assessment- Held, for determining market value of land for acquisition, it is purpose for which land acquired and not its nature and classification, what is relevant -Where nature or classification of land has no relevance with purpose, uniform rate to all kinds of lands is to be given and it cannot be less than higher rate determined by Land Acquisition Collector. (Paras 8 &10 )

**Land Acquisition Act, 1872- Sections 18 & 23** - Acquisition of land for public purpose - Compensation – Market value – Assessment - Deductions towards development charges - Held, when for using land for purpose ( construction of Dam) for which it is acquired, no development activity is undertaken by beneficiary, deductions towards development charges impermissible. (Para 11 )

***Cases referred:***

Anjani Molu Dessai Vs. State of Goa (2010) 13 SCC 710
Bijender and others Vs. State of Haryana and Another (2018) 11 SCC 180
Chindha Fakira Patil (dead) through LRS. Vs. Special Land Acquisition Officer, Jalgaon (2011) 10 SCC 787
Dadu Ram Vs. Land Acquisition Collector and others (2016) 2 ILR 636 (HP)
Executive Engineer and another Vs. Dila Ram, Latest HLJ 2008 (HP) 1007
Goa Housing Board Vs. Rameshchandra Govind Pawaskar, (2011) 10 SCC 371
G.M. Northern Railway Vs. Gulzar Singh and others (Latest HLJ 2014 (HP) 775
Haridwar Development Authority Vs. Raghubir Singh and others, (2010) 11 SCC 581
Himmat Singh and others Vs. State of Madhaya Pradesh and Another, (2013) 16 SCC 392
H.P. Housing Board Vs. Ram Lal and others, 2003 (3) Shim.L.C. 64
Indian Council of Medical Research Vs. T.N. Sanikop and Another, (2014) 16 SCC 274
Jai Prakash and others Vs. Union of India (1997) 9 SCC 510
Kanwar Singh and others etc. etc. Vs. Union of India, AIR 1999 SC 317
Kanwar Singh and others Vs. Union of India (1998) 8 SCC 136
Kolkata Metropolitan Development Authority Vs. Gobinda Chandra Makal and Another, (2011) 9 SCC 207
Land Acquisition Officer Vs. Chindha Fakira Patil (2007) 2 Mah LJ 130
Land Acquisition Officer & Sub-Collector, Gadwal Vs. Sreelatha Bhoopal (Smt.) and Another (1997) 9 SCC 628
LAC and another Vs. Bhoop Ram and others, 1997 (2) SLC 229
Manoj Kumar etc. Vs. State of Haryana, 2017 SCC Online SC 1262
M. Vijayalakshmamma Rao Bahadur Vs. Collector of Madras (1969) 1 MLJ 45 (SC)
Peerappa Hanmantha Harijan (Dead) by Legal Representatives and others Vs. State of Karnataka and Another, (2015) 10 SCC 469
Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala, (1991) 4 SCC, 195
Shub Ram & others Vs. State of Haryana and another 2010 (1) SCC 444
Smt. Gulabi and etc. Vs. State of H.P. (AIR 1998 HP 9
State of Madhya Pradesh and others Vs. Kashiram (dead) by Lrs. And others, (2010) 14 SCC 506
State of Punjab Vs. Hans Raj (1994) 5 SCC 734
Union of India Vs. Harinder Pal Singh and others 2005 (12) SCC 564
Union of India and Others Vs. N.S. Rathnam and Sons (2015) 10 SCC 681
Viluben Jhalejar Contractor (Dead) by LRs. Vs. State of Gujarat, (2005) 4 SCC 789

For the Appellant(s): Mr.Vivek Negi, Advocate.
For the Respondent(s): Mr.M.P. Kanwar and Mr.Pawan K. Sharma, Advocates.
Mr.Shiv Pal Manhans and Ms.Rameeta Kumari, Additional Advocate General with Mr.Raju Ram Rahi, Deputy Advocate General, for respondent-State.

The following judgment of the Court was delivered:

**Vivek Singh Thakur. Judge**

These appeals arising out of the common award dated 30.5.2014, passed by learned District Judge, Sirmaur, District Nahan, H.P., (herein after referred to as the Reference Court) in land Reference Petition Nos. 10-LAC/4 of 2012, 01-LAC/4 of 2012, 02-

LAC/4 of 2012, 03-LAC/4 of 2012, 04-LAC/4 of 2012, 5-LAC/4 of 2012, 6-LAC/4 of 2012, 7-LAC/4 of 2012, 8-LAC/4 of 2012, 9-LAC/4 of 2012, 11-LAC/4 of 2012, 12-LAC/4 of 2012 and13-LAC/4 of 2012 have been heard together and are being decided by this common judgment, as identical question of fact and law is involved therein is to be determined on the basis of common evidence lead in one case.

2. Government of Himachal Pradesh, for the purpose of construction of Renukaji Dam, has acquired land situated in village Panar Kalyan in pursuance to notification dated 24.7.2009 issued under Section 4 of the Land Acquisition Act, 1994 (herein after referred to as the 'Act' in short), last publication wherein was on 14.9.2009. Land Acquisition Collector vide award No. 624 dated 30.4.2011 has determined different rates of acquired land for calculating amount of compensation on the basis of its nature and classification, ranging from `60,500/- per bigha to `3,60,000/- per bigha.

3. In Land Reference Petitions, preferred by land owners/claimants, under Section 18 of the Act for enhancement of compensation, Reference Court has enhanced the compensation by awarding uniform rate of acquired land at the rate of `5,00,000/- per bigha. Being aggrieved by this enhancement, beneficiary project has preferred these appeals under Section 54 of the Act.

4. In Reference Court land owners/claimants have examined PW-1 Surnder Singh on behalf of land owners/claimants and PW-2 Ajay Goel, Vendee in the sale deed Ex. PW-1/B. Land owners have relied upon sale deeds Ex. PW-1/B, Ex. PW-1/C, Ex. PW-1/D, Ex. PC and also awards Ex. PA and PB. Whereas beneficiary proponent has examined one witness RW-1 Ashok Kumar, Patwari of Patwar Circle Dadhau and has relied upon Khaka Dasti Ex. RW-1/A, one year average cost Ex. RW-1/B and sale deeds Ex. RA to RD and also award Ex. RE.

5. It is undisputed fact that land under acquisition has to submerge in Renukaji Dam and no further construction or development activity has been undertaken by the beneficiary project thereupon, for its utilization i.e. submerging thereof in dam.

6. Learned counsel for the appellant beneficiary project has contended that Reference Court has committed a mistake on four counts, i.e. firstly by taking into consideration sale deed of small area, ignoring various pronouncements of the Apex Court, including ***Land Acquisition Officer & Sub-Collector, Gadwal Vs. Sreelatha Bhoopal (Smt.) and Another (1997) 9 SCC 628; Bijender and others Vs. State of Haryana and Another (2018) 11 SCC 180;*** secondly relying upon award related to a different village ignoring pronouncements of the Apex Court in ***Kanwar Singh and others etc. etc. Vs. Union of India, AIR 1999 SC 317; State of Madhya Pradesh and others Vs. Kashiram (dead) by Lrs. And others, (2010) 14 SCC 506;*** thirdly without taking into consideration disability of land owners for putting the land in question for some other use than the agriculture for a restriction imposed upon them as the land in question had been allotted to land owners only out of Shamlat land owned and possessed by Panchayat, for which land owners were not entitled to be compensated at all, particularly in view of pronouncement of the Apex Court in ***Goa Housing Board Vs. Rameshchandra Govind Pawaskar,*** (***2011) 10 SCC 371;*** and fourthly that the Reference court has also failed to make deductions for development charges, in accordance with ratio laid down by the Apex Court in cases ***Kolkata Metropolitan Development Authority Vs. Gobinda Chandra Makal and Another, (2011) 9 SCC 207; Haridwar Development Authority Vs. Raghubir Singh and others, (2010) 11 SCC 581; Indian Council of Medical Research Vs. T.N. Sanikop and Another, (2014) 16 SCC 274*** and ***Bijender'*** case supra.

7. On the contrary learned counsel for the land-owners/claimants, after putting reliance on ***Himmat Singh and others Vs. State of Madhaya Pradesh and Another, (2013) 16 SCC 392,*** has contended that Reference Court has rightly determined the value of land and keeping in view the fact that before putting the land in use for which the land has been acquired, no developmental activity is to be undertaken, no deduction on account of development charges is required and further that in view of evidence on record , Reference Court has rightly relied upon the award of adjoining village Ex. PB and sale deed Ex. PW-1/D.

8. It is well settled that at the time of determining market value of land for acquisition, the purpose for which the land is acquired, is relevant and not nature and classification of land and where nature and classification of the land has no relevance for purpose of acquisition, market value of the land is to be determined as a single unit irrespective of nature and classification of the land. In such a case, uniform rate to all kinds of land under acquisition as a single unit irrespective of their nature and classification is to be awarded. (See ***Dadu Ram Vs. Land Acquisition Collector and others (2016) 2 ILR 636 (HP)***; ***H.P. Housing Board Vs. Ram Lal and others, 2003 (3) Shim.L.C. 64; Union of India Vs. Harinder Pal Singh and others 2005 (12) SCC 564; Executive Engineer and another Vs. Dila Ram, Latest HLJ 2008 (HP) 1007; LAC and another Vs. Bhoop Ram and others, 1997 (2) SLC 229; Smt. Gulabi and etc. Vs. State of H.P. (AIR 1998 HP 9)*** and ***G.M. Northern Railway Vs. Gulzar Singh and others (Latest HLJ 2014 (HP) 775).***

9. Further, it is also settled that when the purpose of acquisition is common and no developmental activity is required to be carried out, compensation is to be awarded at uniform rate. (See ***Viluben Jhalejar Contractor (Dead) by LRs. Vs. State of Gujarat, (2005) 4 SCC 789; Himat Singh and others Vs. State of Madhya Pradesh and Another, (2013) 16 SCC 392 and Peerappa Hanmantha Harijan (Dead) by Legal Representatives and others Vs. State of Karnataka and Another, (2015) 10 SCC 469).***

10. As provided under Section 25 of the Act, Court cannot award compensation lesser than that awarded by Land Acquisition Collector (See ***Shub Ram & others Vs. State of Haryana and another 2010 (1) SCC 444***). Therefore, where uniform rate of compensation is to be awarded, it cannot be less than highest rate determined by the Land Acquisition Collector.

11. Law with respect to allowing or disallowing the deduction on account of development charges is also no longer res-integra and stands settled as also held in the Apex Court in ***Himat Singh's case*** *supra* and ***Union of India and Others Vs. N.S. Rathnam and Sons (2015) 10 SCC 681,*** that when for using the land, for the purpose for which it is acquired, no development activity is undertaken by the beneficiary, no question of expenditure for development thereon would arise and therefore, in such case deduction by way of development charges is impermissible as where there is no development activity, there is no reason to deduct development charges. Therefore, law cited on behalf of appellant, claiming deduction on account of development charges is not applicable in the present case.

12. It is also settled that when no exemplar transactions are available pertaining to the village in which the land under acquisition is situated, exemplar transaction including the sale deeds and awards passed for acquiring the land of different village, can also be taken into consideration, but after making appropriate additions or deductions, on the basis of comparison of nature, location and potentiality of the land of two villages. ***(See Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala, (1991) 4 SCC,***

***195; Jai Prakash and others Vs. Union of India (1997) 9 SCC 510; Kanwar Singh and others Vs. Union of India (1998) 8 SCC 136*** and ***Manoj Kumar etc. Vs. State of Haryana, 2017 SCC Online SC 1262).***

13. The Apex Court in case titled ***Chindha Fakira Patil (dead) through LRS. Vs. Special Land Acquisition Officer, Jalgaon (2011) 10 SCC 787***, after considering all its previous pronouncements in ***M. Vijayalakshmamma Rao Bahadur Vs. Collector of Madras (1969) 1 MLJ 45 (SC), State of Punjab Vs. Hans Raj (1994) 5 SCC 734, Land Acquisition Officer Vs. Chindha Fakira Patil (2007) 2 Mah LJ 130 and Anjani Molu Dessai Vs. State of Goa (2010) 13 SCC 710***, instead of awarding compensation on the basis of average sale price of transactions has awarded the compensation on the basis of sale deed representing the highest value of the land, as the average sale price of transaction relied upon by the respondent therein was far less than the price for which the land was sold in the exemplar sale deed relied upon by the claimants.

14. It is admitted case of the parties, as has been suggested on behalf of appellant-beneficiary at the time of cross-examining PW-1, that during the relevant period taken into consideration for assessing the value of land, no transaction had taken place in village Panar Kalyan. This fact is also substantiated from the fact that all the sale deeds relied upon by appellant-beneficiary Ex. RA, Ex. RB, Ex. RC and Ex. RD pertain to another village namely Dungi Kandyon. However, Reference Court has rightly discarded these sale deeds for the reason that value of land according to these sale deeds comes to even less than the lowest rate awarded by the Land Acquisition Collector. As per Section 25 of the Act, Reference Court cannot determine the value of land less than that determined by Land Acquisition Collector. In these transactions, sale deed Ex. RA gives highest value of land as `55,000/- per bigha, whereas average of these transactions would be `37,000/- per bigha. Both values are lesser than value determined by Land Acquisition Collector. Similarly in award No. 610 dated 8.7.2010, Ex. RE, pertaining to village Dungi Kandyon, also value of land determined as `60,500/- is lesser than `3,60,000/- per bigha determined by Collector in present case. For the same reason average value placed on record vide Annexure RW-1/B, indicating the highest value of the land in village Panar Kalyan at the rate of `2,25,961/- per bigha, has also rightly been discarded by the Reference Court as it would determined the value of acquired land less than the value determine by the Land Acquisition Collector i.e. at the rate of `3,60,000/- per bigha.

15. Though in Khaka Dasti village Dungi Kandyon has been shown in between village Panar Kalyan and Chuli Dadahu, however, there is no evidence on record with regard to similarity of nature and potentiality of land of these villages Panar Kalyan and Dungi Kandyon. These three villages have been shown situated in one line, one after another, indicating that village Dungi Kadyon is in between village Panar Kalyan and Chuli Dadahu. It is also admitted fact that all these three villages fall in patwar circle Dadhau.

16. In affidavit Ex. PW-1/A filed in examination-in-chief of PW-1 Surender Kumar, it is stated that acquisition of land in village Panar Kalyan and Chuli Dadahu was started at one time, however, on account of stay order passed by National Green Tribunal, the award in case of village Chuli Dadahu was announced one year later and further that the land of village Dungi Kandyon and Panar Kalyan is not similar, but the land of Chuli Dadahu is comparable with village of Panar Kalyan. These averments have not been questioned in cross-examination to this witness and have also not been refuted by leading any evidence in rebuttal. PW-2 Ajay Goel has also categorically denied that village Panar Kalyan cannot be equated with the land of Chuli Dadahu. RW-1 Ashok Kumar, in his cross-examination has also admitted that land of village Panar Kalyan, Dheera Bangar and mauja Dadahu are similar in location and potentiality.

17. Land owners/claimants have relied upon Ex. PW-1/B, Ex. PW-1/C, Ex. PW-1/D and Ex. PC and also awards Ex. PA and Ex. PB. As per sale deed Ex. PW-1/B, value of land becomes `3,33,300/- per bigha. However, the said value is lower than `3,60,000/- per bigha, the value determined by Land Accusation Collector. In sale deed Ex. PW-1/C 0-2-6 bigha was sold for `1,10,000/-, but along with structure constructed thereupon. There are no details in the said sale deed with respect of separate value of land and structure and therefore, this sale deed cannot be considered as an exemplar transaction. As per sale deed Ex. PC, value of land becomes to `4,00,000/- per bigha, whereas as per sale deed Ex. PW-1/D, value of land becomes to `5,00,000/- per bigha. Aforesaid all sale deeds pertain to village Chuli Dadahu and award Ex. PB also pertains to village Chuli Dadahu. In award No. 625 dated 30.4.2011 Ex. PA, Land Acquisition Collector has determined the highest value of land at the rate of `3,60,000/- per bigha, like the present case, but the said award has not attained finality yet, hence cannot be considered as exemplar award. As discussed above, there is some evidence on record to establish similarity of land of Panar Kalyan with that of village Chuli Dadahu. In sale deed Ex. PW-1/D, value of land becomes to `5,00,000/- per bigha, which is highest. Applying the ratio of law laid down by the Apex Court in *Chinda Fakira Patil's case supra* sale deed Ex. PW-1/D depicting the highest value of land, can be made basis for determining the compensation. Though there is evidence on record with respect to similarity of land of village Panar Kalyan with that of land of village Chuli Dadahu and the value of land in village Chuli Dadahu in Ex. PB has been determined at `13,00,000/- per bigha by Land Acquisition Collector itself, but keeping in view the fact that value of land as determined by land Acquisition Collector on the basis of evidence on record at the rate of `5,00,000/- has not been further assailed by the land owners/claimants for enhancement, and thus I find that on the basis of evidence on record, there is no reason to interfere in the value determined by Reference Court at the rate of `5,00,000/- per bigha, particularly keeping in view the highest value of land on the basis of sale deed Ex. PW-1/D.

18. It is also pertinent to notice that Land Acquisition Collector at the time of passing award pertaining to land in question in present appeal on 30.4.2011 had awarded the compensation on the basis of nature and classification of the land, whereas in award No. 648 Ex. PB passed on 6.8.2012 pertains to village Chuli Dadahu, he had awarded compensation at uniform rate to the tune of `13,00,000/- per bigha, irrespective of nature and classification of the land.

19. The value of land, in award passed by Land Accusation Collector itself, acquired for the same purpose during the same time period, has been determined at the rate of `13,00,000/- per bigha, whereas Reference Court while relying upon the same award of village Chuli Dadahu, has not awarded `13,00,000/- per bigha to the land owners belonging to village Panar Kalyan and has determined the value of land of village Panar Kalyan at the rate of `5,00,000/- per bigha, which is about 62% lesser than the value of land determined for village Chuli Dadahu, which is sufficient deduction for exemplar transaction/award pertains to different village coupled with week evidence of similarity of nature and potentiality. Therefore, no further deduction on this count is required. Even if sale deed Ex. PW-1/D is also discarded, the amount of compensation as discussed supra has been determined 62% lesser than the amount determined in the award Ex. PB. Therefore, no interference on this count is warranted in the impugned award.

20. Pleas of appellants that on account of disability of claimants with respect to their ownership in the shyamlat land and prohibition with regard to putting the land under acquisition in use for other purpose, is not sustainable, as there is nothing on record in evidence to establish that claimants were limited owners of land in question and/or there

was any prohibition/restriction to put the land in use for another purpose, than the agricultural purpose.

21. In view of aforesaid facts and circumstances, I find that Reference Court has rightly determined the enhanced market value of land at the rate of `5,00,000/- per bigha, irrespective of nature and classification of land and therefore, the impugned award dated 30.5.2014, passed by learned Reference Court is upheld and appeals are dismissed.
No order to costs. Record be sent back.

**********

**BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.**

Vikram Singh ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 459 of 2016
Reserved on: 01.08.2018
Decided on: 05.11.2018

**Narcotic Drugs and Psychotropic Substances Act, 1985** - Sections 8 & 20- Indian Evidence Act, 1872-Sec. 3- Recovery of Charas- Non-joining of independent witnesses during search – Effect - Held, association of independent witnesses in search and seizure process is a rule and non-joining is an exception permissible in peculiar circumstances of a case- Mere non-joining of independent witnesses not fatal to prosecution case provided testimony of official witnesses reliable, trustworthy and convincing. (Paras 19 & 20) (D.B.)

**Narcotic Drugs and Psychotropic Substances Act, 1985** - Sections 8 & 20- Indian Evidence Act, 1872-Sec. 3- Material contradictions – Effect - Held, irreconcilable discrepancies and material contradictions make prosecution case doubtful- Discrepancies as to manner in which accused was apprehended with bag containing contraband, place at which he was apprehended, date and time of recovery, overwriting in NCB Form etc., are material in nature and cumulatively make prosecution case doubtful- Appeal allowed- Conviction and sentence as awarded by Trial Court, set aside. (Paras 21 to 36) (D.B.)

**Narcotic Drugs and Psychotropic Substances Act,1985** - Sections 35 & 54- Presumption of conscious possession – Applicability - Held, presumption as enshrined in said provisions of Act shall come in operation only after discharge of initial onus by prosecution qua recovery of contraband from accused beyond reasonable doubt. (Para 38) (D.B.)

***Cases referred:***

Paramjeet Singh alias Pamma versus State of Uttarakhand, (2010) 10 SCC 439)
Ritesh Chakarvarti versus State of M.P., (2006) 12 SCC 321

For the appellant: Mr. Karan Singh Kanwar, Advocate.
For the respondent: Mr. Ashok Sharma, Advocate General, with Mr. Adarsh Sharma and Ms. Ritta Goswami, Additional Advocate Generals.

The following judgment of the Court was delivered:

**Vivek Singh Thakur, Judge.**

Present appeal has been preferred by appellant against the conviction imposed upon him vide impugned judgment, dated 2nd July, 2016, passed by learned Special Judge (I), Shimla, H.P. (hereinafter referred to as 'trial Court') in Sessions Trial No. 28-S/7 of 2015, arising out of FIR No. 35 of 2015, registered under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') resulting into sentencing him to undergo rigorous imprisonment for a term of ten years and to pay a fine of ₹ one lac and in case of default in payment of fine, to further undergo simple imprisonment for a period of one year.

2. Prosecution case, in brief, is that on 17th May, 2015 at 2.30 a.m., under the instructions recorded in GD Entry No. 4 (A) (Ex. PW-4/A) by SHO Inspector Gopal Singh Verma, police party headed by PW-11 ASI Het Ram consisting of PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar Garg left the Police Station for patrolling in Government vehicle No. HP-07 A – 0685, being driven by HHG Sanjog Kumar. During patrolling, when the police party was moving from Navbahar side to Ramchandra Chowk and had reached near Ramchandra Chowk, it noticed a person coming on foot, having a carry bag in his hand, becoming perplexed on seeing the police vehicle and running after turning back, causing the police party to suspect the said person of being in possession of stolen articles whereupon he was asked to stop, but, when he did not stop, he was chased and overpowered. On inquiry, he disclosed his name, age and address. On checking his carry bag, another carry bag, containing sticks of black substance, was found therein. On the basis of experience, the said substance was identified as *charas* and on weighing the same with the help of electronic weighing machine available with the police party in its kit bag, the same was found to be weighing 2 kilograms 900 grams. The said *charas* was put in a cloth parcel and was sealed with six seals of seal impression 'M'. Seizure memo Ex. PW-6/B, prepared on the spot, was witnessed by PW-6 HC Suresh Kumar and PW-8 Harish Kumar. Form NCB-I (Ex. PW-10/F) was filled-in in triplicate and facsimiles of seal 'M' were taken thereon. Sample seal Ex. PW-6/A of seal 'M' was also taken on the spot on a piece of cloth, which was signed by the appellant and witnessed by PW-6 HC Suresh Kumar and PW-8 Harish Garg.

3. Rukka Ex. PW-10/A, prepared by PW-11 ASI Het Ram at 4.45 a.m., was sent to the Police Station through PW-7 Constable Rajesh Kumar, who handed over the same to PW-10 Inspector Gopal Singh Verma, who, in turn, on the basis of it, at 5.15 a.m., registered FIR No. 35 of 2015 (Ex. PW-10/B) and after making endorsement (Ex. PW-10/C) to that effect on the rukka, handed over the case file to PW-7 Constable Rajesh Kumar, who delivered it to PW-11 ASI Het Ram on the spot. PW-11 ASI Het Ram recorded the statements of spot witnesses PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar, prepared the site plan Ex. PW-11/A, interrogated and arrested the appellant vide memo Ex. PW-11/B, intimation whereof was given to Sandeep Thakur, brother of the appellant.

4. As per prosecution case, police party reached back in the Police Station at 7.40 a.m. and PW-11 ASI Het Ram handed over the sealed parcel to PW-10 SHO Inspector Gopal Verma, who resealed the same with four seals of seal impression 'X' after putting the said parcel in another cloth parcel and after filling in the remaining columns of NCB Form (Ex. PW10/F), to be filled-in by him and imprinting facsimile of seal 'X' thereon, deposited

the case property in the malkhana at 8.05 a.m. by handing over it to MHC PW-5 Subhash. Certificate of resealing (Ex PW-10/E) was also issued by him.

5. Thereafter, on 18th May, 2015, ASI Het Ram, under the instructions of PW-10 SHO Inspector Gopal Verma, had handed over the investigation to another Investigating Officer PW-12 LHC Seema for further investigation. She sent a special report Ex. PW-3/B, under Section 57 of NDPS Act, to Deputy Superintendent of Police (City), Shimla through PW-2 Constable Naresh Kumar, who handed over the same to PW-3 HC Anand Negi, Reader of Deputy Superintendent of Police, whereupon PW-3 HC Anand Negi made an endorsement of receipt thereof on its copy, which was handed over by PW-2 Constable Naresh Kumar to PW-12 LHC Seema. She also recorded statements of PW-1 Constable Kanwar Singh, PW-3 HC Anand Negi, PW-4 Constable Naresh, PW-5 HC Subhash, PW-9 Constable Kushal and Constable Bhushan (not examined).

6. On 18th May, 2015, PW- 5 HC Subhash, vide RC No. 52 of 2015 (Ex. PW-5/B), handed over the parcel alongwith documents to PW-1 Constable Kanwar Singh to deposit the same in State Forensic Science Laboratory, Junga (hereinafter referred to as 'SFSL') for chemical analysis. The said case property, alongwith copy of FIR, seizure memo, NCB Form in triplicate and sample seals of 'M' and 'X', was handed over in SFSL Junga by PW-1 Constable Kanwar Singh and on return, he deposited the receipt thereof with PW-5 HC Subhash. On 10th June, 2015, PW-9 Kushal brought the case property and chemical examination report (Ex. PW-9/A) from SFSL Junga to the Police Station and deposited the same with PW-5 HC Subhash in the Police Station. After receiving the chemical examination report from SFSL Junga (Ex. PW-9/A), obtaining abstract of malkhana register (Ex. PW-5/A), copy of RC (Ex. PW-5/B) and abstract of register from the office of Deputy Superintendent of Police (Ex. PW-3/A), LHC Seema (PW-12) handed over the case file to PW-10 SHO Inspector Gopal Verma, whereafter challan was prepared and presented in the Court.

7. On finding *prima facie* complicity of the appellant in commission of offence, charge under Section 20 of NDPS Act was framed against him. During trial, prosecution has examined twelve witnesses to establish its case. After recording his statement under Section 313 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC'), appellant has chosen not to lead any evidence in his defence. On conclusion of trial, the trial Court has convicted and sentenced the appellant, as detailed supra. Hence, the present appeal.

8. We have heard learned counsel for the appellant and learned Additional Advocate General for the State and have gone through the record carefully.

9. Mr. Karan Singh Kanwar, learned counsel for the appellant, has contended that there is tampering in Malkhana entries as evident from the abstract of malkhana register (Ex. PW-5/A); overwriting in column No. 10 of NCB Form (Ex. PW-10/F); and there are material contradictions in the statements of spot witnesses with respect to manner of search and seizure of appellant, his carry bag and contraband allegedly recovered, timings of sending the rukka from the spot, witnesses in whose presence search was conducted, the spot where the appellant was apprehended and the persons who had signed the seizure memo (Ex. PW-6/B) as witnesses. Contradictions have also been pleaded to be there with regard to timing of reaching the spot and coming back to the Police Station by the police party and also in the statements of PW-2 Constable Naresh Kumar and PW-3 HC Anand Negi with regard to manner in which the special report was produced before Deputy Superintendent of Police (City), Shimla.

10. It has further been argued on behalf of the appellant that in the statements of PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar recorded under Section 161 CPC, the date of the incident mentioned on the top is '19.03.2015' and as per deposition of PW-5 HC Subhash in Court, date of incident is '7.5.2015' whereas as per prosecution story, the date of incident is '17.05.2015'. Further that as per PW-1 Constable Kanwar Singh and PW-9 Constable Kushal, their statements were recorded on the same day when they respectively deposited and brought back the case property in/from SFSL Junga on 18th May, 2015 and 10th June, 2015, whereas as per their statement(s) (Ex. PW-12/A) recorded under Section 161 CrPC, it transpires that their statements were recorded by PW-12 LHC Seema on 10th July, 2015, but not on 18th May, 2015 and 10th June, 2015. It is canvassed that material contradictions and discrepancies in statements of persecution witnesses,going to the root of the case, are warranting for setting aside conviction.

11. It is also pointed out by learned counsel for the appellant that in arrest memo (Ex. PW-11/B), the column of time of arrest as well as place of arrest is blank. He has also contended that though in the documents as well as as per statements of PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar, driver HHG Sanjog was also member of the patrolling party, but, PW-11 ASI Chet Ram has not stated that said Sanjog was also with them on duty at that time. It is also submitted that as per prosecution story, PW-1 Constable Kanwar Singh had taken the parcel of contraband resealed with seal impression 'X', but, in his statement, he has mentioned that he had taken the sealed parcel sealed with seal impressions 'M' and 'X', which creates doubt about the fair investigation as he could not have noticed seal impression 'M' put on the internal parcel which was kept in another cloth parcel at the time of resealing duly sealed with seal impression 'X'.

12. It is also case of the appellant that police party remained on the spot till 7.15 a.m. and despite the fact that there are residential houses, VIP area, Satsang Bhavan of Radhaswami near the spot where the appellant has been claimed to have been apprehended and also for the fact, as admitted by PW-11 ASI Het Ram, that number of people uses the said road for morning walk, any independent witness has neither been associated nor any effort to associate the independent witness has been made by the Investigating Officer. Further that, in the site plan, labour tents have been shown near the alleged place of apprehension of the appellant, but, there is nothing on the record to establish that the police party had ever made any effort to find out availability of any independent witness in those labour tents.

13. Lastly, it is contended that at the time of considering the quantum of sentence to be imposed upon the appellant, the trial Court has mentioned the date and time of the incident as '18.11.2014' at about '5.30' p.m. against '17.05.2015' and '3.30 a.m.', the alleged date and time of incident, which again reflects that there is total non-application of mind on the part of the trial Court.

14. Per contra, learned Additional Advocate General has supported the reasons recorded by the trial Court for convicting and sentencing the appellant with further submission that in the entire judgment, correct date and time with regard to the incident and recovery of contraband from the appellant has been mentioned and mention of wrong date at one place, that too, at the time of adjudicating the quantum of sentence, is nothing, but inadvertent typographical mistake, which may not have been corrected due to oversight. Similarly, mention of date of incident as 19.03.2005, while recording statements on the spot, is also inconsequential. He has also contended that keeping in view the odd hours during which the appellant was apprehended, it was not possible to associate the witnesses.

According to him, the overwriting, tampering, wrong mentioning of date and contradictions pointed out by the appellant are not only minor in nature, but, are natural one, which may occur in the normal course of business and these discrepancies and contradictions are not affecting the genesis of the prosecution case, rather, keeping in view other overwhelming, convincing and reliable evidence on record, these are liable to be ignored.

15. Plea of appellant, that PW-1 Constable Kanwar Singh could not have noticed seal 'M' used for sealing the contraband at the time of recovery as the said parcel was put in another cloth parcel which was resealed with seal having seal impression 'X', is not tenable for the reason that he was not only carrying the resealed parcel but also the sample seals having seal impressions 'M' and 'X', copy of FIR and seizure memo, docket and NCB Form in triplicate. facsimile of both sample seals was there on piece of cloths, including impression of seal 'M' put on the parcel at the time of seizure of contraband, and NCB Form in triplicate was also having the seal impressions as well as details of both the seals. Therefore, it was not impossible for this witness to notice and depose about seal 'M' used for sealing internal parcel at the time of seizure on spot. Sealing of parcels with seals 'M' and 'X' also find mention in RC (Ex.PW-5/B). Moreover, PW-1 Constable Kanwar Singh, in his statement, has not stated that he himself had seen the sealing of the internal parcel with seal impression 'M', but, he has deposed that PW-5 HC Subhash, vide RC No. 52/2015 (Ex. PW-5/B), handed over a sealed parcel, *stated to have contained* 2 kilograms and 900 grams of *charas* pertaining to FIR No. 35/15, sealed with seal impression 'M' and 'X', for being taken to SFSL Junga. The said deposition is not indicative of fact that this witness himself had noticed the seal 'M' in internal parcel. Hence this plea of appellant on this issue is rejected.

16. As per rukka (Ex. PW-10/A), it was prepared at 4.45 a.m. and sent to the Police Station through PW-7 Constable Rajesh Kumar, who, in his deposition, has corroborated the said timing, but, PW-6 HC Suresh Kumar, in his cross-examination, has stated that PW-7 Constable Rajesh Kumar left the spot with rukka at 5.45 a.m. In our opinion, it is not a major discrepancy going to the roots of the case in normal circumstances, as the preparation of rukka at 4.45 a.m. and sending the same through PW-7 Constable Rajesh Kumar to the Police Station stands further corroborated by the registration of FIR (Ex. PW-10/B) at 5.15 a.m. by PW-10 Inspector Gopal Verma.

17. It is contended that there is contradiction with regard to timing of reaching of the police party on the spot and coming back in the Police Station as PW-7 Constable Rajesh Kumar has stated that they left the Police Station at about 2.30 p.m. whereas PW-6 HC Suresh Kumar has stated that they reached at the spot at about 3.30 a.m., remained there till 7.15 a.m. and reached back in Police Station alongwith accused (appellant) at 7.40 a.m. In our opinion, there is no contradiction in the prosecution evidence on this count. According to GD Entry No. 4 (A) (Ex. PW-4/A), time of departure of police party is 2.30 a.m. and PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar have stated that they left the Police station at 2.30 and went to Kasumpti, Panthaghati, Vikasnagar, Chotta Shimla and Navbahar. PW-6 HC Suresh Kumar, like PW-8 HC Harish Kumar, has also stated that they remained on the spot till 7.15 a.m. Therefore, their arrival at Police Station at 7.40 a.m. is not contradictory in nature. So far as time of leaving the Police Station is concerned, in this regard PW-6 HC Suresh Kamar is silent in examination in chief and no question in this regard has been put to him in cross-examination. He has deposed only about arrival on spot at 3.30 a.m. Thus, we find no contradiction in deposition of prosecution witnesses with regard to timing of reaching on the spot and coming back in the Police Station.

18. Plea of appellant that mention of wrong date and time of the incident as 18.11.2014 at 5.30 p.m., in the order passed at the time of imposing sentence by the trial Court, is reflection of non-application of mind by the said Court is not having much force as

in the entire judgment, the date and time of the incident has been mentioned as claimed by the prosecution, i.e. 17.05.2015 at 3.30 a.m. Therefore, typographical mistake at one place in the entire judgment cannot be made basis for holding that there is non-application of mind by the trial Court.

19. Association of independent witnesses in search and seizure process is a rule and non-joining of independent witnesses is an exception permissible in peculiar facts and circumstances of the case. However, prosecution case cannot be rejected only on the ground that no independent witness was associated, particularly, when the testimony of official witnesses is reliable, trustworthy and convincing and has withstood with more careful and cautious judicial scrutiny.

20. In present case, the timing of apprehension of appellant and recovery of contraband from him is between 3.30 a.m. to 4.45 a.m. as after completion of search and seizure, rukka was prepared and sent to Police Station at 4.45 a.m. Therefore, if the prosecution case is to be believed, during such odd hours the condition of associating independent witnesses cannot be trusted upon the prosecution. Though, in the site plan (Ex. PW-11/A), the Investigating Officer himself has mentioned the existence of tents of labour near the alleged place of apprehension of appellant, however, the prosecution evidence is completely silent with regard to the fact as to whether any labour was residing at that time in those tents or not and whether any effort was made by the Investigating Officer to associate any of them, if available at that time. But in case the timing and place of apprehension of appellant, as claimed by the prosecution, is to be believed, then failure in joining of independent witnesses, itself, may not be fatal to the prosecution.

21. However, even if we ignore the fact that there were labour tents near the spot of alleged apprehension of appellant and believe the prosecution case that on account of the location and timing of apprehension of appellant, there was no possibility of associating independent witnesses in search and seizure process as before waking up and coming out of the people for morning walk, the search and seizure process was over, then also, for the irreconcilable discrepancies and material contradictions, discussed hereinafter, the prosecution story becomes doubtful.

22. PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar have corroborated the prosecution story presented in the challan that at the time of noticing the appellant, face of the vehicle was towards Ramchandra Chowk and they were coming from Navbahar Chowk side, i.e. as per site plan (Ex. PW-11/A), the vehicle was moving from point 'B' towards point 'D' and the appellant was noticed in front of the vehicle and had turned back and run towards the same side in which side the vehicle was moving. It has also come in the evidence of these witnesses that the appellant was chased near Satsang Bhavan at a distance of 15 to 50 meters. Meaning thereby, Satsang Bhavan was also towards the Ramchandra Chowk, in which side the vehicle was moving. It also indicates that from place of noticing the appellant, Satsang Bhavan and Ramchandra Chowk were towards one side and Ramchandra Chowk was beyond Satsang Bhavan and appellant was noticed at a spot before Satsang Bhavan. Thus, the place of apprehension was in the middle of Khachi Chowk (point 'B' in the site plan) and Satsang Bhavan. Satsang Bhavan has not been shown in the site plan. To the contrary, PW-11 ASI Het Ram has stated that their vehicle was moving from Ramchandra Chowk towards Satsang Bhavan and point 'E', where the appellant was apprehended, was in the middle of Ramchandra Chowk and Satsang Bhavan. As per his version, when they reached near Ramchandra Chowk, they saw a person coming from the side of Radhaswami Satsang Bhavan. His deposition runs totally converse not only to the statements of PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar, but, also to prosecution story stated in rukka, FIR,

challan and site plan. If the statement of PW-11 ASI Het Ram is to be believed, the face of vehicle should have been towards Khachi Chowk (point 'B') as in the site plan (Ex. PW-11/A) prepared himself by PW-11 ASI Het Ram, Ramchandra Chowk is opposite to Khachi Chowk and as apparent from the statements of all the prosecution witnesses, Satsang Bhavan was after Khachi Chowk, but, before Ramchandra Chowk. In case vehicle is coming from Ramchandra Chowm towards Satsang Bhavan, then, its face must have been towards Khachi Chowk. Further, PW-11 ASI Het Ram, though, stated that the appellant was apprehended at point 'E' between Ramchandra Chowk and Satsang Bhavan, but, in the site plan, he has not indicated the points of location of Ramchandra Chowk and Satsang Bhavan. Even if it is considered that Ramchandra Chowk was beyond point 'E', then also Satsang Bhavan must have been shown between point 'B' (Khachi Chowk) and point 'E' (place of apprehension) of the site plan. Again, as stated by PW-11 ASI Het Ram, vehicle was moving from Ramchandra Chowk towards Satsang Bhavan, which discredits the prosecution story and the statements of PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar and also the fact mentioned in the site plan (Ex. PW-11/A) that vehicle was moving from point 'B' towards point 'D'. Thus, the statements of the prosecution witnesses on this issue are irreconcilable, which render the veracity of these witnesses untrustworthy.

23. Further, according to the prosecution case, the appellant, after noticing the police, ran towards opposite side from which the vehicle was coming, but, they stopped the vehicle, got down and then ran behind him instead of chasing him in the vehicle and stopping the vehicle on or after chasing him, which is again unnatural story put forth by the prosecution.

24. PW-5 HC Subhash, in his examination-in-chief, has deposed that the case property, after resealing, was deposited with him by PW-10 Inspector Gopal Verma on 07.05.2015, however, as is apparent from other material available on record, the date of recovery of contraband from the appellant, as per prosecution case, is 17th May, 2015. In case, the date has been recorded by mistake, no effort has been made by the prosecution, by making a request for re-examination/re-calling of the said witness for further clarification. Moreover, had it been only the single mistake in mentioning the date, it may not have been fatal for prosecution case, but, not only this, in NCB Form, there is overwriting and time of deposit of case property with MHC has been converted from 7.05 a.m. to 8.05 a.m. and no time and place of arrest of the appellant has been mentioned in the arrest memo Ex. PW-11/B, and also in the statements of PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar recorded under Section 161 CrPC, purported to have been recorded on spot on 17.05.2015, the date, at the top, has been mentioned as '19.03.2015' instead of '17.05.2015'.

25. Further, as per version of PW-5 HC Subhash and PW-9 Constable Kushal, the case property was brought from SFSL Junga on 10th June, 2015 and similarly, PW-1 Constable Kanwar Singh had taken the contraband to SFSL Junga on 18th May, 2015. PW-9 Constable Kushal, in his cross-examination, has further stated that his statement was recorded by the Investigating Officer on the same day, but, the fact, as evident from statement of Constable Kushal recorded under Section 161 CrPC (Ex. PW-12/A), is that his statement was recorded after one month thereafter on 10th July, 2015. Perusal of document Ex. PW-12/A, i.e. statements of Constable Kushal and Constable Kanwar Singh recorded under Section 161 CrPC, indicates that these statements were recorded on 10th July, 2015. PW-1 Constable Kanwar Singh had taken parcel to SFSL Junga on 18th May, 2015, but, his statement was recorded on 10th July, 2015, that too, after recording the statement of PW-9 Constable Kushal, who had brought the case property back on 10th June, 2015.

26. The Investigating Officer PW-11 ASI Het Ram has admitted that at the top of the statements of PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar, recorded by him under Section 161 CrPC, he has mentioned the date of recording the same as '19.03.15', which is wrong. As per prosecution the appellant was apprehended on 17.05.2015. In all the other relevant documents prepared before and after recording the statements of these witnesses on the spot, the date of incident has been mentioned as '17.05.15'. In three documents prepared on the same day and at the same time on the spot, there was no reason for PW-11 ASI Het Ram suddenly to mention the date as '19.03.15', particularly, when the said statements had been purported to have been recorded on the spot.

27. PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar, in their deposition, have categorically stated that their statements were recorded on the spot, i.e. on 17th May, 2015. It is not a case that their statements were recorded after two days of the incident probabilizing the mistake in writing the date as '19.03.15' instead of '19.05.15'. Here is a case where not only month, but, the date is also different than the date on which statements are claimed to have been recorded. As observed supra, the documents prepared before and after the alleged recording of the statements of these witnesses also bear the date as '17.05.15'. Any single mistake or discrepancy or omission to fill-in the date and time may not have been fatal to the prosecution case in normal circumstances, but, the cumulative effect of all these mistakes creates suspicion about the trustworthiness of the prosecution story. It reflects that all these documents have not been prepared as are being claimed to have been prepared by the prosecution rendering the prosecution version under cloud.

28. PW-11 ASI Het Ram (Investigating Officer) has stated that he recorded the statements of witnesses on spot and thereafter, accused was interrogated and arrested vide memo Ex. PW-11/B and intimation of his arrest was given to his brother Sandeep Thakur and at 7.40 a.m., case property was handed over to PW-10 SHO Inspector Gopal Verma for resealing, which indicates that appellant was arrested on the spot before leaving for the Police Station. There is no memo of personal search placed on record, but, only memo of arrest (Ex. PW-11/B) has been placed on record. As admitted by the Investigating Officer (PW-11), column of place and time of the arrest is blank in the said memo. It is noticeable that there were three places on this memo where time of arrest was to be mentioned, but, all the three places are blank. Not only this, there are two columns for signature of Investigating officer also and, though, date of arrest has been filled-in in both the places, but, the Investigating Officer has signed only at one place.

29. According to PW-6 HC Suresh Kumar, personal search of the appellant was conducted in the lock up whereas as per statements of PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar, accused was searched by PW-11 ASI Het Ram after asking him on the spot that what was he doing there. On the contrary, PW-11 ASI Het Ram (the Investigating Officer) has specifically denied the said fact in his cross-examination by stating that the personal search of appellant was not conducted by him. However, he further explained that *jama talashi* of the appellant was taken at the time of his arrest. There is no time of arrest mentioned in the arrest memo, however, as per deposition of PW-11 ASI Het Ram in his examination-in-chief, the appellant was arrested after recording of statements of witnesses on spot, but, before reaching the Police Station. In case *jama talashi* of the appellant was taken at the time of arrest, then, there as no occasion to conduct his personal search in the lock up. Further, no memo of *jama talashi* has been placed on record. The stand of prosecution witnesses on this issue is contradictory and irreconcilable again creating doubt about their veracity.

30. According to PW-6 HC Suresh Kumar, appellant was apprehended by PW-11 ASI Het Ram whereas according to PW-7 Constable Rajesh Kumar and PW-11 ASI Het Ram, appellant was apprehended by all the members of the police party collectively. According to PW-6, it was not inquired from the appellant that wherefrom he was coming, but, he was asked by PW-11 ASI Het Ram that as to what was he doing there at that time, whereas, according to PW-8 HC Harish Kumar, the Investigating Officer (PW-11) had inquired from the appellant as to from where he was coming. Contrary to PW-6 HC Suresh Kumar and PW-8 HC Harish Kumar, PW-7 Constable Rajesh Kumar has deposed that appellant was not asked by any police official as to what was he doing there at that time. PW-11 ASI Het Ram (Investigating Officer), in contradiction to PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar, has stated that appellant was asked as to what was he doing there and no one had asked him as to from where he was coming.

31. It is apparent from the extract of malkhana register (Ex. PW-5/A) that initially, there was entry of one cloth parcel alongwith sample of seals having seal impressions 'M' and 'X' and NCB Form in triplicate, however, there is tampering in this entry by making alteration with regard to entry of sample seals of 'M' and 'X' by cutting the said entry, giving impression that the said entry was deleted from the malkhana register. However, despite deletion in entry in Malkhana Register, there is mention in RC (Ex. PW-5/B) with regard to sending sample seals 'X' and 'M' to SFSL Junga and these sample seals are also included in the details given by SFSL Junga in its report (Ex. PW-9/A) against column No. 6 with regard to parcel(s)/articles received there in SFSL. There is no explanation on the part of the prosecution with regard to the fact that in case samples of seals 'X' and 'M' were not deposited in the malkhana, then wherefrom these samples of seals were handed over to PW-1 C. Kanwar Singh for sending to SFSL.

32. As per prosecution case, seizure memo (Ex. PW-6/B) was witnessed by PW-6 HC Suresh Kumar and PW-8 HC Harish Kumar. PW-6 HC Suresh Kumar, in his deposition in Court has corroborated the said fact, but, on the contrary, PW-7 Constable Rajesh Kumar, in his examination-in-chief, has categorically stated that it was he (PW-7) and PW-8 HC Harish Kumar who had witnessed seizure memo Ex. PW-6/B and he is completely silent about signing of the said memo by PW-6 HC Suresh Kumar. This fact has also been deposed by PW-8 HC Harish Kumar in the same fashion. Similarly there is also contradiction with respect to searching of carry bag. According to PW-6 HC Suresh Kumar, the carry bag was searched in his presence alongwith PW-8 HC Harish Kumr whereas as per deposition of PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar, carry bag was searched in presence of PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar. These witnesses are ruling out presence of PW-6 HC Suresh Kumar as a witness to the search of carry bag and preparation of seizure memo Ex. PW-6/B whereas the said seizure memo contains signature of PW-6 HC Suresh Kumar as spot witness, but, does not contain signature of PW-7 Constable Rajesh Kumar. These contradictions are major contradictions creating doubt not only about the place and timing of the creation of seizure memo, but, also about contents contained therein, as PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar and PW-8 HC Harish Kumar are none else, but, the official police witnesses.

33. Non-compliance or irregularity in submission of special report under Section 57 of the NDPS Act is not fatal to the prosecution case unless prejudice, caused to the accused on account of such irregularity, is established. However, the said irregularity may form a part of chain with other material contradictions or discrepancies in prosecution evidence to disbelieve the prosecution case.

34. According to PW-2 Constable Naresh Kumar, he had handed over the special report (Ex. PW-3/B) to Deputy Superintendent of Police (City) Shri Balbir Singh personally,

who had given the same to the Reader for keeping the same in record, who made entry regarding receipt of the special report in his record and handed over the copy of the special report to him (PW-2). To the contrary, Reader of the Deputy Superintendent of Police, i.e. PW-3 HC Anand Negi has stated that special report (Ex. PW-3/B) was received by him and after entering the same in diary register, he produced it before the Deputy Superintendent of Police (City), who made endorsement on the special report and also put his signatures thereon. This contradiction in itself may not be fatal, but, keeping in view the other major contradictions and discrepancies, it again precipitates the suspicion qua the fairness of the investigation.

35. Single omission on the part of PW-11 ASI Het Ram (Investigating Office) to state the name of HHG Sanjog, who was driver of the official jeep, as one of the persons/officials constituting police party, may not be fatal or major contradiction, but, it definitely adds one more link in the chain of suspicion with respect to fairness of investigation.

36. As already discussed, each discrepancy, contradiction in the prosecution evidence and omission on the part of the Investigating Officer, if considered singly, may not be fatal to the prosecution case, but, cumulative effect of all these discrepancies, contradictions and omission definitely indicates that the prosecution case is not based on true facts and there is something which has been hidden from the Court and as such, it cannot be stated that the prosecution has been able to prove the recovery of contraband beyond reasonable doubt from the conscious possession of the appellant at a location and time as claimed, which renders the alleged recovery of contraband from the appellant under cloud. It is cardinal principle of criminal jurisprudence that where there is slightest doubt shaking the prosecution story, benefit of doubt is to be extended to accused. Therefore, prosecution has failed to prove its case by leading cogent, reliable, trustworthy and convincing evidence.

37. Learned Sessions Judge in his discussion, at one hand, has recorded that on careful scrutiny of testimonies of PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar PW-8 HC Harish Kumar and PW-11 ASI Het Ram it cannot be said that their testimonies are free from blemish and not bearing treacherous remarks and on the other hand he has concluded that it has satisfactorily been proved that testimonies of PW-6 HC Suresh Kumar, PW-7 Constable Rajesh Kumar, PW-8 HC Harish Kumar and PW-11 ASI Het Ram are quite natural, consistent, cogent and convincing as none of these witnesses have any element of enmity or hostility towards the appellant-accused so as to depose falsely against him and thereafter he has concluded that he has found a ring of truth attached to testimonies of these witnesses. He has relied upon testimony of PW-6 HC Suresh Kumar as a witness to seizure memo Ext.PW-6/B whereas, as discussed supra, PW-7 and PW-8 have not endorsed him as a witness in the said memo. He has recorded that PW-6 HC Suresh Kumar and PW-8 HC Harish Kumar have corroborated prosecution story whereas PW-7 and PW-8 have claimed them as the witnesses to the said seizure memo but not PW-6 which is in contradiction to prosecution story. Finding of learned Sessions Judge that both of them have substantiated the version of prosecution and testified the recovery of contraband as claimed by prosecution is contrary to record. Finding that prosecution witnesses have corroborated the manner in which appellant was apprehended is also not sustainable for discussion of statements of prosecution witnesses in this regard hereinabove. Conclusion of learned Sessions Judge that prosecution case is also strengthened from the fact that appellant in his statement under Section 313 Cr.P.C. has not denied the question related to fact of movement of police party but has feigned ignorance and also for admitting the fact of his arrest vide arrest memo (Ext.PW-11/B), is also not sustainable as how could appellant

admit or deny the fact beyond his knowledge and also that admission of arrest does not mean admission of arrest as claimed by prosecution. As discussed supra, there is no time of arrest on memo Ext.PW-11/A. It is a fact that appellant was arrested by Police but where, when and in what manner, it has not been proved on record beyond reasonable doubt. Therefore, response of appellant to question in his statement under Section 313 Cr.P.C. is not of any help to the prosecution.

38. No doubt, Sections 35 and 54 of the NDPS Act provide presumption with respect to existence of culpable state of mind and commission of offence for possession of contraband on failure to account the same satisfactorily, but, the said presumption shall come in operation only after discharge of initial onus by prosecution for proving recovery of contraband from conscious possession of the accused beyond reasonable doubt. In present case, prosecution has miserably failed to discharge its primary onus.

39. It is law of the land that stringent the punishment, stricter the degree of proof required, since higher degree of assurance is required to convict the accused in such cases. *(See Ritesh Chakarvarti versus State of M.P., (2006) 12 SCC 321; and Paramjeet Singh alias Pamma versus State of Uttarakhand, (2010) 10 SCC 439)* As discussed hereinabove, in present case, prosecution has failed to prove its case by leading trustworthy, credible, reliable and convincing evidence.

40. Having glance of the above discussion, it can be safely said that the trial Court has failed to appreciate the evidence on record in right perspective and appears to have scrutinize the evidence in cursory manner after being swayed by the quantity of contraband alleged to have been recovered from the appellant. Therefore, the judgment passed by the trial Court is set aside and the appellant is acquitted for the commission of offence with which he was charged. Appellant is directed to be released forthwith, if not required in any other case. Registry to prepare the release warrant immediately.

41. Case property be dealt with in accordance with law.

42. Record be sent back.

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**BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.**

State of Himachal Pradesh ...Appellant.
Versus
Jindu Ram ...Respondents.

Criminal Appeal No.404 of 2018
Reserved on: 23.10.2018
Date of Decision : November 6, 2018

**Code of Criminal Procedure, 1973** - Section 377- **Narcotic Drugs and Psychotropic Substances Act, 1985** - Section 20 - Inadequacy of sentence- Special Judge convicting accused for possessing intermediate quantity (798 gms.) of charas on his confession and sentencing him to imprisonment for period already undergone and fine- Appeal - Held, while determining quantum of sentence discretion lies with Court, but it not to be exercised according to whims and caprice- It is duty of Court to impose adequate sentence - Purpose of imposition of requisite sentence is protection of society and legitimate response to collective conscience- Reasons assigned by Trial Court while imposing sentence, that

accused is first offender, he is sole bread earner of family and honest admissions of guilt, alone cannot be parameters for deciding quantum of sentence -No discussion of circumstance as to why accused sentenced for period already undergone. Appeal allowed – Sentence set aside Matter remanded for fresh consideration. (Paras 11 & 12) (D.B.)

***Cases referred:***

Aero Traders Pvt. Ltd. v. Ravinder Kumar Suri, (2004) 8 SCC 307
Ahmed Hussein Vali Mohammad Saiyed v. State of Gujarat, (2009) 7 SCC 254
Gopal Singh v. State of Uttarakhand; (2013) 7 SCC 545
Guru Basavaraj v. State of Karnataka, (2012) 8 SCC 734
Hazara Singh v. Raj Kumar, (2013) 9 SCC 516
Jameel v. State of U.P., (2010) 12 SCC 532
Ramji Dayawala & sons (P) Ltd. v. Invest Import, (1981) 1 SCC 80
Satish Kumar Jayanti Lal Dabgar v. State of Gujarat, (2015) 7 SCC 359
Shailesh Jaswantbhai v. State of Gujarat, (2006) 2 SCC 359
State of Himachal Pradesh v. Nirmala Devi, (2017) 7 SCC 262
Sumer Singh v. Suraj Bhan Singh, (2014) 7 SCC 323

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| For the Appellant | : | Ms Rita Goswami, Mr. Vikas Rathore, Additional Advocate General; Mr. J.S. Guleria & Ms Svaneel Jaswal, Deputy Advocates General. |
| For the Respondent | : | Mr. Manoj Pathak, Advocate. |

The following judgment of the Court was delicered:

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**Sanjay Karol, Judge**

Trial Court, vide order dated 2.5.2018, passed in Case No.2-R/3 of 2017, titled as *State v. Jindu Ram,* convicted accused-respondent Jindu Ram (hereinafter referred to as the accused) for having committed an offence, punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), for having been found in conscious possession of 798 grams of Charas, and sentenced him to imprisonment already undergone by him, during investigation and trial of the case, and to pay fine of `40,000/-, and in default thereof to further undergo simple imprisonment for a period of four months.

2. Aggrieved by the inadequacy of the sentence, so imposed by the trial Court, the State has preferred the present appeal, under the provisions of Section 377 of the Code of Criminal Procedure, 1973, for enhancement of sentence.

3. After considering its several judicial pronouncements, i.e. *Satish Kumar Jayanti Lal Dabgar v. State of Gujarat,* (2015) 7 SCC 359; *Sumer Singh v. Suraj Bhan Singh,* (2014) 7 SCC 323; *Gopal Singh v. State of Uttarakhand;* (2013) 7 SCC 545; *Hazara Singh v. Raj Kumar,* (2013) 9 SCC 516; *Guru Basavaraj v. State of Karnataka,* (2012) 8 SCC 734; *Jameel v. State of U.P.,* (2010) 12 SCC 532; *Ahmed Hussein Vali Mohammad Saiyed v. State of Gujarat,* (2009) 7 SCC 254; *Shailesh Jaswantbhai v. State of Gujarat,* (2006) 2 SCC 359; *Aero Traders Pvt. Ltd. v. Ravinder Kumar Suri,* (2004) 8 SCC 307; *Ramji Dayawala & sons (P) Ltd. v. Invest Import,* (1981) 1 SCC 80, the Apex Court in *State of Himachal Pradesh v. Nirmala Devi,* (2017) 7 SCC 262, has culled out the following principles:

(i) Imprisonment is one of the methods used to handle the convicts in such a way to protect and prevent them to commit further crimes for a specific period of time and also to prevent others from committing crime on them out of vengeance. The concept of punishing the criminals by imprisonment has recently been changed to treatment and rehabilitation with a view to modify the criminal tendency among them.

(ii) There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/ jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.

(iii) Notwithstanding the above theories of punishment, when it comes to sentencing a person for committing a heinous crime, the deterrence theory as a rationale for punishing the offender becomes more relevant. In such cases, the role of mercy, forgiveness and compassion becomes secondary.

(iv) In such cases where the deterrence theory has to prevail, while determining the quantum of sentence, discretion lies with the Court. While exercising such a discretion, the Court has to govern itself by reason and fair play, and discretion is not to be exercised according to whim and caprice. It is the duty of the Court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience.

(v) While considering as to what would be the appropriate quantum of imprisonment, the Court is empowered to take into consideration mitigating circumstances, as well as aggravating circumstances.

4. Section 20 of the Act is reproduced as under:

"20. Punishment for contravention in relation to cannabis plant and cannabis.- Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder.-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable -

(i) where such contravention relates to Clause (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to sub-clause (b),-

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to one year. or with fine which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine, which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

5. We notice that Section 20, reproduced supra, prescribes punishment for contravention, in relation to (a) cultivation of cannabis plant, and (b) production, manufacture, possession, sale, purchase, transport, imports, etc.

6. In relation to the first part, by virtue of sub-clause (i) clause (a) of Section 20 of the Act, the trial Court is vested with the discretion of imposing punishment of rigorous imprisonment, which may extend to ten years and shall also be liable to pay fine, which may extend to one lakh rupees.

7. With regard to the later part, one notices that the Section is split into three parts - where the quantity is small, punishment of rigorous imprisonment for a term which may extent to one year or with fine which may extend to ten thousand rupees or with both. What would be small quantity is prescribed under Section 2(xxiiia) of the Act.

8. If the offence is for commercial quantity, then the rigorous imprisonment shall not be less than ten years, but may extend to twenty years and shall also be liable to fine, which shall not be less than one lakh rupees, but which may extend to two lakh rupees. In exceptional cases, this amount can exceed the said amount.

9. There is third fact situation envisaged under the Act and that being where the quantity involved is less than commercial but greater than small quantity. The statute provides leeway for imposition of penalty, which is rigorous imprisonment for a term upto ten years and also fine which may extend upto one lakh rupees.

10. In the instant case, we find the trial Court to have imposed a sentence, which is not in the light of the aforesaid principles laid down by the Apex Court. The reasons assigned are (a) that the accused-convict is a first offender, (b) that he is the sole bread earner of the family, and (c) honest admission of guilt.

11. Now, this alone cannot be parameters for deciding the quantum of sentence. Neither there is any proof of the second factor nor is there any discussion as to why under the circumstances, where the case property, which was almost touching the commercial quantity, the accused be sentenced for smaller quantity.

12. In view of the same, the impugned order dated 2.5.2018, passed by the trial Court in Case No.2-R/3 of 2017, titled as *State v. Jindu Ram,* is quashed and set aside. We remand the matter back to the trial Court for consideration afresh. The trial Court shall, after carefully appreciating the material placed on record by the parties, pass a fresh order on the issue of quantum of sentence, be it imprisonment or imposition of fine, in accordance with law. This he shall positively do within a period of four weeks from the date of appearance of the parties.

13. The parties are directed to appear before the trial Court on 20.11.2018.

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

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

Anand Gopal ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. MP(M) No. 1354 of 2018
Decided on: 31.10.2018

**Code of Criminal Procedure, 1973-** Section 439 **-** Regular bail- Grant- Accused, religious preacher (Guru), going to house of devotee and committing rape on her- Petitioner seeking regular bail after rejection of same by Session Court- Held, offence committed by person pretending himself a pious and spiritual person more serious that committed by impious person- Commission of offence by such person shakes trust of society at large- Address given by accused found incorrect- He had no permanent address – Not entitled for bail - Petition rejected. (Paras 10 to 12)

***Cases referred:***

Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129
Ash Mohammad versus Shiv Raj Singh alias Lalla Babu and another, (2012) 9 SCC 446
Chaman Lal versus State of U.P. and another, (2004) 7 SCC 525
Chandrakeshwar Prasad alias Chandu Babu versus State of Bihar and another (2016) 9 SCC 443
Dataram Singh versus State of Uttar Pradesh and another, (2018) 3 SCC 22
Gudikanti Narasimhulu Versus Public Prosecutor, High Court of Andhra Pradesh, AIR 1978 SC 429
Gurbaksh Singh Sibbia versus State of Punjab, (1980) 2 SCC 565
Gurcharan Singh v. State (Delhi Admn.) (1978) 1 SCC 118
Jayendra Saraswathi Swamigal v. State of T.N., (2005) 2 SCC 13
Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528
Kanwar Singh Meena versus State of Rajasthan and another, (2012) 12 SCC 180
Masroor versus State of U.P., (2009) 14 SCC 286
Neeru Yadav versus State of U.P., (2014) 6 SCC 508
Prahlad Singh Bhati v. State (NCT of Delhi) (2001) 4 SCC 280
Prakash Kadam versus Ramprasad Vishwanath Gupta, (2011) 6 SCC 189
Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458
Prashanta Kumar Sarkar versus Ashis Chatterjee and another, (2010) 14 SCC 496
Puran versus Rambilas and another, (2001) 6 SCC 338
Rakesh Ranjan Yadav versus CBI, (2007) 1 SCC 70
Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21
The State of Orissa versus Mahimananda Mishra, Criminal Appeal No. 1175 of 2018 decided on 18th September, 2018
Vimal Kumar Bawa Versus State of H.P. 2002 (1) Shimla L.C. 59
Vinod Bhandari versus State of Madhya Pradesh, (2016) 15 SCC 389

For the petitioner: Mr. Ajay Sharma, Advocate.

For the respondent: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. Raju Ram Rahi, Deputy Advocate General.
ASI Paramjeet, P.S.Bhoranj, present in person.

The following judgment of theCourt was delivered:

**Vivek Singh Thakur, Judge.**

Petitioner has preferred present petition under Section 439 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C') for grant of regular bail in case FIR No. 115 of 2018, dated 9th August, 2018, registered under Sections 376 and 506 of the Indian Penal Code (hereinafter referred to as 'IPC') registered at Police Station Bhoranj, Hamirpur, H.P.

2. Brief facts of the case are that the petitioner has been arrested in pursuance to the complaint lodged by prosecutrix, stating therein that since about last two years, one person Anand Gopal was coming for 'Satsang' in their village and she had met the said person in a 'Satsang' in village Bhated in the house of her friend. At about two years ago and at that time, on his proposal to visit her house for 'Satsang', she had told him that she had to ask her husband. Whereupon, petitioner had asked to come with her husband on that day in the evening. The prosecutrix along with her husband had met him in village Bhated in presence of number of persons where her husband had acceded to proposal of petitioner to visit their house for 'Satsang' in July, 2016. For 'Satsang', petitioner remained in their house for four days and during that period he used to have vulgar conversation with ladies in front of their spouse on the pretext of taking their test. People in the area were not objecting his behaviour believing him a 'renowned Guru'. They were treating him 'God' with full faith in him. On 10.6.2018, he came in her village for 'Satsang' in the house of one Ranjeet Singh. On that day, he told her husband that his next 'Satsang' had been cancelled and thus he had to reside in prosecutrix's house for three days and asked him to come at 9:00 a.m. in the next morning to take him to his house. On 11.6.2018, her husband, after living petitioner in their house, had gone to open his shop. The petitioner was accompanied by a boy named Lucky, who was sent by petitioner to Hamirpur on the pretext of some work and petitioner had handed over his clean clothes to prosecutrix for washing. At that time, her younger son was sleeping, whereas elder son had gone out along with his friends. After taking meals, petitioner called her in the drawing room and on the pretext of taking her test, had put his hand on her hand and slapped her by telling that God was is going to bless her. Thereafter, petitioner asked her to take him to a lower room and immediately after reaching in the said room, he pushed her in the inner room forcibly and ravished her on the pretext of test and thereafter, threatened her not to disclose the same to anybody with threat that on disclosing the same she has to face wrath of God. After the incident, prosecutrix was perplexed and her behaviour became abnormal, whereupon her husband took her to the doctor for treatment. On repeated solicitation by husband, she had disclosed the incident to her husband, whereafter, complaint was lodged against petitioner in the Police Station. It is case of the prosecution that present place of residence of petitioner is not his permanent address, but he belongs to unknown place and during investigation his address disclosed by him as "Sacha Baba Ashram, Village Haripur Kla, Post Office Ray Wala, Tehsil Rishi Kesh, District Dehradun" has been found not in existence.

3. It is contended on behalf of the petitioner that there is about two months delay in lodging the F.I.R. and allegations may have been levelled for mudslinging or for extorting money from the petitioner. It is contended that in her statement, the prosecutrix has stated that her younger son was sleeping in the house at the time of alleged incident

and therefore, it was highly improbable to commit an offence as alleged and without admitting guilty, it is also submitted in alternative that as per statement of prosecutrix, she was meeting petitioner since last about two years and it might be the case where son would have seen the prosecutrix in compromising position and thus, the complaint might have been lodged for face savings. Further that the petitioner is residing on the present address since last about 14-15 years, having his Ration Card and Identity Card of the present place. His Aadhar Card of the said address is also there. Therefore, there is no possibility of his absconding and the petitioner is available for trial, who is not in a position to threaten the witnesses and thus, there is a prima facie case made out for releasing the petitioner on bail.

4. Relying on judgment passed by the Apex Court Court in case titled **Gudikanti Narasimhulu** Versus **Public Prosecutor, High Court of Andhra Pradesh, AIR 1978 SC 429**, it is argued that at the pre-trial stage, bail is right and jail is exception. Further reliance has been put on pronouncement of judgment passed by this High Court in **Vimal Kumar Bawa** Versus **State of H.P. 2002 (1) Shimla L.C. 59**, to canvass that mere arrest of accused in a serious crime, in itself, is not sufficient to reject the bail application and thus, the petitioner is also entitled for release with condition imposed upon him, as no purpose is going to be served by keeping the petitioner behind the bars during trial, for his guilt which is yet to be established. It is also contended that at the time of rejection of bail, learned Sessions Judge has acted as a social reformer, but not in consonance with the law of land.

5. Learned Deputy Advocate General under instructions of Investigating Officer present in the Court has submitted that the address of district Haridwar supplied by the petitioner has been found to be incorrect, as the said Ashram on inquiry through police at Haridwar was found to be closed and therefore, as permanent address has not been disclosed by the petitioner and for want of any roots in the society and for disclosing only his temporary address, there is every possibility of absconding of petitioner, because as nothing is known about his origin and further that by taking undue advantage of his influence on the prosecutrix, he has committed a heinous crime by exploiting fiduciary relationship of 'Guru' and disciple between him and prosecutrix, and breaching trust of the society, and thus, it is argued that his release on bail shall have adverse impact on the society and therefore, rejection of his bail application has been prayed.

6. Considering th question of personal liberty with larger interest of public, the Apex Court has held that the Courts are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated further on human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilised. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. [The] society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a

disharmonious manner ushering in the disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law. (See *Neeru Yadav versus State of U.P., (2014) 6 SCC 508, para 16; Rakesh Ranjan Yadav versus CBI, (2007) 1 SCC 70, para 16; Masroor versus State of U.P., (2009) 14 SCC 286, para 15; Ash Mohammad versus Shiv Raj Singh alias Lalla Babu and another, (2012) 9 SCC 446, paras 10 & 25; Chandrakeshwar Prasad alias Chandu Babu versus State of Bihar and another, (2016) 9 SCC 443 paras 10, 11)*

7. The Apex Court also also held that detailed examination of evidence and elaborate documentation of merits of the case are to be avoided. (See *Puran versus Rambilas and another, (2001) 6 SCC 338, para 8; Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528:* (SCC pp. 535-36, para 11); *Vinod Bhandari versus State of Madhya Pradesh, (2016) 15 SCC 389, para 13; Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 2.)* Consideration of details of the evidence is not a relevant consideration. While it is necessary to consider the *prima facie* case, an exhaustive exploration of the merits of the case should be avoided by refraining from considering the merits of material/evidence collected by the prosecution. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 15; and Criminal Appeal No. 1175 of 2018, titled The State of Orissa versus Mahimananda Mishra, decided on 18th September, 2018)*

8. In case ***Dataram Singh versus State of Uttar Pradesh and another, (2018) 3 SCC 22, para 16***, it has been observed that it is not necessary to go into the correctness or otherwise of the case made against the accused as this is a subject matter to be dealt with by the Trial Judge.

9. The relevant factors to be kept in mind at the time of consideration of bail applications as referred in various pronouncements, are as follows:

(1) Satisfaction of the Court in support of the charge as to whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(2) Nature and gravity of the accusation/ charge;

(3) Seriousness of the offence/crime and severity of the punishment in the event of conviction;

(4) Nature and character of supportive evidence;

(5) Character, conduct, behaviour, means, position and standing of the accused;

(6)The Courts must evaluate the entire available material against the accused very carefully; circumstances which are peculiar to the accused and the Court must also clearly comprehend the exact role of the accused in the case;

(7)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;

(8) Position and status of accused with reference to the victim and witnesses to assess the impact that release of accused may make on the prosecution witnesses and reasonable apprehension of the witnesses being influenced or tampered with or apprehension of threat

to the complainant/ witnesses and possibility of obstructing the course of justice;

(9) 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;

(10) likelihood and possibility of the accused's likelihood to repeat similar or the other offences;

(11) A reasonable possibility of the presence of the accused not being secured at the trial and danger of the accused absconding or fleeing from justice;

(12) Impact of grant of bail on the society and danger, of course, of justice being thwarted by grant of bail affecting the larger interest of the public or the State;

(13) 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;

(14) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(15) Whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(16) 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;

(17) No doubt, this list is not exhaustive. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court.

(See - *Gurcharan Singh v. State (Delhi Admn.) (1978) 1 SCC 118; Gurbaksh Singh Sibbia versus State of Punjab, (1980) 2 SCC 565; Prahlad Singh Bhati v. State (NCT of Delhi) (2001) 4 SCC 280; Puran v. Rambilas (2001) 6 SCC 338; Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598; Chaman Lal versus State of U.P. and another, (2004) 7 SCC 525; Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528, para 11); Jayendra Saraswathi Swamigal v. State of T.N., (2005) 2 SCC 13, para 16); State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21, para 18; Prashanta Kumar Sarkar versus Ashis Chatterjee and another, (2010) 14 SCC 496; Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694; Prakash Kadam versus Ramprasad Vishwanath Gupta, (2011) 6 SCC 189; Kanwar Singh Meena versus State of Rajasthan and another, (2012) 12 SCC 180; Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129; Criminal Appeal No. 1175 of 2018, titled The State of Orissa versus Mahimananda Mishra, decided on 18th September, 2018)*

10. Our society has tremendous faith in religious 'Gurus' and they are treated by the public, equivalent to God and normally devotees submit themselves to such 'Gurus' unconditionally and obey their dictates like an obedient child. An offence committed by person pretending himself a pious/spiritual person is more serious than a impious person, particularly when commission of such an offence shakes the trust of society at large. Breach of faith by a person of higher status has deep hurting impact on society. Higher the faith deposed by the society higher the responsibility to keep it.

11. A petition preferred by the petitioner before the learned Sessions Judge has been rejected on 6.10.2018. There is no changed circumstances thereafter, nor there is any material infirmity or perversity in the order passed by him, so as to hold the said order a wrong order. Plea extended on behalf of petitioner that learned Sessions Judge has acted like a social reference is out of context. Otherwise, also Courts have to be sensitive to legitimate social sentiments and must respond taking into larger interest of society.

12. Further, during investigation on verification, details of his permanent address, given by the petitioner, was not found to be correct and there is no permanent address of the petitioner available on record so as to establish his roots in the society to ensure his presence during the trial. Nothing concrete has been brought to the notice of the Court from the material on record or otherwise causing the prosecutrix to implicate the petitioner falsely in the present case. It is true that during trial, imprisonment cannot be used as substitute to the punishment without scrutiny of the evidence by the trial Court, but at the same time, in a case where a lady has been exploited by taking undue advantage of fiduciary relationship resulting into breach of faith of the society at large, as discussed above, grant of bail to the petitioner at this stage may also have an adverse impact on the society. The petitioner has a right to liberty under Article 21 of the Constitution of India, but balance has to be maintained between the personal and societal interest.

13. In view of above, considering cumulative effect of entire facts and circumstances, without commenting upon the merits of the evidence and keeping in view the principles laid down by the apex Court and other factors, like nature of offence, manner in which it has been committed and its impact on the society, petitioner is not entitled for bail, at this stage. Hence, the petition is dismissed.

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**BEFORE HON'BLE MR. JUSTICE SURYA KANT, CJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.**

Parma Nand ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CWP No. 2304 of 2018
Decided on: 31.10.2018

**Constitution of India, 1950-** Articles 14 and 16- **Baba Balak Nath Temple Trust Deothsidh Employees Service Rules, 2000-** Clause 6- Clause providing for appointment to post of electrician by direct recruitment from persons possessing two years diploma from institutions recognized by H.P. Government – Petitioner initially joined as Assistant

electrician on daily wage basis in 1989 by Temple Trust, but absorbed as Assistant Electrician and granted ACP – Petitioner not fulfilling requisite qualifications for post of Electrician - Challenging validity of Clause 6 and claiming appointment through promotion - Held, it is for Rule making Authority or Competent Authority to prescribe source of recruitment – It may invite Court's interference only if it does not meet with test of reasonableness - Competent Authority deciding to fill up post of Electrician by direct recruitment and also suitably compensated cadre of Assistant Electricians by providing benefit of ACP – No stagnation in service career of petitioner – No case of interference in Rules made out – Petition dismissed. (Paras-8 to 10)

For the petitioner: Mr. Ajay Sharma, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General, with Mr. J.K. Verma, Mr. Adarsh Sharma and Mr. Nand Lal Thakur, Additional Advocate Generals, for respondent No. 1.
Mr. K.D. Sood, Senior Advocate, with Mr. Het Ram Thakur, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

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**Surya Kant, Chief Justice.** *(Oral)*

The petitioner seeks quashing of Clause 6 of Schedule III of the Rules as incorporated in Baba Balak Nath Temple Trust Deotsidh Employees Service Rules 2000-2001, Clause 6 whereof provides that the post of Electrician shall be filled up by Direct Recruitment and minimum qualification required to be possessed is two years Diploma from H.P. Government recognized institution.

2. The petitioner had joined as an Assistant Electrician on daily wage basis under the Baba Balak Nath Temple Trust in the year 1989. The Management of the Trust was subsequently taken over by the State Government. It appears that services of some of the employees like the petitioner were sought to be terminated for want of requisite qualification but Rule 9.1 of the Baba Balak Nath Temple Trust Employees (Terms of Employment) and Working Condition Rules was amended vide Fifth Amendment Rules, 1995 (Annexure P-3) and it was resolved that the employees who did not fulfill requisite qualification but have got sufficient experience in the field of their work and were found fit during screening to carry out the duties entrusted to them, may also be absorbed under those Rules.

3. The petitioner was one of such employees who was then absorbed as an Assistant Electrician by the Trust.

4. Thereafter arose a dispute as to whether or not the employees of the Trust were entitled to the grant of benefit of Assured Career Progression Scheme, regardless of the fact that they were not in possession of the requisite qualification prescribed under the Rules formulated by the Trust. This Court in CWP No. 3784 of 2010, decided on 14th July, 2011, accepted the claim of the employees and held that the prescription of qualification under the Rules for recruitment/promotional purposes was alien to the Scheme of ACP, hence, the employees of Trust were entitled to the benefit of increments under the Assured Career Progression Scheme. The said judgment has attained finality. There is no quarrel that the employees of the Trust like the petitioner have been granted the benefit of Assured Career Progression Scheme.

5. In the instant writ petition, the petitioner has now laid challenge to the provisions contained in the Rules regarding appointment to the post of Electrician which, according to him, ought to be filled by promoting an Assistant Electrician. The Rule, however, has caused two obstacles against promotion of the petitioner, namely, (i) that the source of appointment is Direct Recruitment, and (ii) the incumbent is required to possess two years Diploma from H.P. Government recognized institution. The petitioner, on the other hand, contends that once this Court in the matter of grant of ACP has held that the employees not possessing requisite qualification were entitled to be treated at par with those who were having the prescribed qualification for the purpose of grant of ACP, on the same analogy, he is entitled to be promoted as Electrician and the riders provided under the Rules are, thus, liable to be struck down.

6. We have heard learned counsel for the parties at a considerable length and gone through the record.

7. True it is that in some of the judgments, the Hon'ble Supreme Court has observed that the State Government or its agencies ought to provide promotional avenues to the employees who may not be stagnated throughout their service career. This exception, nevertheless is attracted and cannot pressed into aid in a case like this for the reason that the employees of the respondent-Trust have been admittedly provided the benefit of Assured Career Progression Scheme which is meant to remove stagnation in the career of such employee who does not get opportunity to be promoted.

8. Promotion cannot be claimed as a matter of right save where an employee fulfills the eligibility conditions and there is nothing to deprive him of the benefit of due promotion. In the instant case, there is only one post of Electrician and the Rule Making Authority has decided to fill up the same by Direct Recruitment. The Competent Authority has further provided that the incumbent must possess two years Diploma from a recognized institute to become eligible for recruitment. The petitioner is neither an aspirant for Direct Recruitment nor he possesses the requisite qualification. Merely because he is not entitled to be promoted as Electrician under the Rules, would not render Clause 6 in Schedule III of the Rules as violative of Articles 14 or 16 of the Constitution.

9. It is well settled that it is for the Rule Making Authority or the Competent Authority to prescribe the source of recruitment. It may invite Court's interference only if it does not meet with the test of reasonableness. In the instant case, if, on one hand, the Competent Authority has decided to fill up the post of Electrician by Direct Recruitment, it has, on the other hand, suitably compensated the feeder cadre, namely, the Assistant Electrician, by providing benefit of Assured Career Progression Scheme.

10. There is, thus, no stagnation in the service career of the petitioner which might prompt this Court to command the respondents to consider and make a provision for promotional avenues. No case to interfere in the Rules under challenge is thus made out. Hence, the writ petition is dismissed so also the pending miscellaneous applications, if any.

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

M/s Andritz Hydro Pvt. Ltd. ...Petitioner.

Versus

SJVN Ltd. through its General Manager (ECD) & another . ..Respondents.

CWP No. 1204 of 2018
Reserved on:01.10.2018
Date of Decision: November 6, 2018

**Constitution of India, 1950-** Articles 14 & 226- Tender – Acceptance– Challenge thereto – Held, evaluating tenders and awarding contracts are essentially commercial functions – Principles of equity and natural justice stay at distance –If 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 Government - On facts, deviation in accepted tender of respondent No.2 alleged to be critical and making it to be non-responsive, not proved – Petition dismissed. (Paras 29 to 31, 42 & 43)

***Cases referred:***

Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & another, (2016) 16 SCC 818
Air India Limited vs. Cochin International Airport Ltd. & others, (2000) 2 SCC 617
B.S.N. Joshi & sons Ltd. vs. Nair Coal Services Ltd. & others, (2006)11 SCC 548
Central Coalfields Limited & another vs. SLL-SML (Joint Venture Consortium) & others, (2016) 8 SCC 622
G. J. Fernandez vs. State of Karnataka, (1990) 2 SCC 488
JSW Infrastructure Limited & another vs. Kakinada Seaports Limited & others, (2017) 4 SCC 170
Michigan Rubber (India) Limited vs. State of Karnataka & others, (2012) 8 SCC 216
Montecarlo Limited vs. National Thermal Power Corporation Limited, (2016) 15 SCC 272
Ramana Dayaram Shetty vs. International Airport Authority of India, (1979) 3 SCC 489
Raunaq International Ltd. vs. I.V.R. Constructions Ltd., (1999) 1 SCC 492
Reliance Airport Developers (P) Ltd. vs. Airports Authority of India, (2006) 10 SCC 1
Sterling Computers Ltd. vs. M&N Publications Ltd., (1993) 1 SCC 445
Tata Cellular vs. Union of India, (1994) 6 SCC 651
Tejas Constructions and Infrastructure Private Limited vs. Municipal Council Sendhwa and another, (2012) 6 SCC 46

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| For the Petitioner: | Dr.Ashwani Kumar and Mr.B.C. Negi, Sr. Advocates with M/s Sangeeta Bharti, Ashish Kumar, Brijesh Anand, Rahul Tyagi & Raj Negi, Advocates, for the petitioner. |
| For the Respondents: | Mr.K.T.S. Tulsi & Mr.Ramakant Sharma, Sr.Advocates with M/s Gaurave Bhargava, Raj Singh Niranjan & Basant Thakur, Advocates, for respondent No.1. |
| | Mr.Rajiv Nayyar & Mr.Naresh K. Sood, Sr.Advocates, with M/s Omar Ahmad, Ishan Gaur, Sumer Seth & Rohit Chauhan, Advocates, for respondent No.2. |

The following judgment of the Court was delivered:

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**Ajay Mohan Goel, J.**

The central issue, which arises for consideration in the present petition, is as to whether the bid submitted by M/s Voith Hydro Ltd. (respondent No.2) contained

variation/deviation of a critical provision and as to whether act of SJVN Ltd (respondent No.1), in accepting such bid, in any manner, has unfairly affected the competitive position of petitioner M/s Andirtz Hydro Pvt. Ltd.

2. Briefly stated, the facts are as under.

3. On 26.9.2017, SJVN Ltd. invited bids for construction of project, termed as 'Naitwar Mori Hydro Electric Project (2x30) 60 MW, Mori, District Uttarkashi, Uttarakhand (India)'. The Bid Document, contained the instructions to bidder, which is commonly termed as 'Instructions to Bidder (ITB)'. All the bids were required to be filled up in the mode and manner prescribed therein.

4. It is not in dispute that four parties, including the writ petitioner M/s Andritz Hydro Pvt. Ltd. (hereinafter referred to as the petitioner) and respondent No.2 M/s Voith Hydro Ltd. (hereinafter referred to as Voith), submitted such bids. It is also not in dispute that bids were to be submitted online, in terms of Clause-21 of ITB. The Bid Document, inter alia, was to contain Envelope-1 (containing the qualification particulars and Techno Commercial Bid), and Evnelope-2 (Price Bid). It is not in dispute that alongwith Envelope-1, all attachments, except Attachment 8(ii), were to be uploaded. It is also not in dispute that Voith uploaded Attachment 8(ii) alongwith Envelope-1, though it was supposed to be attached with Envelope-2 (Price Bid).

5. The Technical Bid was opened on 28.2.2018. It is the claim of the petitioner that on the said date, SJVN found the Bid of Voith to be non-responsive, but however, there is no document evidencing such fact and the same is denied by respondents.

6. It is not in dispute that on 18.5.2018, Bids of all the Techno Commercial Responsive Bidders were opened and the Bid of Voith was found to be lowest. On opening, the Price Bids of the Bidders, were found to be as under:

| Andritz | Voith | BHEL | GE |
|---|---|---|---|
| INR | INR | INR | INR |
| 1,465,817,074 | 1,177,757,996 | 1,666,871,562 | 1,549,621,393 |

7. However, prior thereto on 16.5.2018, vide written communication dated 16.05.2018, the petitioner, suggesting that the Bid of Voith was found to be non-responsive on account of deviation of price adjustment clauses, desired furnishing of list of qualified bidders. It be also noticed that vide another communication dated 18.5.2018 (Annexure P-7), the petitioner claiming the Bid of Voith to be non-responsive, requested the same to be rejected with a further request to award the project to other lowest bidder.

8. Not finding favour with the claim set up by the petitioner, vide communication dated 22.5.2018 (Annexure P-1), SJVN rejected such claim.

9. It is in this backdrop, the petitioner field the instant petition on 26.5.2018.

10. At this juncture, it be also observed that during the pendency of the present petition, Bid of Voith stood accepted by SJVN.

11. As per Clause 5(i) – Qualification of Bidder of the ITB, the Bidder was required to submit a declaration as per proforma given in Attachment confirming that the bid submitted by the Bidder is strictly in conformity with the documents issued by the Employer.

12. As per Clause 13, termed as "Documents comprising the Bid" of the ITB, the Bid submitted by the Bidder was to comprise the documents in the manner specified therein. Each Bidder was required to submit its Bid, attaching certain documents. Here we are concerned with Attachment-8, which is reproduced as under:

"Attachment 8: Deviations

In order to facilitate evaluation of bids, variations & deviations, if any, (except critical provisions) from the requirements of the conditions of Contract, Bid Data Sheet and other Commercial conditions, Technical Specifications and Drawings shall be listed in Attachment-8(i) and the withdrawal cost for the same shall be listed in Attachment-8(ii) as provided in bid document. The deviations listed elsewhere in the bid shall not be given any cognizance and shall be treated as deemed to be withdrawn. The Bidder has to provide the additional price, for withdrawal of the variations and deviations indicated therein.

In particular, Bids with deviations from, objections to or reservations on provision such as those concerning Bid security/EMD, Bid validity, Defects Liability, Idemnity and on provisions mentioned below, if any, will be treated as non-responsive.

Bids containing deviations from critical provisions relating to GC Clause 11.0 (Contract Price), 12.0 (Terms of Payment), 13.3 (Performance Security), 14 (Taxes and Duties), 27.0 (Defects Liability), 29.0 (Patent Inemnity) 30 (Limitation of Liability), 40 (Extension of Time for Completion), 45 & 46 (Claims, Disputes and Arbitration), Appendix-2 (Price Adjustment) and Functional Guarantees will be considered as non-responsive. The above list is illustrative only and not exhaustive.

However, the bidders wishing to propose deviations to any of the provisions other than those mentioned above, must provide in the Attachment-8(i) without cost of withdrawal and in Attachment-8(ii) of the bid with cost of withdrawal of each of such deviations. If such deviations are not priced, cost of withdrawal of such deviations shall be treated as 'NIL'. The evaluated cost of the bid shall include the cost of withdrawal of the deviations from the above provisions to make the bid fully compliant with these provisions.

The deviations listed without any cost and not accepted by Employer shall have to be withdrawn by the bidder without any financial implications to Employer before opening of price bid. In case of non-withdrawal of such deviations, the bid shall be rejected being non-responsive.

At the time of Award of Contract, if so desired by the Employer, the bidder shall withdraw these deviations listed in Attachment-8(i) and 8(ii) at the cost of withdrawal stated by him in the bid. In case the bidder does not withdraw the deviations proposed by him, if any, at the cost of withdrawal stated by him in the bid, his bid will be rejected.

However, the attention of the bidders is drawn to the provisions of preliminary examination of bids regarding the rejection of bids that are not substantially responsive to the requirements of the bidding documents.

Regarding deviations, conditionality or reservations introduced in the bid, which will be reviewed to conduct a determination of substantial responsiveness of the Bidder's bid as stated in ITB Clause 13.2(h) above, the order of precedence of these documents to address contradictions, if any, in the contents of the bid, shall be as follows:

I. Deviation Attachment 8(i) & 8(ii).

II. Letter of tender.

III. Price Schedule.

IV. Technical Data Sheet.

V. Any other part of the bid.

Contents of the document at Sr. No. 1 above will have overriding precedence over other documents (Sr. No. II to V above). Similarly, contents of document at Sr. No. II above will have overriding precedence over other documents (Sr. No. III to V above) and so on.

……."

13. As per Clause 21.1, preparation, uploading and submission of bids was to be in the format prescribed therein. There was to be online submission of the Bid in two envelopes. Envelope-1, was to contain Qualifications, Particulars and Techno Commercial Bid, and Envelope-2, which was to be termed as "Price Bid", was to be submitted in consonance with Clause 21.3.

14. As per Clause 25, termed as "Bid Opening", the Price Bids of the Bidders, whose Bids were not found to be technically responsive were not to be considered for opening.

15. Clause 28 dealt with "preliminary examination of Bids and determination of responsiveness", which is reproduced as under:

| | | |
|---|---|---|
| "28. Preliminary examination of Bids And Determination of Responsiveness | 28.1 | The basis and methodology for evaluation of the Qualification Particulars and techno-commercial bids shall generally be as described in the supplement to instructions to Bidders attached as Annexure -B to these ITB. The Employer will examine the bids to determine whether they are complete, whether any computational errors have been made, whether required securities and cost of Bid Document have been furnished, whether the documents have been properly signed, whether all the requisite declaration, undertakings have been furnished and whether the bids are generally in order. |
| | 28.2 | The Price Bid duly filled in electronic form in conformity with the tender specification on the portal only. The Price Schedule is to be filled in for filling rates of the items to be filled in by the Bidder. The calculation of amount by multiplying the quantities with the rates filled in by the bidder, sub-totals, total etc. shall be done by the formulae already provided in electronic form. In case of any discrepancy in the calculations, the rates shall be considered final and the amount calculated by using the same shall be corrected and considered as final. Where ever prices for items is left blonk, in the Price Schedule, it shall be deemed to have been included in other items. |
| | 28.3 | The Employer may waive any minor informality, non-conformity or irregularity in a bid that does not constitute a material deviation and that does not prejudice or affect |

| | | |
|---|---|---|
| | | the relative ranking of any Bidder as a result of the evaluation of Bids, pursuant to these Clauses. |
| | 28.4 | Prior to the detailed evaluation, the Employer will determine whether each Bid is of acceptable quality, is complete and is substantially responsive to the Bid Documents. For purposes of this determination, a substantially responsive Bid is one that conforms to all the terms, conditions and specifications of the Bid Documents without material deviations, objections, conditionalities or reservations. A material deviation, objection, conditionality or reservation is one (I) that affects in any substantial way the scope, quality or performance of the Contract; (ii) that limits in any substantial way, inconsistent with the Bid Documents, the Employer's rights or the successful Bidder's obligations under the Contract; or (iii) whose rectification would unfairly affect the competitive position of other Bidders who are presenting substantially responsive bids.<br><br>The Employer's determination of a Bid's responsiveness is to be based on the content of the Bid itself without recourse to extrinsic evidence. |
| | 28.5 | If a Bid is not substantially responsive, it will be rejected by the Employer and may not subsequently be made responsive by correction or withdrawal of the nonconforming deviation or reservation. |
| | 28.6 | All the bidders shall be informed, about their status of qualification/disqualification/techno-commercial responsiveness, in a single letter. |

16. Clause 30 dealt with "Evaluation and Comparison of Bids". Clause 30.4 provided that after arriving at L1 evaluated bid price through e-tender, the qualified bidders shall participate in E-Reverse auction process, as envisaged therein.

17. Similarly, Clause 31, which envisaged award of contract, provided that subject to the provisions contained in Clause 32, the employer will award the contract to the Bidder meeting the specified qualifying requirements.

18. As much emphasis is laid on non-compliance of the Bid Document, the prescribed format with regard to Attachment 8 (i) and Attachment 8(ii), we deem it appropriate to reproduce the same as under:

"**ATTACHMENT -8(i)**

**ELECTRO MECHANICAL PACKAGE FOR**

**NAITWAR MORI HYDRO ELECTRIC PROJECT 60(2X30) MW**

**List of Deviations without Cost of Withdrawal**

(To be furnished by the Bidders alongwith Techno-commercial bid)

(Bidder's Name & Address):

To:.....
(Name of the Employer)

Dear Sir,

Following are the deviations proposed by us as per ITB Clause 13.2 (h)

| S. No. | Clause No. | Deviation | Remarks/Justifications |
|---|---|---|---|

Note :

1. We hereby confirm that all the deviations specified as above in Attachment-8(i) are the same which have been mentioned in Attachment-8(ii) alongwith its cost of withdrawal.

2. We hereby confirm our acceptance and compliance to the critical provisions of GC clauses listed in ITB clause 13.2(h).

Date: ..... (Signature).....
Place ..... (Printed Name).....
(Designation).....
(Common Seal).....



**"ATTACHMENT -8(ii)**

**ELECTRO MECHANICAL PACKAGE FOR**
**NAITWAR MORI HYDRO ELECTRIC PROJECT 60(2X30) MW**

**List of Deviations without Cost of Withdrawal**

(to be submitted with Price Bid)

(Bidder's Name & Address):

To:.....
(Employer's Name & Address)

Dear Sir,

Following are the deviations proposed by us as per ITB Clause 13.2(h). We are also furnishing below the cost of withdrawal for the deviations proposed by us in Attachment 8(i). We confirm that we shall withdraw the deviations proposed by us at the cost of withdrawal indicated in this attachment failing which our bid may be rejected.

**Deviations:**

| S. No. | Clause No. | Deviation | Remarks/Justification |
|---|---|---|---|
| 1. | 2. | 3. | 4. |

In case no specific cost of withdrawal is mentioned against any item in column no. 4, cost of withdrawal of such deviations shall be treated as 'NIL'.

Date: .....
Place .....

(Signature).....
(Printed Name).....
(Designation).....
(Common Seal).....

| | | |
|---|---|---|
| Bid Document for EM Works of NMHEP (2x30) 60MW No. SJVN/ CC/ ECD/ NMHEP/EM/17 | Section-VII (Attachments) | Page 17 of 227" |

19. It is not in dispute that as per Clause 13.2(h) technical specifications and drawings with regard to the deviations proposed by the bidder were to be listed in Attachment 8(i) and withdrawal cost of the same was to be listed in attachment 8(ii). It is also not in dispute that in terms of ITB, it was Attachment 8(i), which was to form part of Envelope-1 i.e. the Techno Commercial Bid and Attachment 8(ii) was to form part of Envelope-2 i.e. Price Bid.

20. In other words, the proposed deviations were to be provided by a bidder in Attachment 8(i) and withdrawal cost thereof only was to be provided in Attachment 8(ii).

21. It is also not in much dispute that in the present case, the proposed deviations, which were provided in Attachment 8(i) by Voith, were not "critical deviations". Primarily challenge laid to the bid which was so put forth by respondent No.2, by the petitioner is, that because in Attachment 8(ii) certain "critical deviations" were proposed, therefore, the same rendered the bid of respondent No.2 to be non-responsive and respondent No.1 could not have had accepted the same as has been done by it.

22. We reiterate that as per the scheme of ITB, proposed deviations were to be part of only Attachment 8(i). Therefore, at this stage, we independently dwell with what were the proposed deviations in Attachment 8(i) incorporated by Voith. The same are reproduced below.

| S.No. | Clause No. | Deviation | Remarks/ Justifications |
|---|---|---|---|
| GENERAL | | | |
| 1. | - | The clarifications and Amendments issues pursuant to the pre-bid meeting held on 13th November, 2017 shall form an integral part of the Contract | |
| COMMERCIAL | | | |
| 2. | GC 25.3.1(d) | Delete the following sentence "any minor items mentioned in GC Clause 24.7 hereof relevant to the Facilities or that part thereof have been completed" and insert the following sentence at the end of GC Clause 25.3.4 "Notwithstanding anything contained to the contrary under the Contract Documents, the Completion of the Facilities under GC Clause 24.7 and issuance of Operational Acceptance Certificate shall not be withheld for completion of minor items which do not hinder commercial operation of the Facilities or part thereof". | |
| 3. | Clause(c)—Third Party Liability Insurance, Appendix-3 to the Contract Agreement | Replace the following sentence "Rs.0.5 million per person per occasion" with "Rs.0.5 million per person per occasion and in aggregate." | |

23. It is not in dispute that only those bids containing deviations from critical provisions as has been mentioned in 13.2(h) were to be considered as non-responsive. A perusal of the contents of said clause demonstrates that the proposed deviations by Voith in Attachment 8(i) cannot be termed as deviations from critical provisions. We may add that during the course of arguments, there was not much serious dispute vis-a-vis this issue. Therefore, we hold that the proposed deviations by Voith as were envisaged in Attachment

8(i) and which as per terms of ITB were to form part of Envelope-1, which was Techno Commercial Bid were not such deviations which would have rendered the bid to be non-responsive.

24. That being so, the moot issue which arises for consideration is as to whether bid of respondent No.2 could have been termed to be non-responsive on the basis of contents of Attachment 8(ii) which erroneously was uploaded alongwith Envelope-1 and which Attachment as per terms of ITB was not to be uploaded with Envelope-1, but was to be uploaded with Envelope-2 i.e. the Price Bid.

25. As mentioned above, preparation uploading and submission of bid is provided in Clause-21 of ITB. At the cost of repetition, it is stated that Clauses-21 envisages online submission of Envelope-1 bid i.e. qualification particulars and Techno Commercial Bid to contain the Documents/Attachments referred therein which expressly mentioned "all Attachments except 8(ii) alongwith supporting documents".

26. Because Attachment 8(ii) was not to be a part of Envelope-1 bid i.e. qualification particulars and Techno Commercial Bid, therefore, even if erroneously or otherwise, document such like Attachment 8(ii) was uploaded alongwith Envelope-1, then the only option with the Employer-Respondent No.1 was to examine the Techno Commercial Bid, so submitted by respondent No.2 by excluding/ignoring Attachment 8 (ii).

27. As it is not in dispute that deviations proposed in Attachment 8(i) were not critical deviations, therefore, in our considered view simply because Attachment 8(ii) was erroneously uploaded alongwith Envelope-1 and the same contained mention of "price adjustment", it did not render the Techno Commercial Bid of respondent No.2 to be non-responsive.

28. We reiterate that the Techno Commercial Bid of the said bidder was to be examined on the basis of Attachment appended with the said Bid minus Attachment 8(ii).

29. Record also demonstrates that at the time of preliminary examination of the bid and determination of responsiveness which took place qua techno commercial bid on 28.02.2018, respondent No.1 did not find the bid of respondent No.2 to be non-responsive. It is also a matter of record that pursuant to communications which took place between respondent No.1 and respondent No.2, the proposed deviations be it in Attachment 8(i) or Attachment 8(ii) stood withdrawn by respondent No.2 as on 11.04.2018, i.e. much before the date on which the price bids were opened i.e. 18.04.2018.

30. In other words, as on the date when the price bids of the bidders whose bids were found to be technically responsive were opened by respondent No.1, the deviations, which were proposed by respondent No.2 stood withdrawn.

31. Therefore, it is not a case that as on the date when the price bids were opened by respondent No.1 any material prejudice was caused to either of the bidders, including the petitioner on the basis of proposed deviations, which were made by respondent No.2.

32. At this stage, we observe as to what really is the meaning of words "critical provisions". For such purpose, we do not have to travel beyond ITB. Clause 13.2 (h) itself illustrates as to what really would be critical deviations. Price adjustment is once such component. Also Clause 28.4 further illustrates as to what really would be critical deviations though referred to as material deviations. It is one of three components i.e. (i) that affects in any substantial way the scope, quality or performance of the Contract; (ii) that limits in any substantial way, inconsistent with the Bid Documents, the Employer's rights or the successful Bidder's obligations under the Contract; or (iii) whose rectification would unfairly affect the competitive position of other Bidders who are presenting substantially responsive bids.

33. When we peruse Attachment 8(i) so uploaded by respondent No.2, we find that there is no deviation with respect to price adjustment. Similarly, we find it not to, in

any manner affect the scope, quality or performance of the contract; limit in any substantial way the employer's rights or bidder's obligation under the contract or unfairly affect the competitive position of other bidders. Can it be said that the erroneous uploading of a document i.e. Attachment 8(ii) by a party would unfairly affect the competitive position of other bidder? In our considered view, the answer is in the negative.

34. At this stage, we would also like to state that Attachment 8(i) and Attachment 8(ii) cannot be read disjunctively. They have to be read harmoniously, as per the contents of ITB, which provided that proposed deviations are to be mentioned in Attachment 8(i) and Attachment 8(ii) is only to contain "withdrawal price thereof".

35. In other words, nothing is to be read in Attachment 8(ii), save and except withdrawal price referred to therein, with regard to deviations, which are to be provided in Attachment 8(i). In our considered view, the scheme of the ITB is such that whether or not a Bid is responsive has to be gathered from the Attachments which are appended alongwith Envelope-1, which includes Attachment 8(i) and not from any other Attachment, which otherwise is not to be part of Envelope-1.

36. It is not the case of petitioner that on the strength of those Attachments, which were to be uploaded alongwith Envelope-1, the Bid of Voith was non-responsive. Petitioner has harped only upon the contents of Attachment 8(ii) to justify that the Bid of Voith was non-responsive. As we have already held, because Attachment 8(ii) was not to be part of Envelope-1, therefore, erroneous uploading of the same, in our considered view, cannot render the Bid of Voith to be non-responsive, because for all intents and purposes, the same was liable to be ignored. We may also add, at this stage, that it is not the case of the petitioner that as on 28.2.2018, the Bid of Voith was found to be technically responsive, only on the strength of the contents of Attachment 8(ii). Therefore, also we do not find any merit in the contention of the petitioner.

37. In view of the above discussion, in our considered view, it cannot be said that the uploading of Attachment 8(ii) alongwith Envelope-1, amounted to deviations from a critical condition even if, the term "price adjustment" was mentioned therein. Similarly, it cannot be said that SJVN in an illegal, improper, irregular, arbitrary or with malafide intention considered technical bid of Voith as responsive. On the strength of documents appended by the petitioner, it could not be substantiated that the competitive position of the petitioner was anyway affected to its disadvantage by the act of uploading of Attachment 8(ii) alongwith Envelope-1 by Voith. While arriving at the said decision, we have not been influenced by the fact that contents contained in Attachment 8(ii) were termed as suggestion by SJVN. On an independent appreciation of the contents of the said Attachment vis-a-vis terms of ITB, we have come to the conclusion that erroneous uploading of the said Attachment alongwith Envelope-1, including the contents of the same cannot be said to have had rendered the bid of Voith to be unresponsive. The condition that Clause 13.2(h) stipulated deviations except "critical deviations" also *per se* does not has any bearing on the responsiveness of the bid of Voith because the deviations were to be reflected in Attachment 8(i) and there were no critical deviations mentioned in the said Attachment.

38. Further, ITB contemplated that deviations mentioned anywhere except Attachment 8(i) had to be ignored and therefore, also in our considered view, reference of certain deviations in Attachment 8(ii) is not fatal to the cause of Voith.

39. It is a matter of record that the deviations be it in Attachment 8(i) or Attachment 8(ii) were withdrawn by Voith on 11.04.2018 i.e. much before the date when the Price Bids were opened. It is also a matter of record that Prince Bid of Voith was approximately `33 Crores less than the petitioner and in our considered view even otherwise, if the tender process is set aside at this stage, public exchequer undisputedly will be fastened of additional financial burden. It is a settled principle of law that it is the employer who is best judge as to whether a bidder is responsive or not. In the present case, according

to the employer the bid of Voith has been found to be responsive. In our considered view, this view of the Experts can otherwise also not substituted by the Court until or unless it is shown to the Courts on face of it that the decision so taken by the employer is erroneous. In the facts of this case, petitioner has not been able to prove that the acceptance of the bid of Voith by SJVN on the face of it is an erroneous act.

40. It cannot be disputed that Clause 13.2(h) is mandatory, however, its violation by respondents has not been proved by the petitioner. It can also not be said that any relaxation has been given by SJVN in favour of Voith to accommodate the said respondent though Voith was not conforming to the bid conditions. In our considered view, from the record, it cannot be said that SJVN has favoured Voith. It is no ones case that the Rules of the Game or condition of ITB were at any stage altered or changed by SJVN to favour Voith. No unfair advantage has been given to Voith as is claimed by the petitioner nor the doctrine of legitimate expectation has been violated. This is for the reason that before Price Bid was opened on 18.05.2018, none knew as to who was the lowest bidder. Much before that, deviations stood withdrawn by Voith which is a matter of record. Herein it is not a case that any essential condition of ITB was either relaxed or deviated and therefore, also it cannot be said that by entertaining the bid of Voith the employer has acted in an arbitrary manner.

41. We have at length examined as to whether the process adopted or decision made by the authority is hit by malafides or was intended to benefit someone or whether the process adopted or decision made is arbitrary or whether public work is affected which in the instant case is none.

42. In *Jagdish Mandal vs. State of Orissa & others,* (2007) 14 SCC 517 Hon'ble Supreme Court has held that judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. A contract is a commercial transaction and 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 bonafide 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.

43. In *Michigan Rubber (India) Limited vs. State of Karnataka & others,* (2012) 8 SCC 216, the Hon'ble Supreme Court has held that in the matter of formulating conditions of tender documents and awarding contract, greater latitude is required to be conceded to the State Authorities. Unless action of the tendering authority is found to be malafide and is a misuse of statutory powers, interference of Courts is not warranted. It has been further held that if the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited. If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, again interference by Court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

44. Hon'ble Supreme Court in *Michigan Rubber* (supra) further held that Court would not normally interfere with the policy decision and in matters challenging award of contract by the State or Public Authorities. As per the Hon'ble Supreme Court interference can only be if a party establishes that the award is contrary to public interest and beyond pain of description or unreasoning.

45. Similarly in *Tejas Constructions and Infrastructure Private Limited vs. Municipal Council Sendhwa and another,* (2012) 6 SCC 464, Hon'ble Supreme Court while reiterating the principles laid down in *Tata Cellular vs. Union of India,* (1994) 6 SCC 651; *Raunaq International Ltd. vs. I.V.R. Constructions Ltd.,* (1999) 1 SCC 492; *Reliance Airport Developers (P) Ltd. vs. Airports Authority of India,* (2006) 10 SCC 1 etc., has held that in the

absence of any *malafides* or arbitrariness in the process of evaluation of bids and determination of eligibility of bidders, there cannot be any interference by the Court.

46. In *Air India Limited vs. Cochin International Airport Ltd. & others,* (2000) 2 SCC 617 the Hon'ble Supreme Court has held that even when some defect is found in the decision making process, Court must exercise its discretionary powers under Article 226 of the Constitution of India with greater caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.

47. In *B.S.N. Joshi & sons Ltd. vs. Nair Coal Services Ltd. & others,* (2006)11 SCC 548 the Hon'ble Supreme Court has held that it may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor, same ordinarily being within its domain, Courts interference in such matters should be minimized.

48. In *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & another,* (2016) 16 SCC 818 the Hon'ble Supreme Court Held that owner or employer of a project having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The Constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is malafide or perversity in the understanding or appreciation or in the application of the terms of the tender condition. It has also been held that it is possible that the owner or the employer of a project may give an interpretation to the tender documents that is not acceptable to the Constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

49. In *JSW Infrastructure Limited & another vs. Kakinada Seaports Limited & others,* (2017) 4 SCC 170 the Hon'ble Supreme Court while reiterating the principles laid down in *Tata Cellular vs. Union of India,* (1994) 6 SCC 651 held as under: -

> "8. …We may also add that the law is well settled that superior courts while exercising their power of judicial review must act with restraint while dealing with contractual matters. A Three Judge Bench of this Court in Tata Cellular vs. Union of India, 1994 6 SCC 651 held that:
>
> (i) there should be judicial restraint in review of administrative action;
>
> (ii) the court should not act like court of appeal; it cannot review the decision but can only review the decision making process
>
> (iii) the court does not usually have the necessary expertise to correct such technical decisions.;
>
> (iv) the employer must have play in the joints i.e., necessary freedom to take administrative decisions within certain boundaries."

50. In *Central Coalfields Limited & another vs. SLL-SML (Joint Venture Consortium) & others,* (2016) 8 SCC 622 the Hon'ble Supreme Curt has again reiterated the findings in *G. J. Fernandez vs. State of Karnataka,* (1990) 2 SCC 488 and *Ramana Dayaram Shetty vs. International Airport Authority of India,* (1979) 3 SCC 489 that deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination.

51. In *Montecarlo Limited vs. National Thermal Power Corporation Limited,* (2016) 15 SCC 272, reiterating the law declared by the Hon'ble Supreme Court in *Sterling Computers Ltd. vs. M&N Publications Ltd.*, (1993) 1 SCC 445, that by way of judicial review, the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State and that Courts have inherent limitations on the scope of any such inquiry.

In view of the aforesaid discussions, the present petition is dismissed. Pending applications, if any, also stand disposed of accordingly.

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

Court on its own motion .....Petitioner.
Vs.
State of H.P. and others .....Respondents.

CWPIL No.: 103 of 2017
Reserved on: 04.10.2018
Date of Decision: November 5 ,2018

**Constitution of India, 1950-** Article 21-Right to Life - Scope- Held - Right to life includes right to live with human dignity - No exact definition of human dignity exists- It refers to intrinsic value of every human being which is to be respected- Every human being has dignity by virtue of his existence. (Para 6) (D.B.)

**Constitution of India, 1950-** Articles 14 and 15**- Rights of Persons with Disabilities Act, 2016 (New Act) -** Section 32**-** Reservation in higher educational institutions - University denying admission to letter petitioner in Post -graduation course on ground that its Ordinance based on Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (old Act) speaks of providing only 3% reservation and no seat available for her against that category-Petitioner contending that as per New Act, reservation ought to be to extent of 5% instead of 3% - Inter regnum, University issuing notification and enhancing percentage of reservation for disabled students from 3% to 5%- Held, statutory provision mandates that all government institutions of higher education and other higher education institutions receiving aid from State Government shall reserve not less than 5% seats for persons with benchmark disabilities- This 5% reservation of seats has to be provided each time when process of filling up seats is initiated by above mentioned Institutions - Petition disposed of. (Para 29) (D.B.)

***Cases referred:***

Ankush Dass Sood v. State of H.P. & Others, *CWP No. 192 of 2004*
Bandhua Mukti Morcha vs. Union of India, (1984) 3 SCC 161
Common Cause vs. Union of India, (2018) 5 SCC 1
Court on its own motion v. State of Himachal Pradesh & others; CWP No. 192 of 2004
Disabled Rights Group and another Vs. Union of India and others, (2018) 2 SCC 397
Jeeja Ghosh vs. Union of India (2016) 7 SCC 761
K.S. Puttaswamy vs. Union of India, (2017) 10 SCC 1
M Nagaraj vs. Union of India, (2006) 8 SCC 212
Navtej Singh Johar vs. Union of India, Writ Petition (Criminal) No.76 of 2016
Sunanda Bhandare Foundation Vs. Union of India and another, 2017 SCC OnLine SC 481
Union of India vs. National Federation of Blind (2013) 10 SCC 772

For the petitioner: Mr. Dilip Sharma, Senior Advocate, with Mr. Arjun Lall, Advocate, as Amicus Curiae.

For the respondents: Mr.Ashok Sharma. Advocate General, with Mr.J.K. Verma, Mr. Ranjan Sharma, Ms.Ritta Goswami and Mr.Nand Lal Thakur, Additional Advocate Generals, for the respondent-State.
Mr.J.L. Bhardwaj, Advocate, for respondent No.2.
Mr. Karan Parmar, Advocate, for respondent No. 5.
Mr. B.M. Chauhan, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

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**Sanjay Karol, Judge**

This Court took *suo motu* cognizance of a letter petition addressed by a student, namely, Indu Kumari, daughter of Shri Durga Singh, resident of VPO Naini Khadd, Tehsil Bhatiyat, District Chamba, wherein she had highlighted the issue of denial of admission to her under 5% quota, as provided in Rights of Persons with Disabilities Act, 2016 by the Himachal Pradesh University. The contention of the letter petitioner was that she had applied for admission in M.A. (Political Science) in Himachal Pradesh University, Shimla under 5% quota reserved for disabled students under Section 32 of the Rights of Persons with Disabilities Act, 2016. However, admission was denied to her and when she inquired, she was informed that the respondent-University was providing only 3% reservation to the disabled students and that too, as per the provisions of the old Act, i.e., the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. As per letter petitioner, as the students intake in the concerned subject was 40, therefore, two seats were to be reserved for persons with disabilities in the Department of Political Science as per the 2016 Act, but ignoring the said provisions, only one seat had been reserved. It was on these basis that the letter petition was addressed to this Court.

2. While issuing notice on 11.08.2017, this Court had requested Mr. Arjun Lall, learned counsel, who was present in the Court, to assist as Amicus Curiae.

3. In the course of hearing of the matter on 22nd August, 2017, this Court had passed the following order:

> *"Issue pertains to the implementation of the provisions of Rights of Persons with Disabilities Act, 2016 (hereinafter referred to as the Act).*
>
> *2. Allegedly, Institutions imparting education and/or training, within the State of Himachal Pradesh are not providing reservations for students, who are otherwise entitled for the benefit of the provisions under the Act. Section 32 of the Act mandates all Government institutions of higher education and other higher educational institutions, receiving aid from the Government, that not less than 5% of seats shall be reserved for persons with benchmark disabilities. Sub Section (r) of Section 2 defines "person with benchmark disability" and Sub Section (i) of Section 2 defines "establishment", which includes Government and private establishments.*
>
> *3. Mr. J.K. Verma, learned Deputy Advocate General invites our attention to communication dated 31.7.2017 that of Director Empowerment for the SC, OBC, Minority and the Specially Abled, Himachal Pradesh, wherein all the departments of the Government have been "requested to implement the provisions of the Act".*

*4. Well, this, in our considered view, would not serve the purpose. There is nothing on record to establish as to whether the Government has issued any direction, directing the institutions of higher education, Government or Private, which are otherwise receiving aid from the Government, for making reservation for persons with benchmark disabilities. It is true that respective educational institutions are not before us, but then it is the responsibility of the Government to ensure complete and proper implementation of the provisions of the Act. It is an obligation, coupled with a duty, cast upon the Government to ensure compliance of the statutory provisions. Mere "request" has not helped the situation anyone bit.*

*5. Mr. Arjun K. Lall, learned Amicus Curiae has invited our attention to the several decisions rendered on the issue, not only by this Court in CWPIL No. 30 of 2011, titled as Court on its own motion v. State of Himachal Pradesh & others; CWP No. 192 of 2004, titled as Ankush Dass Sood v. State of H.P. & Others, as also the observations made by the Hon'ble Apex Court in Sunanda Bhandare Foundation Vs. Union of India and another, 2017 SCC OnLine SC 481, wherein it stands observed that statute operates in a broad spectrum and stress is laid to protect the rights and provide punishment for non-implementation of statutory obligations.*

*6. Before we issue any further directions with regard to the implementation of the provisions of the Act, we direct the Chief Secretary to the Government of Himachal Pradesh to file his affidavit dealing with the following aspects:-*

*a) Steps taken for implementing the provisions of Section 32 of the Act;*

*b) As to whether all institutions of higher education, Government or otherwise falling within the ambit and scope of Section 32 of the Act have provided reservation of not less than 5%;*

*c) As to whether Indu Kumari, complainant before this Court, was eligible and entitled for admission in the reserved category so provided under the provisions of the Act and if so, then the reason for not entertaining her application and admitting her in the reserved category;*

*d) As to whether there is a mechanism for redressal of grievances by the students who otherwise stand deprived of the statutory entitlement;*

*e) As to whether six more persons as pointed out by learned Amicus Curiae in his note dated 18th August, 2017, copy whereof stands supplied to the State were denied admission on legitimate grounds.*

*7. Affidavit of compliance be positively filed within four days.*

*8. We also direct respondent No.2- Registrar, H.P. University to file his personal affidavit to similar effect within four days.*

*9. List on* ***29.8.2017.***

*10. We further direct that the complainant and four students, who stand denied admission/not admitted into the respective courses, if otherwise are eligible, their cases shall be considered and be admitted to their respective courses in accordance with law.*

*11. Mr. Arjun K. Lall, learned Amicus Curiae points out that three students, namely, Ms. Muskan Thakur, Ms Sangeeta and Mr. Vinod Sharma have yet not been provided Hostel accommodation and as such have to travel from far flung areas. Their cases for accommodation in the Hostel shall also be considered by the University.*

*The Registry is directed to forthwith supply complete paper book, in all respect, to all the learned counsel during the course of the day."*

4. Thereafter on 05.09.2017, this Court had passed the following order:

*"A perusal of the affidavit so filed by respondent No. 2-University demonstrates that as of now, i.e. for the Academic Session 2017-18, only 3% seats have been reserved for the persons with disabilities. The explanation which has been given in the affidavit by the Registrar is that presently, the Ordinance which is being followed by respondent No.2-University provides only for 3% reservation and further they are following the reservation policy of the government of Himachal Pradesh, as per which only 3% seats can be reserved for the persons with disabilities except the department of Physical Education.*

*Be that as it may, in view of the provisions of Rights of Persons with Disabilities Act, 2016, wherein an express provision is there in Section 32 of the same that 5% of seats are to be reserved for persons with disabilities, the act of the University of reserving only 3% seats for persons with disabilities is totally unjustified and not acceptable being violative of the statute (supra).*

*Faced with this situation, Mr. J.L. Bhardwaj, learned Counsel for the University submits that respondent No. 2 shall explore the possibility of admitting the candidates with disabilities in respective streams in which they want admission. He further submits that in courses which are being run by the University, necessary decision in this regard shall be taken by the University itself and for admission in professional courses, University shall forthwith take up the matter with the concerned statutory authorities apprising them of the peculiar circumstances of the case. The statement so made by Mr. Bhardwaj is taken on record. Mr. Arjun K. Lall, learned Amicus is directed to hand over a list of candidates who are interested in seeking admission in the H.P. University within three days alongwith certificates of the said candidates depicting their educational qualifications and thereafter, the respondent-University shall admit/take steps for admission of the said candidates in the courses in which they are interested strictly on the basis of merit within a period of 10 days. We make it clear that the number of candidates to be admitted against the quota of persons with disabilities shall not exceed 5% of the total seats.*

*At this stage, learned Amicus Curiae submits that the University should also take steps to provide Hostel facility to the candidates who are admitted under the quota for persons with disabilities. Mr. Bhardwaj has assured that the respondent-University shall sympathetically look into this aspect of the matter also and provide rooms to persons with disabilities taking into consideration the total number of rooms available in the Hostels and the rooms already being occupied by the persons with disabilities. List on* ***19th of September, 2017*** *for compliance."*

5. Article 21 of the Indian Constitution provides for the right to life an important facet of which is a dignified life. The Hon'ble Apex Court in *Bandhua Mukti*

*Morcha vs. Union of India,* (1984) 3 SCC 161, has held that the right to live with human dignity as enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42. These being the minimum requirements which must exist in order to enable a person to live with human dignity and neither the central nor any State Government has the right to take any action which will deprive a person of the enjoyment of these basic essentials. Where legislation is already enacted by the State providing these basic requirements, particularly belonging to the weaker section of the community and thus investing the right to live with basic human dignity, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation what does amount to general of protection guaranteed under Article 21.

6. A Five-Judge Constitution Bench of the Apex Court in *M Nagaraj vs. Union of India,* (2006) 8 SCC 212, has held that the expression "life" in Article 21 of the Indian Constitution does not connote mere physical or animal existence. The right to life includes right to live with human dignity. It is the duty of the State not only to protect human dignity but also to facilitate it by taking positive steps in that direction. No exact definition of "human dignity" exists. It refers to the intrinsic value of every human being which is to be respected. It cannot be taken away. It cannot be given. It simply is. Every human being has dignity by virtue of his existence.

7. A Nine Judges Constitution Bench of the Apex Court in *K.S. Puttaswamy vs. Union of India,* (2017) 10 SCC 1, has reaffirmed that human dignity is a component of Article 21.

8. In *Common Cause vs. Union of India,* (2018) 5 SCC 1, a Five Judges Constitution Bench of the Apex Court observed that a life without dignity is like a sound that is not heard. Dignity speaks, it has its own sound, it is natural and human. The Apex Court further added that dignity does not recognize or accept any nexus with the status or station in life. The singular principle that it pleasantly gets beholden to is the integral human right of a person. Law gladly takes cognizance of the fact that dignity is the most sacred possession of a man.

9. A Five Judges Constitution Bench of the Apex Cuort in Writ Petition (Criminal) No.76 of 2016, titled as *Navtej Singh Johar vs. Union of India,* has reiterated that the fundamental idea of dignity is regarded as an inseparable facet of human personality. Dignity has been duly recognized as an important aspect of the right to life under Article 21 of the Indian Constitution. Also in the international sphere the right to live with dignity had been identified as a human right way back in 1948 with the introduction of the Universal Declaration of Human Rights. The Constitutional Courts of the country have solemnly dealt with the task of assuring and preserving the right to dignity of each and every individual whenever the occasion arises, for without the right to live with dignity, all other fundamental rights may not realise their complete meaning.

10. Accordingly, the Apex Court in a number of cases has broadened the spectrum of Article 21 of the Indian Constitution and has in unequivocal terms reaffirmed and reiterated that Article 21 envisages a right to a dignified life.

11. A social welfare legislation such as the Act of 2016, the legislative intent of which is (a) respect for inherent dignity, individual autonomy, including the freedom to make one's own choices and independence of persons; (b) non-discrimination; (c) full and effective participation and inclusion in society; (d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) equality of opportunity; (f) accessibility; (g) equality between men and women; and (h) respect for the

evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities, seeks to reduce the hardship of those who incur certain disabilities for after all the law seeks to ensure a dignified life to them as well.

12. By denying the statutory right to those for whose upliftment and empowerment such a beneficial legislation has been enacted the State failed in ensuring a dignified life to the disabled persons, rather the real beneficiaries of the Act and thus added to their hardships more so when the State is also duty bound by virtue of Article 41 of the Indian Constitution to make effective provisions for securing the right to work, to education and to public assistance in cases of unemployed, old age, sickness and disablement and in other cases of undeserved want.

13. As a matter of fact, it is imperative that the authorities must look into the real grievances of the visually impaired people and the State through the Universities and all Educational Institutions must have a role of *loco parentis* and must show its concern to redress the grievances in proper perspective.

14. The Act of 2016 which has been brought into existence to give effect to the United Nation Convention on the Rights of Persons with Disabilities encompasses sea-change and conceives of the implementation of the beneficial provisions of the Act and realization of the numerous benefits engrafted under the same.

15. We are of the considered view that in the backdrop of the laudable policy inherent within the framework of the legislation, the same must be interpreted in a manner so as to ensure that the benefits so guaranteed are made available to the differently abled and does not remain to be a distant dream.

16. Hon'ble the Apex Court in Rajive Raturi vs. Union of India (Two Judges), (2018) 2 SCC 413, while dealing with the rights of the visually impaired vis-a-vis the issue of accessibility requirements in respect of safe access to roads and public transport and the duty of the State with respect to the same has held that right to dignity, which is ensured in our constitutional set-up for every citizen applies with much more vigour in case of persons suffering from disability and, therefore, it becomes imperative to provide such facilities so that these persons also are ensured level playing field and not only they are able to enjoy life meaningfully, they contribute to the progress of the nation as well.

17. In *Jeeja Ghosh vs. Union of India (Two Judges),* (2016) 7 SCC 761, while dealing with the rights of disabled and differently abled persons, the Apex Court awarded damages of Rs. 10,00,000/- to the petitioner, a differently abled person, for the mental and physical suffering experienced by her as she was forcibly de-boarded by the flight crew, because of her disability.

18. Stressing upon the duty of a welfare State, in relation to differently abled persons, a Full Bench of the Apex Court in *Union of India vs. National Federation of Blind* (Three Judges), (2013) 10 SCC 772, held that the Union of India, the State Governments as well as the Union Territories have a categorical obligation under the Constitution of India and under various international treaties, relating to human rights in general and treaties for disabled persons, in particular, to protect the rights of disabled persons.

19. Since the Act of 2016 is a meaningful attempt in assimilating the differently abled persons into the mainstream of nation's life by providing beneficial reservation to the extent of 5% in the higher educational institutions, it is, therefore, necessary that the Act be implemented in true letter and spirit in all higher educational institutions and other higher education institutions receiving aid from the Government.

20. In the backdrop of aforesaid principles, on 31.10.2017, the following order was passed:

> *"Written notes, dated 30th October, 2017, filed by learned Amicus Curiae, are taken on record. Respondents to respond to the same. We also request Mr. Dilip Sharma, learned Senior Advocate, to assist the Court as Amicus Curiae in the matter. Registry is directed to forthwith supply complete paper book to Shri Dilip Sharma, learned Senior Advocate. Registrar (Judicial) to ensure compliance of the order.*
>
> *Let Chief Secretary, Government of Himachal Pradesh, to file an affidavit, indicating the steps taken, thus far, for complying with the directions, issued by this Court vide judgment, dated 4th June, 2015 in CWPIL No. 30 of 2011, titled as Court on its own motion Vs. The State of Himachal Pradesh and others. Needful be positively done within a period of one week. List on 13th November, 2017."*

21. It is evident that with the issuance of notification, dated 13th October, 2017, so issued by the Himachal Pradesh University, the percentage of reservation of seats for the purpose of seeking admission for disabled students has been extended from 3% to 5%. This was so done only with the Court monitoring the matter. For ready reference, we are reproducing the relevant portion of the notification as under:

> *"In compliance of orders passed by the Hon'ble High Court in CWPIL No. 103 of 2017 titled as Court on its own motion versus State of H.P. and others dated 05.09.2017, the Hon'ble Vice Chancellor has been pleased to implement the Section 32 of the persons with Disabilities Act, 2016, circulated by the Government of India vide their letter dated 19.04.2017 under which the percentage of reservation of seats for the purpose of seeking admission for disabled students has been extended from 3% to 5%. Therefore, all the teaching departments of Himachal Pradesh University and Government Degree Colleges/Private affiliated Colleges are hereby directed to strictly comply with Section 32 of Ministry of Law and Justice (Legislative Department) Gazette of India dated 27.12.2016 of the Persons with Disabilities Act, 2016 with immediate effect."*

22. In this background, the only issue which remains to be adjudicated is as to whether the respondent-University can have a running roster for the purpose of identifying the number of seats which can be reserved in each academic session for persons with disabilities or not.

23. Unlike employment, in the stream of education, each academic session is a fresh academic session which is complete in itself, totally distinct and distinguishable from the previous session or the next session.

24. The Rights of Persons with Disabilities Act, 2016 has been enacted to give effect to the United Nations Convention on the Rights of Persons with Disabilities and for matters connected therewith or incidental thereto. Chapter VI of the Act, which deals with special provisions for persons with benchmark disabilities provides in Section 32 for reservation in higher educational institutions. Said Section reads as under:

> *"32(1) All Government institutions of higher education and other higher education institutions receiving aid from the Government shall reserve not less than five percent seats for persons with benchmark disabilities.*
>
> *(2) The persons with benchmark disabilities shall be given an upper age relaxation of five years for admission in institutions of higher education."*

25. Thus, said statutory provision mandates that all Government institutions of higher education and other higher education institutions receiving aid from the Government shall reserve not less than 5% seats for persons with benchmark disabilities.

26. As we have already mentioned above, in the field of education, each academic session is distinct and different from other academic session. Fresh admissions are made in each academic session and there is no jurisprudence in educational law of "carrying forward a seat", as there is in service law with regard to posts/vacancies. In other words, with the issuance of prospectus for admission to a particular course, the rights of eligible candidates crystallized for the academic session in question and these rights are not carried forward, because with the start of a fresh academic session, a fresh prospectus is issued.

27. Hon'ble Supreme Court in ***Disabled Rights Group and another*** Vs. ***Union of India and others***, (2018) 2 Supreme Court Cases 397 has held as under:

> *"9. No doubt, some progress is made in this behalf after the filing of this present petition and monitoring of the case by this Court, there is a need for complying with this provision to full extent. Accordingly, we direct that all those institutions which are covered by the obligations provided under Section 32 of the Disabilities Act, 2016 shall comply with the provisions of Section 32 while making admission of students in educational courses of higher education each year. To this end, they shall submit list of the number of disabled persons admitted in each course every year to the Chief Commissioner and/or the State Commissioner (as the case may be). It will also be the duty of the Chief Commissioner as well as the State Commissioner to enquire as to whether these educational institutions have fulfilled the aforesaid obligation. Needless to mention, appropriate consequential action against those educational institutions, as provided under Section 89 of the Disabilities Act, 2016 as well as other provisions, shall be initiated against defaulting institutions.*
>
> *.....*
>
> *35. There cannot be any dispute that the suggestions given by the petitioner, which are reproduced above, appear to be reasonable and are worthy of implementation. However, at the same time, it would be appropriate to consider the feasibility thereof particularly with regard to the manner in which these can be implemented. This task can be undertaken by the UGC. Likewise, the directions which are sought by the petitioners are in consonance with the provisions contained in the 22 Disabilities Act, 2016. In these circumstances, we dispose of these writ petitions with the following directions:*
>
> *35.1. While dealing with the issue of reservation of seats in the educational institutions, we have already given directions in para 8 above that the provisions of Section 32 of the Disabilities Act, 2016 shall be complied with by all concerned educational institutions. In addition to the directions mentioned therein, we also direct that insofar as law colleges are concerned, intimation in this behalf shall be sent by those institutions to the Bar Council of India (BCI) as well. Other educational institutions will notify the compliance, each year, to the UGC. It will be within the discretion of the BCI and/or UGC to carry out inspections of such educational institutions to verify as to whether the provisions are complied with or not.*
>
> *35.2. Insofar as suggestions given by the petitioner in the form of "Guidelines for Accessibility for Students with Disabilities in*

*Universities/Colleges" are concerned, the UGC shall consider the feasibility thereof by constituting a Committee in this behalf. In this Committee, the UGC would be free to include persons from amongst Central Advisory Board, State Advisory Boards, Chief Commissioner of State Commissioners appointed under the Disabilities Act. This Committee shall undertake a detailed study for making provisions in 23 respect of accessibility as well as pedagogy and would also suggest the modalities for implementing those suggestions, their funding and monitoring, etc. The Committee shall also lay down the time limits within which such suggestions could be implemented. The Expert Committee may also consider feasibility of constituting an in-house body in each educational institution (of teachers, staff, students and parents) for taking care of day to day needs of differently abled persons as well as for implementation of the Schemes that would be devised by the Expert Committee. This exercise shall be completed by June 30, 2018.*

*35.3. Report in this behalf, as well as the Action Taken Report, shall be submitted to this Court in July, 2018. On receipt of the report, the matter shall be placed before the Court."*

28. We are of the considered view that the reservation in educational institutions, as is provided under the Rights of Persons with Disabilities Act, 2016 and further the directions, which stand issued by Hon'ble Supreme Court in ***Disabled Rights Group and another Vs. Union of India and others*** (*supra*), leave no room of doubt that in all Government institutions of higher education, as also other higher educational institutions receiving aid from the Government, not less than 5% seats have to be reserved for persons with benchmark disabilities. This 5% reservation of seats has to be provided each time when process for filling up the seats is initiated by the above mentioned institutions. There can be no running roster and for each academic session, fresh roster has to be prepared, earmarking number of seats which are to be reserved for persons with benchmark disabilities, in view of the total seats available.

29. Therefore, we dispose of this petition by directing that all institutions of higher education and other higher educational institutions receiving aid from the Government in the State of Himachal Pradesh, shall not only reserve not less than 5% seats for persons with benchmark disabilities, but said reservation to the extent of 5% shall be provided each time when the institutions initiate the process of admission to academic courses and there shall be no carrying forward of seats so reserved for persons with benchmark disabilities nor a running roster in this regard shall be maintained by the institutions.

30. Before parting, we place on record our appreciation for the efforts put in by Mr. Dilip Sharma, learned Senior Advocate and the learned Amicus Curiae Mr.Arjun Lall, in assisting the Court in the adjudication of the petition. A copy of the judgment shall be made available to the Principal Secretary (Education), Government of Himachal Pradesh, as also to the Vice Chancellor(s) of all the Universities situated in the State of Himachal Pradesh, which are covered under the provisions of the Rights of Persons with Disabilities Act, 2016.

Petition stands disposed of, so also miscellaneous application(s), if any.

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

Bimla Devi and others ...Appellants
Versus
HPSEB and others ...Respondents

FAO No. 290 of 2018
Decided on: 1.11.2018

**Employees Compensation Act, 1923-** Section 4-A(3)(a)- Compensation- Interest on amount assessed, whether can be denied? – Held– No - In case of fault on part of employer in paying compensation within one month from date it became due, Commissioner shall direct that in addition of amount of arrears, employer shall pay interest @ 12% P.A. or at such higher rate not exceeding maximum of lending rates of any Scheduled Bank – And arrears become due after one month of accident- Accident taking place on 30.8.2013 and arrears of compensation as calculated by Department and accepted by claimants deposited on 23.9.2016, therefore, Commissioner could not have denied interest on arrears of compensation. (Paras 6 & 7)

For the appellants: Mr. P.S.Goverdhan, Advocate.
For the respondents: Mr. Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

**Vivek Singh Thakur, Judge.** (oral)

With the consent of the parties, present appeal has been taken for final hearing at this stage of admission in view of the nature of controversy involved in the present appeal.

2. This appeal has been preferred by petitioners/claimants for modification of award/order dated 21.3.2018, passed by learned Commissioner under Employees Compensation Act, 1923 (hereinafter to be referred as 'Commissioner' and 'the Act', respectively), whereby petitioners/claimants have been denied interest on the principal amount of compensation.

3. On perusal of record and pleadings of parties before the learned Commissioner as well as in appeal filed herein, following substantial question of law has arisen for determination:-

1) Whether learned Commissioner has committed mistake of law by denying interest on the principal amount of compensation to the petitioner/claimants by observing that petitioners are satisfied by the principal amount only, without having any implied or explicit consent of the petitioners/claimants.

4. Learned counsel for the petitioners has restricted his claim in the appeal to the aforesaid substantial question of law and is not pressing the issue with respect to the penalty.

5. It is undisputed that during the pendency of the claim petition before learned Commissioner, respondents had calculated the principal amount of compensation as ₹5,84,800/-, which was considered to be correct by learned Commissioner and accepted by the petitioners/claimants. Thereafter, the said amount was deposited by the respondents in

the Court of learned Commissioner on 23.9.2016 and the said amount was released in favour of the petitioners.

6. As per Section 4-A (3) (a) of the Act, in case of default on the part of the employer in paying the compensation due under this Act within one month from the date, it fell due, learned Commissioner shall direct that the employer shall, in addition to amount of arrears, pay simple interest thereon at the rate of 12% per annum or at such higher rate not exceeding the maximum of lending rates of any scheduled bank as may be specified by the Central Government by notification in official gazette, on the amount due.

7. The amount of compensation, in present case, has not only been admitted, rather, has been calculated by the respondents itself, which admittedly fell due after one month of the accident i.e. on 30.8.2013, but was deposited in the Court of learned Commissioner, on 23.9.2016. Therefore, keeping in view the provisions of the Act, the petitioners/claimants are entitled for interest at the rate of 12% per annum from 30.8.2013 to 23.9.2016.

8. Learned Commissioner, though, has allowed the claim petition filed by petitioners/claimants by holding that the petitioners are entitled for compensation along with interest, but has denied the payment of interest by observing that the principal amount deposited by respondents had been received by petitioners and they are satisfied by it. Whereas, the petitioners had never made any statement or filed any application or had expressed implied or explicit satisfaction by receiving the principal amount only, rather they continued to pursue their claim petition even after release of the said amount in their favour. Therefore, observation made by learned Commissioner for denying the interest component, for which petitioners are entitled as per Section 4-A (3) (a) of the Act, is contrary to the record.

9. Therefore, learned Commissioner has committed a mistake of Law by denying the interest to petitioners/claimants on principal amount of compensation.

10. In view of above discussion impugned finding/observation of learned Commissioner, vide which petitioners have been denied interest is quashed and set aside and the petitioners/claimants in addition to principal amount of compensation, are held to be entitled for interest on the principal amount i.e. ₹5,84,800/- at the rate of 12% per annum w.e.f. 3.8.2013 to 23.9.2016. The respondents are directed to deposit the said amount with the Registry of this Court within eight weeks from today. The appeal is allowed by modifying the impugned award passed by the Commissioner in aforesaid terms.

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**BEFORE HON'BLE MR. JUSTICE SURYA KANT, CJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.**

LPA No. 387/2012 alongwith LPA Nos.517, 518 of 2012, 11, 66, 70, 86, 98, 129 of 2013, 161, 195 of 2015 and 37 of 2017
Date of decision: October 30, 2018

(1) LPA No.387/2012

State of H.P and others ....Appellants

Versus

Kamlesh Kumar and others ....Respondents

(2) LPA No.517/2012
State of H.P and others .....Appellants
Versus
Chaman Lal Bali and others .. .....Respondents

(3) LPA No.518/2012
State of H.P and others .....Appellants
Versus
Gulshan Rai Sharma and others ....Respondents

(4) LPA No.11/2013
Rachna Saklani .....Appellant
Versus
State of H.P. and others ....Respondents

(5) LPA No.66/2013
State of H.P and others .....Appellants
Versus
Sanjogta Parmar ....Respondent

(6) LPA No.70/2013
State of H.P and others .....Appellants
Versus
Ravi Palsra and another ....Respondents

(7) LPA No.86/2013
State of H.P and others .....Appellants
Versus
Raj Kumar Parmar and another ....Respondents

(8) LPA No.98/2013
State of H.P and others .....Appellants
Versus
Rohini Rana and another ....Respondents

(9) LPA No.129/2013
State of H.P and others .....Appellants
Versus
Renu Kaul ....Respondent

(10) LPA No.161/2015
State of H.P and others .....Appellants
Versus
Ved Parkash ....Respondent

(11) LPA No.195/2015

State of H.P and others .....Appellants
Versus
Pooja and another ....Respondents

(12) LPA No.37/2017

State of H.P and others .....Appellants
Versus
Leena Sharma and another ....Respondents

**Constitution of India, 1950 -** Articles 14 and 16- Notification dated 25.8.1994- Clause 10 - Government taking over Private Colleges alongwith staff - Denial of absorption to petitioners who were on the teaching staff - Hon'ble Single Bench directing State to absorb petitioners from date of taking over with all consequential benefits – Letter Patent Appeal– State opposing taking over of services on ground that petitioners stood appointed under "Self Financing Scheme" and not from grant-in-aid released by Department of Education- Held, Notification of Government dated 25.8.1994 clearly lays down terms and conditions of taking over of privately managed colleges including staff – Clause 10 empowers Government to impose any other condition for taking over - But for absorption of regularly appointed teachers, source of payment of salary immaterial and inconsequential – What is relevant is that teacher concerned possessed requisite qualification at time of appointment and recruited through transparent mode of recruitment – It is beyond reach of teacher to ascertain whether salary being paid to him coming from grant-in-aid or from funds generated by Management – Condition imposed by to this effect by State has no rational – Absorption order upheld. (Paras 17, 18 & 20)

**Constitution of India, 1950-** Articles 14 & 16- Appointment as Lecturer – Requisite qualification – Date relevant for determination- Held, question of eligibility to be seen on date when post advertised or Selection Committee constituted – Subsequent change in qualification, if any, cannot work to disadvantage of person as it would amount to introducing such revised and amended qualification with retrospective effect. (Para 18)

LPA No.387 of 2012

For the appellants : Mr. Ashok Sharma, Advocate General with
Mr. Adarsh Sharma, Addl. Advocate General.
For respondent No.1 : Mr. Onkar Jairath, Advocate
For respondent No.2 : Mr. Neel Kamal Sharma, Advocate
For respondent No.3 : None

LPA Nos.517 and 518 of 2012

For the appellants : Mr. Ashok Sharma, Advocate General
with Mr. Adarsh Sharma, Addl. Advocate General.
For respondent No.1 : Mr. Dilip Sharma, Sr. Advocate with
Mr. Sanjeev Sharma, Advocate
For respondent No.2 : Mr. Neel Kamal Sharma, Advocate
For respondent No.3 : None

LPA No.11 of 2013

For the appellant : Mr. Surinder Saklani, Advocate
For the respondents : Mr. Ashok Sharma, Advocate General
with Mr. Adarsh Sharma, Addl. Advocate, General

LPA Nos.66, 70, 98, 129 of 2013 & 161 of 2015
For the appellants : Mr. Ashok Sharma, Advocate General
with Mr. Adarsh Sharma, Addl. Advocate General
For HPU/respondent : Mr. Neel Kamal Sharma, Advocate

LPA No.86 of 2013
For the appellants : Mr. Ashok Sharma, Advocate General
with Mr. Adarsh Sharma, Addl. Advocate General
For respondent No.1 : Mr. Bhuvnesh Sharma, Advocate
For HPU: : Mr. Neel Kamal Sharma, Advocate

LPA No.195 of 2015
For the appellants : Mr. Ashok Sharma, Advocate General
with Mr. Adarsh Sharma, Addl. Advocate General.
For respondent No.1 : Mr. K. D. Shreedhar, Sr. Advocate with
Ms. Shreya Chauhan, Advocate
For HPU: : Mr. Neel Kamal Sharma, Advocate

LPA No.37 of 2017
For the appellants : Mr. Ashok Sharma, Advocate General with
Mr. Adarsh Sharma, Addl. Advocate General.
For respondent No.1 : Mr. Onkar Jairath, Advocate
For HPU : Mr. Neel Kamal Sharma, Advocate

The following judgment of the Court was delivered:

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**Surya Kant, Chief Justice.** *(Oral)*

This order shall dispose of the above captioned intra-Court appeals which have arisen out of a common and same set of judgments rendered by the learned Single Judge(s), whereby writ petitions filed by the respondents (except in LPA No. 11 of 2013 titled as *Rachna Saklani versus State of HP and others*), have been allowed and the appellant-State has been directed to take over the services of the respondents as Lecturers (College Cadre) in different subjects with effect from the date, the College in which they were working, were taken over by the State Government. Respondents have also been held entitled to consequential benefits.

2. In order to appreciate the controversy, facts are being extracted from LPA No. 518 of 2012, titled as *State of Himachal Pradesh versus Sh. Gulshan Rai Sharma and others*.

3. The respondent offered his candidature for the post of Lecturer Chemistry (College Cadre) and he was interviewed by a Selection Committee on 1.9.1996. Having been selected, he was offered appointment on 2.9.1996. The appointment was approved by the Himachal Pradesh University, vide communication dated 29.11.1996 (Annexure A-7 appended with the petition) in exercise of its powers under Ordinances 38.5 B (d).

4. Subsequently, the State of Himachal Pradesh issued a Notification on 14.9.2006, whereby it decided to take over DAV PG College Daulatpur Chowk, District Una, Himachal Pradesh, in which respondent was working as Lecturer on regular basis.

5. Vide a subsequent Notification dated 4.1.2007, services of Teaching and Non-Teaching Staff of the above mentioned DAV College were taken over. Respondent, however, was denied the benefit of above stated Notification. He made representation but finding no favourable consideration, he approached the HP State Administrative Tribunal (hereinafter referred to as 'the Tribunal') by way of Original Application, which, on abolition of the Tribunal, was transferred to this Court and registered as CWP(T) No. 16148/2008.

6. The precise case of the respondent was that the denial of absorption in Government service to him amounted to artificial discrimination, which could not stand to the test of Articles 14 and 16 of the Constitution of India. Respondent relied upon Government Notification dated 25.8.1994, whereby the Government of Himachal Pradesh through Education Department had laid down the terms and conditions for taking over privately managed affiliated Colleges, alongwith Teaching and Non-Teaching Staff.

7. The claim of the respondent, on the other hand, was opposed by the appellant-State on the premise that he was being paid salary by DAV College, Daulatpur Chowk District Una from "Self Financing Scheme" hence his services should not be taken over. On behalf of the University, the stand taken before the learned Single Judge was that it had accorded its approval to the appointment of the respondent on 29.11.1996.

8. In the light of the above stated rival stands, the issue which fell for consideration before the learned Single Judge was whether the initial appointment of the respondent in DAV College Daulatpur Chowk was in accordance with law and if so, whether denial of absorption in Government service, after the said College was taken over by the State Government alongwith Teaching and Non-Teaching Staff, amounted to subjecting the respondent with discriminatory treatment?

9. Learned Single Judge took note of the fact that respondent was initially appointed on *ad hoc* basis on 20.12.1988, before his regular appointment through a competitive selection process on 2.9.1996. His suitability was adjudged by a validly constituted Selection Committee comprising Chairman of the Managing Committee, nominee of the Director of Education, nominee of the Vice Chancellor of the University and a Subject Expert. The appointment of the respondent was duly approved by the University as per its Ordinances. Since then the respondent was working on regular basis. Learned Single Judge further found that the claim of the respondent, so far as his absorption in Government service upon taking over the College by the State Government alongwith Teaching and Non-Teaching Staff was concerned, was squarely covered in his favour, in terms of Government Notification dated 25.8.1994.

10. As regards the plea taken by the appellant-State before the learned Single Judge, namely, that the respondent was not entitled to be taken in Government service as he was being paid salary by DAV College Daulatpur Chowk, District Una, from the funds privately generated by it and not out of the Grant-in-Aid released by the Department of Education, learned Single Judge held and rightly so that the source of payment of salary could not be a valid ground for classification. It was further held that teachers, whether paid from Grant-in-Aid or out of the Self Generated Income of the Managing Committee, constituted one homogeneous class and no artificial discrimination could be made amongst them. The action was thus held violative of Articles 14 and 16 of the Constitution of India.

11. The aggrieved State of Himachal Pradesh and its Education Department have preferred these intra Court appeals.

12. We have heard learned counsel for the parties at a considerable length and gone through the record.

13. Since both sides have pressed into aid some of the Clauses of the Government Notification dated 25.8.1994, it will be profitable to reproduce Preface of the Notification alogwith Clauses 7 and 10 of the same, which are to the following effect:

> *"Notification.*
>
> *The Governor of Himachal Pradesh is pleased to frame following terms and conditions for taking over privately managed Colleges in the Pradesh (affiliated) including teaching and non-teaching staff:-*
>
> *(1) to (6) ……..*
>
> *7.The services of only qualified teaching and non-teaching staff appointed one year earlier who fulfill, prescribed departmental recruitment and promotion rule conditions, prevalent at the time of taking over will be considered for taking over subject to the approval of the State Public Service Commission or Departmental Screening Committee from the date of taking over. The services of the Principal will be taken over only as Senior most lecturer of the college concerned subject to the above mentioned proviso. The Government scales in respect of the respective categories shall be permissible to them after the take over.*
>
> *(8) and (9)……*
>
> *10. The Government may impose any other condition they may deem fit for the taking over of the college in the notification to be issued on the subject."*
>
> *[Emphasis applied]*

14. It goes without saying that the State Government had taken a conscious policy decision through the above stated Notification laying down terms and conditions for taking over privately managed Colleges, which are duly affiliated, alongwith Teaching and Non-Teaching Staff. Clause (1) (a) stipulates that only those privately managed Colleges which are permanently affiliated to the Himachal Pradesh University, recognized by the Department of Education for Grant-in-Aid and which are having permanent affiliation from the University as well as as University Grants Commission (UGC) shall be considered for taking over. Other Clauses obligate the Managing Committee of the College to transfer all the moveable and immoveable assets in favour of the State as soon as a decision to take over such College is taken. The Notification contemplates a procedure to be followed by the Departmental Inspection Committee to ensure that the Staff, moveable and immoveable property, including buildings and play grounds are identified for the purpose of taking over. It is in continuity with these conditions that Clause 7 further provides that services of only qualified Teaching and Non-Teaching Staff appointed one year earlier, who fulfill the eligibility conditions as prescribed under Departmental Recruitment and Promotion Rules, prevalent at the time of taking over, will be considered for taking over, subject to approval of the State Public Service Commission or Departmental Screening Committee etc. Clause (10) of the Notification is an omnibus Clause which empowers the State Government to impose any other condition that it may deem fit for taking over the College.

15. The issue thus, which requires determination is- whether the appellants were competent to invoke Clause (10) and insist that only those members of the Teaching Staff shall be taken over, who were being paid salary from the Grant-in-Aid?

16. This issue has been rightly determined by the learned Single Judge in favour of the respondents/teachers, for the source of payment of salary is immaterial and inconsequential as far as the absorption of a regularly appointed teacher is concerned. What has to be seen is that the teacher concerned possesses requisite qualification at the

time of his appointment; he was recruited through a transparent mode of recruitment; was appointed on regular basis and was being paid salary, as admissible to his counterparts in the Government service.

17. Having fulfilled all these conditions, it is beyond the reach of a teacher to ascertain as to whether the salary being paid to him was coming out from the Grant-in-Aid or from the funds generated by the Management. The condition imposed to this effect by the appellants has no rationale. It also defeats the very purpose of taking over a College as the exercise of powers under Notification dated 25.8.1994 (supra) is preceded with an assumption that the acquisition of a College is required in larger public interest. If such College is taken over, sans the Teaching and Non-Teaching Staff, the very public purpose for which acquisition takes place, would stand defeated.

18. It is true that Clause (7) of the Notification dated 25.8.1994 contemplates that the members of the Teaching Staff must have been appointed one year earlier or that he/she fulfills prescribed Departmental Recruitment and Promotion Rules condition prevalent at the time of taking over the College. Nevertheless, we are of the considered view that question of eligibility has to be seen when the teacher was appointed, as per the qualifications prescribed when the post was advertised or Selection Committee was constituted. Respondent was found eligible at the time when he applied for the post or appeared before the Selection Committee and the University also approved his appointment on finding that at that relevant time he was possessing the requisite qualification. Subsequent change in the qualification, if any, cannot work to the disadvantage of the respondent as it would amount to introducing such revised/amended/changed qualification with retrospective effect.

19. Faced with this, learned Advocate General urges that since there were contentious issues involved with regard to the claim of the respondent(s) for their absorption in Government service on taking over the College, learned Single Judge ought not to have granted the consequential benefits or 9% interest (as awarded in some of the cases).

20. We find merit in this contention. Notification dated 25.8.1994 lays down general terms and conditions for taking over all privately managed Colleges alongwith Teaching and Non-Teaching Staff. As there was grey area as to whether the respondents in these cases fulfill all the eligibility conditions, there arose necessity for adjudication of dispute by this Court. In such like situation, it appears that ends of justice would be adequately met by directing that though the respondents will stand absorbed from the date when the College was taken over, however, such absorption will be on notional basis and they will be entitled to salary from the date of their actual appointment. In other words, respondents shall not be paid the arrears of salary from the date the College was taken over till a formal order of their absorption is passed hitherto within a period of two months from the date of receipt of copy of this judgment. They shall, however, be entitled to notional pay fixation without any interest or arrears, as awarded by the learned Single Judge.

21. Some of the respondents, who are continuing in service will also be entitled to notional pay fixation without any arrears of pay. The benefit of seniority, however, shall be admissible to all the respondents from the date of absorption.

22. The facts in LPA No. 11 of 2013 titled as *Rachna Saklani versus State of HP and others*, are slightly different. Here the claim of the appellant for taking over her services in Maharaja Sansar Chand Memorial Degree College Thural, District Kangra, HP, as Lecturer in Sociology, has been turned down by the learned Single Judge on the premise that she was not recruited through an open competitive selection process. In other words,

post was not advertised, though it appears that a Selection Committee was constituted which found her suitable for such appointment.

23. We find that the reason assigned by the learned Single Judge is plausible and would not warrant any interference, for the selection as the appointment of appellant does not strictly meet with the requirement of Articles 14 and 16 of the Constitution of India. There are nevertheless some mitigating circumstances, namely, (i) that the appellant worked in the College for eight years or so and by now she might have become overage for Government service; (ii) she has been legitimately expecting for the outcome of these proceedings; and (iii) she relies upon certain instances where the Council of Ministers granted special relaxation and absorbed similarly placed persons. While no positive Mandamus can be issued to grant relaxation and for absorption of the appellant, it appears to us that owing to the peculiar facts and circumstances noticed above, her case requires sympathetic consideration by the State Government. It is clarified that in case, the competent authority decides to absorb the appellant in service, in that event, she will not be entitled to any arrears of pay or seniority or any other service benefits except from the date of her appointment. She will be treated as a fresh entrant in service.

24. Let the appropriate decision be taken within three months from the date of receipt of a copy of this judgment.

25. With the aforesaid observations, all the appeals stand disposed of alongwith pending applications, if any.

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

RFA No. 316 of 2017 a/w RFAs No. 263 to 266 of 2017, 317 to 332 of 2017, 334 to 347 of 2017.
Reserved on : 17.09.2018
Decided on : 01.11.2018

1. **RFA No. 316 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Kamla Devi & others ...Respondents

2. **RFA No. 263 of 2017.**
General Manager, Northern Railway .....Appellant
Versus
Surinder Singh & others ...Respondents

3. **RFA No. 264 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Vinod Kumar & others ...Respondents

4. **RFA No. 265 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Manohar Lal & others ...Respondents

5. **RFA No. 266 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Manohar Lal & others ...Respondents

6. **RFA No. 317 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Rameshwar Dutt & others ...Respondents

7. **RFA No. 318 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Rameshwar Dutt & others ...Respondents

8. **RFA No. 319 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Rameshwar Dutt & others ...Respondents

9. **RFA No. 320 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Rameshwar Dutt & others ...Respondents

10. **RFA No. 321 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Manohar Singh & others ...Respondents

11. **RFA No. 322 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Iqbal Singh & others ...Respondents

12. **RFA No. 323 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Iqbal Singh & others ...Respondents

13. **RFA No. 324 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Iqbal Singh & others ...Respondents

14. **RFA No. 325 of 2017**

General Manager, Northern Railway .....Appellant
Versus
Punya Devi & others ...Respondents

15. **RFA No. 326 of 2017**

General Manager, Northern Railway .....Appellant
Versus
Punya Devi & another ...Respondents

16. **RFA No. 327 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Karam Singh & others ...Respondents

17. **RFA No. 328 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Rustam Singh & others ...Respondents

18. **RFA No. 329 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Dilbag Singh (deceased) Pushpa
Devi & others ...Respondents

19. **RFA No. 330 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Balwant Singh & another ...Respondents

20. **RFA No. 331 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Vidya Devi & another ...Respondents

21. **RFA No. 332 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Dhian Singh & another ...Respondents

22. **RFA No. 334 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Shakin Biwi & another ...Respondents

23. **RFA No. 335 of 2017**

General Manager, Northern Railway .....Appellant
Versus
Ranjeet Singh & another ...Respondents

24. **RFA No. 336 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Nazeer Biwi & another ...Respondents

25. **RFA No. 337 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Vinod Kumar & another ...Respondents

26. **RFA No. 338 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Rattan Chand & others ...Respondents

27. **RFA No. 339 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Rukaman Deen & others ...Respondents

28. **RFA No. 340 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Rattani Devi & others ...Respondents

29. **RFA No. 341 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Krishna Devi (deceased) through her Lrs & others ...Respondent

30. **RFA No. 342 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Krishna Devi (deceased) through her Lrs & others ...Respondents

31. **RFA No. 343 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Shaukat Ali & others ...Respondents

32. **RFA No. 344 of 2017**
General Manager, Northern Railway .....Appellant
Versus

Sugriva Nand Ji and another ...Respondents

33. **RFA No. 345 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Ramesh Chand and others ...Respondents

34. **RFA No. 346 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Parkash Chand and others ...Respondents

35. **RFA No. 347 of 2017**
General Manager, Northern Railway .....Appellant
Versus
Amir Ali and others ...Respondents

**Land Acquisition Act, 1894 -** Sections 18, 23 & 25- Acquisition of land for public purpose –Compensation- Market value- Assessment – Sale transaction- Held, sale deeds on basis of which value of acquired becomes lesser than value assessed by Collector himself not relevant (Para-22)

**Land Acquisition Act, 1894 -** Sections 18 & 23- Acquisition of land for public purpose – Reference - Compensation –Market value - Assessment – Previous Awards – Relevancy – Previous awards pertaining to adjoining village can be considered for paying identical compensation for land under acquisition provided nature and potentiality of lands of both villages are similar – In appropriate cases, where similarly or nature and potentiality of lands not established, some deductions can be made. (Para-23)

***Cases referred:***

Ali Mohammad Beigh & other Vs. State of Jammu and Kashmir (2017)4 SCC 717

Dadu Ram versus Land Acquisition Collector and others (2016) 2 ILR 636 HP

Executive Engineer and another versus Dila Ram, Latest HLJ 2008 (HP) 1007

G.M. Northern Railways versus Gulzar Singh and others, Latest HLJ 2014 (HP) 775

Hemant Singh's case supra and Union of India and others Vs. N.S.Rathnam and sons (2015) 10 SCC 681

Himmat Singh and others vs. State of Madhya Pradesh and another (2013) 16 SCC 392 H.P. Housing Board versus Ram Lal and others, reported in 2003 (3) Shimla Law Cases 64

Jai Prakash and others versus Union of India, reported in (1997) 9 SCC 510

Kanwar Singh and others versus Union of India, (1998) 8 SCC 136

LAC another versus Bhoop Ram and another, reported in 1997(2) Shimla Law Case 229

Manoj Kumar etc. versus State of Haryana, 2017 SCC Online SC 1262

Peerappa Hanmantha Harijan (dead) by Legal Representatives and others vs. State of Karnataka and another, (2015) 10 SCC 469

Periyar and Parkeekanni Rubbers Ltd. Versus State of Kerala, (1991) 4 SCC 195

Smt. Gulabi & others versus State of H.P., AIR 1998 HP 9

Special Land Acquisition Officer Kheda and another vs. Vasudev Chandrashankar and another, (1997) 11 SCC 218

Subh Ram and others Vs. State of Haryana and another, (2010)1 SCC 444

Union of India versus Harinder Pal Singh and others, 2005 (12) SCC 564
Viluben Jhalejar Contractor (dead) by Lrs vs. State of Gujarat, (2005) 4 SCC 789

| | |
|---|---|
| For the Appellant (s) : | Mr. Rahul Mahajan, Advocate. |
| For the Respondents: | Mr. Ajay Sharma, Advocate, for respondents in RFAs No. 264, 316 to 321, 323 to 332, 335 to 339, 341, 342, 344 & 345 of 2017.<br>Mr. Dheeraj K. Vshisht, Advocate, for respondents in RFAs No. 341, 342 & 346 of 2017.<br>Mr. Ramakant Sharma, Senior Advocate with Ms. Devyani Sharma and Mr. Dinesh Bhatia, Advocates, for respondent No. 1 in RFAs No. 340, 343 and 347 of 2017.<br>Mr. Tek Chand, Advocate vice Mr. Sanjeev Suri, Advocate, for respondent in RFA No. 263 of 2017.<br>Mr. Shiv Pal Manhans, Additional Advocate General, for the respondent-State.<br>None for the respondents in other appeals. |

The following judgment of the Court was delivered:

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**Vivek Singh Thakur, Judge** (oral)

These appeals arising out of a common award dated 02.04.2016, passed by learned Additional District Judge-II, (hereinafter referred to as 'Reference Court') in Land Reference No. : 1-IV/2012 RBT No. 152/13/12 titled as Joginder Singh (deceased) through his Lrs. Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 2-IV/12 RBT No. 153/2013/12 titled as Satya Prakash (deceased) through his Lrs. Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 3-IV/12 RBT No. 154/2013/12 titled as Satya Parkash (deceased) through his Lrs. Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 4-IV/12 RBT No. 155/2013/12 titled as Satya Parkash (deceased) through his Lrs. Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 5-IV/12 RBT No. 156/2013/12 titled as Satya Parkash (deceased) through his Lrs. Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 6-IV/12 RBT No. 157/2013/12 titled as Manohar Singh and others Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 7-IV/12 RBT No. 158/2013/12 titled as Iqbal Singh and others Versus Land Acquisition Collector (Railway) and another; Land Reference No.: 8-IV/12 RBT No. 159/2013/12 titled as Iqbal Singh & others Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 9-IV/12 RBT No. 160/2013/12 titled as Iqbal Singh and others Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 10-IV/12 RBT No. 161/2013/12 titled as Punya Devi & others Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 11-IV/12 RBT No. 162/2013/12 titled as Punya Devi Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 12-IV/12 RBT No. 163/2013/12 titled as Karam Singh & another Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 13-IV/12 RBT No. 164/2013/12 titled as Rustam Singh and another Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 14-IV/12 RBT No. 165/2013/12 titled as Dalbag Singh and another Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 15-IV/12 RBT No. 166/2013/12 titled as Balwant Singh Versus Land Acquisition Collector (Railway) and another; Land Reference No: 16-IV/12 RBT No. 167/2013/12, titled as Vidya Devi Versus Land Acquisition Collector

(Railway) and another; Land Reference No. : 17-IV/12 RBT No. 168/2013/12 titled as Dhian Singh Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 18-IV/12 RBT No. 104/2013/12 titled as Paro Devi & another Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 19-IV/12 RBT No. 103/2013/12, titled as Surinder Singh & others Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 20-IV/12 RBT No. 117/2013/12 titled as Shakin Biwi Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 21-IV/12 RBT No. 116/2013/12 titled as Ranjeet Singh Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 22-IV/12 RBT No. 115/2013/12 titled as Nazeer Biwi Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 23-IV/12 RBT No. 114/2013/12 titled as Vinod Kumar & others Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 24-IV/12 RBT No. 113/2013/12 titled as Vinod Kumar Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 25-IV/12 RBT No. 112/2013/12, titled as Manohar Lal and another Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 26-IV/12 RBT No. 111/2013/12, titled as Manohar Lal & another Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 27-IV/12 RBT No. 110/2013/12 titled as Rattan Chand & others Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 28-IV/12 RBT No. 100/2013/12, titled as Rukaman Deen Versus Land Acquisition Collector (Railway) and others; Land Reference No. : 29-IV/12 RBT No. 102/2013/12 titled as Rattani Devi Versus Land Acquisition Collector (Railway) and others; Land Reference No. : 30-IV/12 RBT No. 101/2013/12 titled as Krishna Devi (deceased) through her Lrs. & others Versus Land Acquisition Collector (Railway) and others; Land Reference No. : 31-IV/12 RBT No. 99/2013/12 titled as Krishna Devi (deceased) through her Lrs. & others Versus Land Acquisition Collector (Railway) and others; Land Reference No. : 32-IV/12 RBT No. 109/2013/12 titled as Shaukat Ali Versus Land Acquisition Collector (Railway) and others; Land Reference No. : 33-IV/12 RBT No. 108/2013/12 titled as Sugriva Nand Ji Versus Land Acquisition Collector (Railway) and another; Land Reference No. : 34-IV/12 RBT No. 107/2013/12, titled as Ramesh Chand & another Versus Land Acquisition Collector (Railway) and others; Land Reference No. : 36-IV/12 RBT No. 106/2013/12 titled as Parkash Chand Versus Land Acquisition Collector (Railway) and others and Land Reference No. : 37-IV/12 RBT No. 118/2013/12 titled as Amir Ali Versus Land Acquisition Collector (Railway) and others; are being decided by this common judgment, as common questions of law and facts, based on the identical evidence led in lead case, are involved therein.

2. Government of Himachal Pradesh, for expansion/construction of Nangal-Talwara Broad Gauge Railway Line, had acquired land in village Athwan, Tehsil Amb, District Una, after initiating acquisition process by issuing notification under Section 4 of the Land Acquisition Act (hereinafter referred to as 'the Act'), which was published on 24.04.2009. After completing the process under the Act, the Land Acquisition Collector, (Railway), Una, Distt. Una (hereinafter referred to as Land Acquisition Collector) had announced Award No. 3/2009-10 under Section 11 of the Act on 06.05.2010 assessing the market value of the acquired land on the basis of nature and classification as under:-

| **Sr.No.** | **Class of land** | **Rate per sq. m. within radius of 40 m of N.H.** | **Rate per Sq.m. beyond 40 m of N.H.** |
|---|---|---|---|
| i | Kuhli Abbal/ Gair Mumkin Abadi | 575/- | 450/- |

| | | | |
|---|---|---|---|
| ii | Barani Abbal | 560/- | 450/- |
| iii | Banjar Kadeem/ other Gair Mumkin | 400/- | 300/- |

3. Land owners/claimants, for enhancement of compensation, had preferred reference petitions under Section 18 of the Act which were clubbed together, wherein evidence was led only in one lead case, i.e. Land Reference No. : 1-IV/2012 RBT No. 152/13/12, titled as Joginder Singh (deceased) through his Lrs. Versus Land Acquisition Collector (Railway) and another. After considering the evidence on record Reference Court vide the impugned award has re-determined uniform value of land at the rate of Rs.1,000/- per square meter alongwith statutory benefits thereupon irrespective of classification and category of the land.

4. Being aggrieved by and dissatisfied with award passed by the Reference Court, Northern Railway has preferred present appeals under consideration.

5. Land owners/claimants have examined four witnesses to substantiate their claim. PW-1 Anil Kumar and PW-4 Neeraj Kumar are Architects, who have been examined to establish the valuation of buildings/structures of Satya Parkash and Iqbal Singh. PW-2 Sat Pal is Pradhan of the concerned Gram Panchayat, who has been examined to prove the nature, location and potentiality of the acquired land. PW-3 Rameshwar Dutt, one of the landlords/claimants, has been examined on behalf of all the landlords/claimants to substantiate their claim.

6. The Northern Railway has examined RW-1 Madan Lal, Kanungo (Railway), Una, Himachal Pradesh to support valuation of Land Acquisition Collector and to rebut the claim of the land owners.

7. For establishing claim with respect to structures/buildings of Satya Parkash, PW-1 has proved on record valuation Ext. PW-1/A, description of property Ext. PW-1/B, ground floor plan Ext. PW-1/C and estimate Ext. PW/1/D. Similarly, abstracts of cost of two structures/buildings of Iqbal Singh have been proved as Ext. PW-4/A & Ext. PW/4/D alongiwth calculations thereof Ext. PW/4/B & Ext. PW-4/E and site plans Ext. PW/4/C and Ext. PW-4/F. Jamabandis of land in question have also been placed on record as Ext. P-1 to Ext. P-23. As an exemplar transaction, land owners have put reliance on award passed by the Reference Court in another case bearing Land Reference No. 8/2013/2012, titled as Chain Singh & another versus Land Acquisition Collector (Railway) & others (Ext. P-24), relating to acquisition of land in village Adarsh Nagar, Tehsil Amb for the same purpose initiated vide notification under Section 4 of the Act, dated 24.04.2009, wherein, the Reference Court had awarded uniform rate of compensation at the rate of Rs.1,000/- per square meter. Reliance has also been placed on another award passed by the Reference Court in Land Reference RBT No. 49/2013/12, titled as Yash Pal versus The Land Acquisition Collector & another (Ext. P-25), wherein also, for acquisition of land for the same purpose by issuing notification under Section 4 of the Act, published on 24.04.2009, value of the land acquired in Village Kalroohi, Tehsil Amb, Distt. Una has been determined at uniform rate to the tune of Rs. 1,000/- per square meters.

8. In its evidence, Northern Railway has placed on record copy of notification under Section 4 of the Act (Ext. RW-1/A) and notification under Section 6 of the Act (Ext. RW-1/B), Award No. 3/2009-10, passed by the Land Acquisition Collector (Ext. RW-1/C) alongwith *Vivaran Talika 19,* under Section 18 of the Act (Ex.RW-1/D) but related to Joginder Singh only. Further reliance has also been placed by Northern Railways on Sale

Deeds Ext. R-1 dated 12.06.2008, R-2 dated 19.03.2009, R-3 dated 13.10.2007, R-4 dated 04.04.2008, R-5 dated 30.05.2008 and R-6 dated 11.06.2008.

9. Reference Court has taken into consideration exemplar Award Ext. P-25 pertaining to the adjoining village and has awarded the same rate i.e. Rs.1,000/- per square meter in present case also.

10. Learned counsel for the appellant(s) has submitted that the Reference Court has committed an illegality by relying upon the awards Ex. P-24 and Ext. P-25 belonging to different villages as there is no evidence on record to establish that nature and potential of the land in Village Athwan and that of Villages Adarsh Nagar and Kalroohi was the same and in absence of evidence that Villages Adarsh Nagar and Kalroohi are adjacent to Village Athwan these awards could not have been taken into consideration for determining the value of acquired land. According to him, land under acquisition, in the present case, is different in nature and there is no evidence of similarity of the same with the land of villages involved in Ext. P-24 and Ext. P-25 and, therefore, for different nature and potentiality of land, compensation at different rate is required to be determined.

11. Judgment of the apex Court in case titled as **Jai Prakash and others versus Union of India,** reported in **(1997) 9 Supreme Court Cases 510,** has also been relied upon by the learned counsel for the appellant(s), wherein it has been held that merely because in some neighbouring villages, valuation has been made at a higher rate, it cannot be said that the claimants-land owners must also be given the same rate of compensation.

12. Reliance has also been placed by learned counsel for the appellant(s) on para 9 of the judgment rendered by the apex Court in case titled as **Kanwar Singh and others versus Union of India,** reported in **(1998) 8 Supreme Court Cases 136,** wherein the Apex Court has held that generally, there would be different situation and potentiality of land situated in two different villages and unless it is proved that the situation and potentiality of the land in two different villages are the same, the same rate of compensation, as awarded to the land owners of one village cannot be granted to the land owners of the another village for the acquisition of land for the same purpose.

13. Pronouncement of the apex Court in case titled as **Manoj Kumar etc. versus State of Haryana,** reported in **2017 SCC Online SC 1262,** has also been relied upon by the learned counsel for the appellant(s) wherein also it has been held that in absence of evidence of similarity of nature and potential of the land, previous judgment and award cannot be made basis for awarding same compensation to the land owners of the adjacent villages.

14. On the other hand, learned Counsel appearing for land owners/claimants while referring the judgment, titled as **Ali Mohammad Beigh & other Vs. State of Jammu and Kashmir** reported in **(2017)4 SCC 717,** have justified the value re-determined by the Reference Court on the basis of Award Ext. P-24, with submissions that there is ample evidence on record to infer that the value of land in Village Athwan is equivalent to the value of land of Villages Adarsh Nagar and Kalroohi and thus keeping in view the nature and contents of the evidence on record Reference Court has rightly awarded compensation at the rate of Rs.1,000/- per square meters, as awarded in Ext. P-24 and Ext. P-25. It is further contended that the Award passed in Yash Pal's case Ext. P-25, has attained finality, as the same has been affirmed by this Court vide judgment dated 26.07.2018, passed in RFA No. 388 of 2016 alongwith connected matters, titled as General Manager, Northern Railways versus Yash Pal and another.

15. The Apex Court in case titled as **Periyar and Parkeekanni Rubbers Ltd. Versus State of Kerala**, reported in **1991) 4, Supreme Court Cases 195,** has held that when the Courts are called upon to fix the market value of the land in compulsory acquisition, the best evidence of the value of property is the sale of acquired land to which the claimant himself is a party, in its absence the sales of the neighbouring lands; and the transaction relating to the acquired land of recent dates or in the neighbourhood lands that possessed of similar potentiality of fertility or other advantageous features are relevant pieces of evidence.

16. The Apex Court in case titled as **Special Land Acquisition Officer Kheda and another vs. Vasudev Chandrashankar and another,** reported in **(1997) 11 SCC 218** has ruled that award passed by Reference Court in another case subject to certain conditions, also offers a comparable base for determination of the compensation**.**

17. Ratio of law in above referred pronouncement is that in absence of availability of comparable sales in village/area, of which land is under acquisition, transaction relates to acquired land of recent dates or same dates in the neighbourhood lands, that possessed similar potentiality of fertility or other advantageous factors, are also relevant piece of evidence. However, for that purpose, nature and potentiality of land in two different villages should be the same for awarding the same rate of compensation in acquisition of land for the same purpose.

18. It also now well settled that where the purpose for acquisition of land is common and the acquired land is to be put in use for one and the same purpose irrespective of its nature and classification, an uniform rate notwithstanding the nature and classification of land is to be awarded for the said land. (See: ***LAC and another versus Bhoop Ram and another***, reported in ***1997(2) Shimla Law Cases, 229, Smt. Gulabi & others versus State of H.P.,*** reported in ***AIR 1998 HP 9, Housing Board versus Ram Lal and others,*** *reported in* ***2003 (3) Shimla Law Cases 64, Union of India versus Harinder Pal Singh and others,*** *reported in* ***2005 (12) SCC 564; Executive Engineer and another versus Dila Ram,*** reported in ***Latest HLJ 2008 (HP), 1007, G.M. Northern Railways versus Gulzar Singh and others,*** *reported in* ***Latest HLJ 2014 (HP) 775, Dadu Ram versus Land Acquisition Collector and others,*** *reported in* ***(2016 2 ILR 636 (HP)****.*

19. As per Section 25 of the Act, the amount of compensation awarded by the Court shall not be less than the amount awarded by the Collector under Section 11 of the Act. (Also see **Subh Ram and others Vs. State of Haryana and another (2010)1 SCC 444).**

20. Further it is also settled that when the purpose of acquisition is common and no developmental activity is required to be carried out for putting it for the said purpose, compensation is to be awarded at uniform rate. (see **Viluben Jhalejar Contractor (dead) by Lrs** vs. **State of Gujarat *(2005) 4 SCC 789*, Himmat Singh and others** vs. **State of Madhya Pradesh and another (*2013) 16 SCC 392*, Peerappa Hanmantha Harijan (dead) by Legal Representatives and others** vs. **State of Karnataka and another *(2015) 10 SCC 469***.)

21. Law with respect to allowing or disallowing the deduction on account of development charges is also no longer *res-integra* and stands settled by the Apex Court in ***Hemant Singh's*** case supra and **Union of India and others** *Vs.* **N.S.Rathnam and sons *(2015) 10 SCC 681***, wherein it has been held that when for using the land to the purpose for which it is acquired, no developmental activity is undertaken by the beneficiary, no question of expenditure for development thereon would arise and therefore, in such case,

deduction by way of development charges is unpermissible as where there is no developmental activity there is no reason to deduct development charges.

22. Out of six sale deeds Ext. R-1 to Ext. R-6, Ext. R-3 is dated 12.10.2007, which is beyond the period of twelve months from date of publication of notification under Section 4 of the Act and thus is not proximate in time as per adopted practice for determination of value of land. Otherwise also, value of land on the basis of sale deed becomes at the rate of Rs. 26.04 per square meters, which is less than the value determined by the Land Acquisition Collector. Similarly, value of land on the basis of other sale deeds become at the Rs. 35.15, Rs.36.10, Rs.197.96, Rs.261.19 and Rs.26.99 per square meter, respectively, the average whereof becomes at the rate of Rs.111.46 per square meter. Highest value in these sale deeds is Rs.261.19 per square meter which again less than that value determined by the Land Acquisition Collector. Value of land on the basis of these sale deeds either singly or collectively after calculating average value becomes to be lesser value determined by the Land Acquisition Collector and award of compensation on the basis of which is impermissible under Section 25 of the Act, hence these sale deeds have been rightly ignored by the Reference Court.

23. As discussed *supra,* in absence of availability of exemplar sale deeds pertaining to the village, land whereof is under acquisition, exemplar sale deeds of adjoining villages can be taken into consideration. The principle also applies **equally to the award(s), pertaining to adjoining village(s), passed during acquisition of land in these village(s) and such award(s) can also be taken into consideration for determining the value of land under acquisition in adjacent village either for awarding identical compensation if nature and potentiality of lands of both villages is similar or after making appropriate deductions in cases, where similarity of nature and potentiality of lands in both villages is not established.**

24. PW-2 Satpal, in his examination-in-chief submitted by way of affidavit has deposed that village Athwan is a part of economic zone, Una surrounded by Amb Industrial Area in the East, Gagret Industrial area in the West, villages Kalroohi and Mubarakpur in the North and village Adarsh Nagar, Amb in the South and is situated on National Highway Amb to Hashiarpur and all government offices/institutions of Sub Division Amb are near the land of this village under acquisition. In cross-examination, he has stated that his house is situated in village Kalroohi and village Adhwan is also a part of village Kalroohi.

25. PW-3 Rameshwar Dutt in his examination-in-chief has corroborated the statement of PW-2 Satpal with further clarification that acquired land is situated in between the villages Adarsh Nagar Amb and Kalroohi and on account of location and quality, this land was the best land in the area. The fact stated by PW-2 Satpal and PW-3 Rameshwar Dutt, with regard to location of the land in question as well as the best quality of the same in comparison to other lands in surroundings, has not been questioned in cross-examination. From the oral evidence on record, it is apparent that the land under acquisition of village Athwan is located in between Adarsh Nagar Amb and Kalroohi. Village Athwan is also having the identical facilities of electricity, water like Adarsh Nagar Amb and Village Kalroohi and also that the said land was having the potential of development as industrial/residential/commercial area, as the same is surrounded by industries on three sides. Further, the land is also situated near the National Highway like the land of villages Kalroohi and Adarsh Nagar. Not only this, the Land Acquisition Collector, at the time of acquisition of the land of village Kalroohi, has rated the value of land of village Athwan and Kalroohi almost of the similar value. The said fact is evident on comparison of rate determined by LAC in present case as reproduced in para 2 with the value of land of village

Kalroohi determined by him, which is reproduced in award Ext. P-25, which reads as under:-

| **Sr. No.** | **Class of land** | **Rate per sq. m within radius of 40 m of N.H.** | **Rate per Sq.m. beyond 40 m of N.H.** |
|---|---|---|---|
| i. | Kuhli Abbal/ Gair Mumkin Abadi. | 575/-(Athwan) | 450/- (Athwan) |
| | | 600/- (Kalroohi) | 450/- (Kalroohi) |
| ii. | Barani Abbal | 560/-(Athwan) | 450/-(Athwan) |
| | | 550/- (Kalroohi) | 450/- (Kalroohi) |
| iii. | Banjar Kadeem/ other Gair Mumkin | 400/-(Athwan) | 300/-(Athwan) |
| | | 400/- (Kalroohi) | 300/- (Kalroohi) |

26. From the above comparison, it is evident that for Kuhli Abbal Gairmumkin Abadi situated within the radius of 40 meters of National Highway and for the land situated beyond 40 meters of National Highway, value of land in village Kalroohi has been determined at the rate of Rs. 600/- and Rs.450/-, whereas for village Athwan, it has been valued at the rate of Rs. 575/- and Rs. 450/-, for Barani Abbal, the rates are Rs. 550/- and Rs. 450/- in village Kalroohi and Rs. 560 and Rs. 450/- in village Athwan has been assessed. Similarly, Banjar Kadeem and other Gair Mumkin land has been assessed having the value at Rs. 400/- and Rs. 300/- in both the villages. Therefore, Land Acquisition Collector himself considered the value of nature and potentiality of land of both the villages on equal footings. Therefore, plea of Northern Railway that there is no evidence on record for equating nature and potentiality of land of these two villages, is not sustainable. As there is ample evidence of similarity of nature and potentiality, the award passed in related acquisition in village Kalroohi can be taken into consideration for awarding identical rate for acquisition of land in village Athwan.

27. Though, there is also evidence of location of land at Village Adharsh Nagar Amb adjoining to village Adhwan, but there is weak evidence of similarity of nature and potentiality of that land with land of village Athwan. Therefore, award Ext.P-24 cannot be strictly relied upon for awarding the identical compensation of land in village Athwan. Perusal of the impugned award passed by the learned Reference Court also indicates that this award Ext. P-24 pertaining to village Adarsh Nagar, Amb has not been taken into consideration by the Reference Court for enhancing the value of land under consideration. The Reference Court has only relied upon the award Ext. P-25, pertaining to village Kalroohi.

28. For the discussion made hereinabove, no illegality, irregularity or perversity is found committed by the Reference Court by relying upon the award Ext.P-25 for determining the value of acquired land at the rate of R***Hemant Singh's*** case supra and **Union of India and others** *Vs.* **N.S.Rathnam and sons *(2015) 10 SCC 681***, s. 1,000/- per square meter. I find no ground for interference, particularly when the said award Ext.P-25 has also been affirmed by this Court vide judgment dated 26.07.2018, passed in RFA No. 388/2016 alongwith connected matters.

29. So far as the valuation of the building/structure standing on the land under acquisition is concerned, no evidence to rebut the same has been led by the Northern

Railways before the Reference Court. In cross-examination of PW-1 Anil Kumar and PW-4 Neeraj Kumar also nothing substantial has been brought on record to discredit the valuation of building/structure proved by these witnesses. Rather it has come in their cross-examination that the scheduled rate of Public Works Department was followed for valuation and nothing has been put to these witnesses or placed on record to establish that valuation carried out by them was not inconsonance with the scheduled rate of PWD or excessive in nature. Therefore, no interference on this issue also, is warranted.

30. Therefore, land owners/claimants are entitled for enhanced compensation on the basis of value of land at the rate of Rs. 1,000/- per square meters alongwith statutory benefits and also compensation for structures/houses as determined by the Reference Court.

31. Accordingly, the impugned award is upheld and all appeals are dismissed. Pending application(s), if any, also stand disposed of.

32. Record be sent back.

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

Shri Atma Ram (since deceased) through his LRs. & Ors. .....Appellants.

Versus

Shir Onkar Singh (since deceased) through his LRs. & Ors. ..... Respondents.

RSA No. 149 of 2003
Reserved on: 01.11.2018
Date of decision: 06.11.2018.

**Indian Easements Act, 1882** - Section 15 - Right of passage over land recorded as "Share-am-rasta" - Acquisition of – Held, right over other's land can be acquired either by way of easement or by adverse possession – Other than these two rights, right to interfere and use someone else property against his consent, unknown to law – Mere classification of land as "Share-am-rasta" does not confer larger right upon plaintiff to claim right of passage by way of easement – Right of passage since negated by both lower courts, suit for permanent prohibitory injunction could not have been decreed – RSA allowed – Decrees of lower courts set aside – Suit dismissed. (Paras-13 & 18)

For the Appellants: Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajit Pal Singh Jaswal, Advocate.

For the Respondents: Mr. G. D. Verma, Sr. Advocate, with Mr. B. C. Verma, Advocate, for respondents No. 1(b) to 1(e).

Mr. Parminder Singh Kanwar, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

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**Tarlok Singh Chauhan, Judge**

The appellants are the successors-in-interest of defendant No. 1 and having lost before both the Courts below have filed the instant Regular Second Appeal. (Parties hereinafter shall be referred to as the 'Plaintiffs' and 'defendants').

2. The plaintiff/respondent No. 1 filed a suit for permanent injunction restraining the defendant No. 1 from interfering in any manner and causing any sort of obstruction in the right of passage and further restraining him from encroaching upon and from raising any sort of construction over the passage comprised in Khasra No. 433, Khewat No. 943, Khatauni No. 1285, measuring 0-18 marlas as entered in the jamabandi for the year 1980-81. It was averred that the plaintiff alongwith the other residents of the village had their abadi and landed property in village Amb since the time of their ancestors and the aforesaid land was classified in the revenue record as "Share-aam-rasta" and being used by the villagers since the time immemorial and on such basis claimed the right of easement of prescription as well as easement of necessity and thereby prayed for decree for permanent injunction and in alternate for mandatory injunction on the ground that defendant No. 1 alongwith Pradhan of the Gram Panchayat was trying to block the passage by storing dry fuel wood without any right, title or interest.

3. In the written statement filed by defendant No. 1, preliminary objections regarding maintainability, better particulars, estoppel, cause of action etc. were raised. On merit, it was contended that the abadi of the plaintiff in the village was not disputed, however, it was denied that there was a passage and rather it was claimed that the suit land falls inside the gate of the abadi of defendant No. 1 and the entries in the revenue record showing suit land as passage are absolutely wrong, false and illegal and were the result of connivance of the plaintiff with the revenue field staff because the plaintiff himself retired as Patwari.

4. In the written statement filed by defendants No. 2 and 3, it was alleged that defendant No. 1 has moved an application before the Gram Panchayat for inspection of the spot and accordingly Pradhan and Members of the Gram Panchayat had inspected the spot in presence of the plaintiff and defendant No. 1 on 20.04.1996. They also disputed the passage as claimed by the plaintiff. It was submitted that settlement authority has carved out new khasra Nos. 1054, 1055 and 1060 of old khasra No. 433. Other allegations, so called obstructions in the passage were denied.

5. At this stage, it would be relevant to mention that earlier defendants No. 2 and 3 i.e. Gram Panchayat and Gram Sabha, Amb were not parties and came to be subsequently incorporated. This necessitated the framing of additional issues. The total issues framed in this case read thus:-

**Issues framed on 29.06.1989:**-

1. Whether there is a Share-aam-Rasta (Passage) over the suit land?OPP
2. Whether the suit land is not maintainable?OPD
3. Whether the suit is barred under Section 91 CPC?OPD
4. Whether the plaintiff is estopped by his act and conduct?OPD
5. Whether the plaintiff has no standing to file the present suit?OPD
6. Relief

**The following additional issues were framed on 15.05.1991:-**

1A. Whether the plaintiff has a right of way by way of easement of prescription?OPP

1B. Whether the plaintiff has acquired right of way by way of easement of necessity over the suit property?OPP

**Again the following issues were framed on 04.06.1996:-**

5A. Whether the plaintiff is entitled to the relief of injunction as prayed for?OPP

5B. Whether the suit is bad for mis-joinder of parties as alleged?OPD-2

5C. Whether the suit is not maintainable for want of notice under Section 193 of the H.P. Panchayati Raj Act, 1994?OPD-2

5D. Whether the suit is bad for non-compliance of the provisions of order 1 Rule 10 CPC?OPD-2

**The following additional issue was framed on 07.04.1997:-**

5E. Whether the suit is barred under Section 41(1)(h) of Specific Relief Act as alleged?OPD-1

6. The learned trial Court after recording evidence and evaluating the same, decreed the suit of the plaintiff and the appeal filed against the same also came to be dismissed, constraining the defendant No. 1 to file the instant appeal.

7. On 24.04.2003, the appeal came to be admitted on the following substantial questions of law:-

1. When the settlement in village took place much before the institution of the suit and the revenue entries stood corrected in faovur of the defendant-appellant, could the plaintiff-respondent No. 1, without assailing such entries and without giving proper description of the khasra Nos. allocated during the settlement, institute the suit by mentioning the old khasra Nos. for grant of the relief of permanent prohibitory and mandatory injunction?

2. Whether both the courts below have acted beyond their jurisdiction in not appreciating the provisions of the Easement Act whereby it was not permissible for the plaintiff-respondent No. 1 to institute the suit claiming the easement of prescription as well as easement of necessity with respect to the same passage?

3. Whether both the courts below have illegally exercised the jurisdiction in not dismissing the suit of the plaintiff-respondent No. 1 for want of arraying such persons as party to the suit who allegedly have claimed the alleged passage which was claimed by the plaintiff-respondent No. 1 to be “share-aam-rasta”?

4. Whether both the courts below have misdirected themselves by misreading the oral and documentary evidence and misapplying the correct principles of law in holding that the entries corrected during the settlement with respect to the disputed property stood rebutted?

8. Since all these issues are intrinsically interlinked and interconnected they are taken up together for consideration and are being disposed of by way of common reasons.

9. At the outset, it needs to be observed that an owner of a property is entitled to enjoy and seek protection of such enjoyment of his property and this right can never be denied by any Court. Therefore, the third party normally has no right to interfere or claim

any title over the property belonging to the real owner, save and except, on the basis of right of easement or by way of adverse possession etc.

10. The instant case relates to a claim put-forth by the plaintiff on the plea of easement of necessity as also prescription, but then this plea has been specifically negated by the learned trial Court by observing as under:-

> 15. The plaintiff has further pleaded that suit land has been used by the plaintiff and other inhabitants of the village continuously, regularly, freely and acquired right of easement by way of prescription as well as easement of necessity. In the plaint, plaintiff is trying to assert and establish his right over the path by way of easement of necessity and prescription and in the plaint he has nowhere pleaded that said path was used as of right. In such circumstances, user of path will not mature into a right by way of prescription unless that path issued as of right. The right way by way of prescription is a hostile claim against true owner and has all ingredients of adverse possession. A right of easement cannot arise by prescription in favour of an individual. Mere lawful exercise by an individual of a common right for the prescriptive period cannot confer an exclusive right and in order to acquire a prescriptive right, the individual must perform some act to the knowledge of the servant owner clearly indicating his individual claim of right. The plaintiff has nowhere claimed in his statement that he had been using the path as of right for the last 20 years. The evidence led by the plaintiff is not proving that path was being used by the plaintiff as of right without any interruption, peacefully and openly and the same was being used as of right for the last 20 years. The plaintiff has further pleaded right of easement by way of necessity. When the plaintiff has pleaded that suit land is a Share-aam-Gair Mumkin Rasta and defendant No. 1 has blocked the same in connivance with the Pradhan of Gram Panchyat and further pleaded that defendant No. 1 has no right, title or interest to block the same. The said passage is Share-aam-Gair Mumkin Rasta which connected the land and abadi with the link road which further connected with the main PWD road leading from Mubarikpur-Una, in such circumstances, plaintiff cannot claim right of way by way of easement of prescription and necessity. Moreover, there is no cogent and reliable evidence on case file, on the basis of which it can be said that plaintiff has right of way by way of easement of prescription and necessity over the suit land and as such issues No. 1A and 1B are decided against the plaintiff.

11. However, still the learned trial Court still decreed the suit of the plaintiff on the basis of findings recorded qua issue No. 1 by holding that since the suit land was classified as “Share -aam-rasta” in the revenue record, therefore, the plaintiff was entitled to a decree of mandatory injunction against the defendant and further ordered the removal of the encroachment and demolition of super structure, if raised over the passage.

12. Admittedly, the plaintiff did not assail the findings recorded by the learned trial Court regarding the easementary rights and it was only the defendant who aggrieved by the judgment and decree passed by the learned trial Court, filed an appeal before the first appellate Court. The first appellate Court categorically took note of the fact that the plea of right of easementary claim by the plaintiff had been rejected by the learned trial Court and has not even been agitated by the plaintiff. Yet it too solely on the basis of the findings recorded by the learned trial Court on Issue No. 1, proceeded to affirm the decree passed by the learned trial Court.

13. As observed above, a right of easement like adverse possession are few of those rights that can be claimed over someone else property or else such rights are not at all recognised and other then these two rights, right to interfere and use someone else property that too against his wish and consent is unknown to law. The property in dispute admittedly belongs to Gram Panchayat and, therefore, it is really not understandable how contrary to its wishes and consent the suit of the plaintiff has been decreed merely on the basis of the revenue entries. The mere fact that the land has been classified as "share-aam-rasta", does not in any way confer a larger right upon the plaintiff to claim this land as a matter of right and other than the right by way of easement and this right was held to not proved and in fact has been negated and rejected by the learned Courts below. Therefore, the suit of the plaintiff could not have been decreed.

14. To say the least the findings recorded by the learned Courts below are based on complete misunderstanding and mis-appreciation of the law on the subject and being perverse, therefore, cannot withstand judicial scrutiny.

15. Article 300 A of the Constitution of India reads as under:-

> "300A. Persons not to be deprived of property save by authority of law- No person shall be deprived of his property save by authority of law."

16. No doubt right to acquire, hold and dispose of property ceased to be a fundamental right under the Constitution, yet still continues to be a Constitutional right. Therefore, a person whether a juristic or natural can be deprived of his property only in accordance with due process of law. Anything done in contravention of Constitution of India guaranteed under Article 300A of the Constitution is liable to be struck down by the Court. Substantial questions of law are answered accordingly.

17. In addition to the aforesaid, it would be noticed that defendant No. 1, during the pendency of the appeal had filed an application for additional evidence being CMP No. 343 of 2006 and vide order dated 11.09.2006, the same was ordered to be listed alongwith the main appeal. Vide this application the defendant has sought to bring on record the certified copy of the order passed by the learned Assistant Collector First Grade, Amb dated 22.08.2003, whereby the revenue records have been duly corrected in favour of the appellant for the land on which the plaintiff had been claiming the alleged right of passage. No doubt the orders of the revenue Court are not binding on this court but nonetheless the said orders cannot be ignored particularly when it relates to the correction of the revenue record, which otherwise is in the exclusive domain of the revenue officer. The application is accordingly allowed.

18. In view of the aforesaid discussion, I find merit in this appeal and the same is accordingly allowed and consequently the suit filed by the plaintiff is dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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**BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.**

Kamla Nand ....Appellant.

Versus

State of Himachal Pradesh ....Respondent.

Cr. Appeal No.39 of 2017.
Reserved on : 01.11.2018.
Date of Decision : 06.11.2018.

**Indian Penal code, 1860** - Section 302- **Arms Act, 1959-** Section 27 - Trial Court convicting and sentencing accused for committing murder of his wife with gun shot – Appeal against – On facts, High court found (i) accused frequently resorting to beating of his wife whenever she requested him not to take liquor (ii) compromise had arrived between parties before Panchayat wherein accused had agreed not to take liquor in future (iii) 'R' son of accused had seen him at door of kitchen with gun immediately after gun shot and his mother lying in pool of blood there (iv) 'V' another son of accused,who rushed to spot on call of 'R' saw accused with gun on stairs connecting upper floor of house with courtyard (v) Deceased disclosing to her sister-in-law (Devrani) residing in same building (Inhone Mar Diya) referring to accused having killed her (vi) Forensic evidence showing death taking place from gun shot (vii) Gun recovered at instance of accused found workable and empty cartridge having been fired from it – Held, evidence clearly point to guilt of accused – Appeal dismissed – Conviction and sentence upheld. (Paras- 9 to 18).

For the appellant : Mr. Rajesh Mandhotra, Advocate.
For the respondent : Mr. Vikas Rathore, Additional Advocate General.

The following judgment of the Court was delivered:

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**Chander Bhusan Barowalia, Judge.**

The present appeal is maintained by the appellant/accused/convict (hereinafter referred to as "the accused"), laying challenge to judgment dated 24.2.2011, passed by learned Additional Sessions Judge, Fast Track Court, Shimla, H.P., in Sessions Trial No.16-S/7 of 2010, whereby the accused was convicted for the commission of the offence punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act and sentenced as under:-

| **Offence** | **Sentence** |
|---|---|
| Under Section 302 IPC | Sentenced to imprisonment for life and fine of `10,000/-; |
| Under Section 27 of Arms Act | Sentenced to simple imprisonment for a period of three years and to pay fine of `10,000/-. Both the substantive sentences shall run concurrently. |

2. The key facts necessary for adjudication of this appeal can tersely be summarized as under:

Accused-appellant, who belongs to Village Kalyai of Gram Panchayat Dhar Kundru, Tehsil Theog, District Shimla, was having his wife, namely, Smt. Kanta Devi, sons, namely, Rakesh Kumar (PW-1), Virender Verma (PW-2) and Meena Devi-daughter, who was studying in ITI at Shimla. As per the prosecution case, accused is a dead drunkard and used to quarrel with his wife, whenever she asked the accused not to take liquor. Not only this, the accused also gave beatings to his wife (Kanta Devi-deceased) frequently under the influence of liquor. It is alleged that two years before this incidence, Kanta Devi, wife of the accused left the matrimonial house and went to the house of her parents. Further, with the

intervention of the relatives and members of Panchayat, the matter was compromised and his wife joined company of the accused on the promise that he will not take liquor in future nor he will beat her. On 28.5.2010, at about 6:00 PM, a day before the incidence, accused left the house without telling anyone. In the morning of 29.5.2010, Virender Verma, PW-2 (son of the accused and Kanta Devi) went to nearby forest around 7:00 AM, for grazing the cattle. At about 7:30 AM, Kanta Devi, was in the kitchen and preparing meals for the day. Rakesh Kumar, (PW-1) elder son of the accused had just put off his clothes to take bath, when he heard a gun shot in the kitchen and cries of his mother "*Mar Diya*". He immediately put on his clothes and rushed towards the kitchen and found that his mother Kanta Devi, was lying on the floor and a gun shot had hit her and she received injuries on her back side. He found his father standing at the door of the kitchen with a gun in his hands. On finding, something unusual had happened Smt. Nirmala Devi (PW-4) rushed to the house of the accused, found him standing at the door with gun, then went to the kitchen and put Kanta Devi in her lap. She tied '*dhatu*' (head gear) on the wound of Kanta Devi, simultaneously, Virender Verma (PW-2) and other residents of the village also arrived there, when people started collecting there, the accused tried to flee away from the spot, but he fell down and received injuries. Pradhan of the village was informed about the incidence telephonically to Police Post Matiana within whose jurisdictions this incidence has taken place. Police reached at the spot alongwith Police of Police Station, Theog. Statement of Rakesh Kumar (PW-1) recorded under Section 154 of the Code of Criminal Procedure, in respect of this incidence and site plan was prepared. The inquest report was prepared and took into possession, blood stained clothes from the kitchen as well as the blood lying on the floor with the help of cotton swab in the presence of witnesses taken into possession and spot was also photographed. Thereafter, the accused was arrested by the police and it has been alleged in the charge sheet that he while in police custody made a disclosure statement, under Section 27 of the Indian Evidence Act, on 29.5.2010, in the presence of witnesses that he could get his double barrel gun as well as the used cartridge recovered and pursuant thereto, a double barrel gun was recovered from the ceiling of the room and empty cartridge from a field situated nearby the house. The police also took into possession gun as well as cartridge and got them analyzed from the Ballistics Expert at FSL, Junga. The report of expert shows that gun shot was fired from the aforesaid gun. The postmortem of the deceased was conducted at IGMC, Shimla, from the Forensic Experts and as per the report of expert, she died due to injuries of gun shot. Investigating Officer also took into possession, the record pertaining to the gun licence of the accused, purchase of live cartridges by him from Arms Dealer at Theog. It has come in the investigation that the deceased immediately before her death had told Nirmla Devi (PW-4) that accused had killed her. It has also come during the investigation, on the evening of 28.5.2010, accused had gone to the house of Tara Chand Verma, his brother-in-law and left in the early morning of 29.5.2010 for his (accused) house. After completion of investigation, *challan* was prepared and presented in the Court.

3. The prosecution, in order to prove its case, examined as many as twenty one witnesses. Statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, wherein he pleaded not guilty. The accused did not lead evidence in his defence.

4. The learned Trial Court, vide impugned judgment dated 24.2.2011, convicted the accused for the commission of the offence punishable under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life and fine of `10,000/-. The convict is further sentenced to simple imprisonment for a period of three years and to pay fine of `10,000/-, for offence punishable under Section 27 of the Arms Act. Both the substantive sentences to run concurrently.

5. Mr. Rajesh Mandhotra, learned counsel for the accused/appellant has vehemently argued that the prosecution has failed to prove the guilt of the accused conclusively and beyond the shadow of reasonable doubt, as the disclosure statement and recovery made thereafter seems to be improbable, as per the prosecution case, accused was not having any opportunity to conceal the gun at the place from where it was recovered. He has argued that dying declaration is also not clear, as the deceased has only stated that "*Inhone Maar Diya*", which does not mean that it was the accused who has killed her. He has further argued that accused was not in his house on the previous night and his presence in his house in the early morning on 29.5.2010, is highly improbable.

6. Conversely, Mr. Vikas Rathore, learned Additional Advocate General has argued that the gun belongs to the accused and accused purchased the cartridge, empty shell of the cartridge, which was recovered from the field found to be fired from the gun by the Ballistics Expert of FSL, Junga, the presence of the accused alongwith gun on the door of the kitchen making people come there after the gun shot coupled with the fact that dying declaration of the deceased was clear and unambiguous ('*Inhone*' means husband) leads to only one of the conclusion that it was the accused, who has killed his wife after firing gun shot. He has further argued that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt and thus, well reasoned judgment of learned Trial Court is not required to be interfered with.

7. In rebuttal, learned counsel appearing on behalf of the accused has argued that for severe punishment, strict proof is required. He has argued that the sequence of events shows that the prosecution story is full of lacuna and the accused, who has been convicted on the basis of prosecution evidence, which is full of surmises and suspicion, required to be acquitted.

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

9. PW-1, Rakesh Kumar, deposed that he got recorded his statement under Section 154 of the Code of Criminal Procedure, Ex.PA, on the basis of which, FIR Ex.PW17/A was registered in Police Station, Theog. He deposed that the accused was his father and Kanta Devi was his mother. He deposed that he is having one more brother Virender Verma (PW-2) and one sister Meena. He deposed that his father was having a double barrel gun which was licensed one. He deposed that his father was dead drinker and there used to be quarrels between his mother and father. He deposed that two years back, the quarrel has taken place between his mother and father and thereafter, his mother left the matrimonial house and went to the house of her parents. Further, she was brought back pursuant to the compromise which took place before Pradhan of Panchayat, Vidya Sagar (PW-3), at the time of compromise, his father has agreed not to take liquor in future. He deposed that on 28.5.2010, his father went out of the house around 6:00 PM, without telling anything and he did not return at night. In the morning of 29.5.2010, when his brother went to graze the cattle and his mother was preparing meals in the kitchen, at about 7:30 AM, he had gone to bathroom to take bath, which is adjoining to the kitchen, when he was to take bath, he heard the sound of gun shot from the kitchen side. He heard the cries of her mother also "*Mar Diya*". Thereafter he (PW-1), came out from the bathroom and found his father standing there with a gun in his hands, he was standing just outside the door of the kitchen. He went to kitchen and found that her mother lying on the floor with gun shot injuries on the back side. From the wound blood was gushing out. He loudly made a call to his brother, who was grazing cow in a field nearby. On hearing, the gun shot, his uncle Khem Raj and *Chachi* Nirmla Devi (PW-4), whose house was adjoining also reached there and his brother Virender Verma (PW-2) also came there. Thereafter, he made a phone call to

his uncle Balanand and requested him to come there. He deposed that all of them were attending the deceased, accused went away. Further, at that time, many persons gather there and they caught the accused while running the accused fell down and received injuries on his head. His mother died shortly, thereafter, the police from Police Post, Matiana and Police Station, Theog, reached there, his statement was recorded. He has stated that '*Dhatu*' (head gear) of his mother had been tied by his aunt on the wound of his mother. The '*Dhatu*' (head gear) was taken into possession by the police. Thereafter, this witness remained busy in connection with dead body of the mother. On 31.5.2009, the police again came to their house, at that time, his uncle, Balanand and Dinesh Verma were also present. He handed over the gun licence to the police, which was taken into possession, vide memo, Ex.PB, which bears his signature and signatures of the witnesses and exhibited the licence, Ex.P1. He has identified the gun, which was sealed in a parcel, with three seals of FSL and after opening the seal parcel, a double barrel gun was taken out and the same as per this witness belongs to his father. The gun was exhibited, as Ex.P2. He has also identified the '*dhatu'* (head gear) to be the same of his mother, which smeared with blood type substance. The '*dhatu*' (head gear) was exhibited, as Ex.P3. He also stated that this is the same '*dhatu*' (head gear) which was tied by her aunt on the wound of his mother. In his cross-examination, he stated that income from the orchard was about `80,000/- to `90,000/- per year. He has admitted that the gun licence had been given to his father by the administration for crop protection. He has admitted that gun shot was to be fired to scare the wild animals. He has stated that neither he nor his brother load and use the gun. He has stated that the distance between kitchen and bathroom is about 8 feet and one of the wall is common between two. The said wall is '*kachha*' one. He has admitted that keys of the house generally remained with his mother. The gun Ex.P2 and cartridges were used to be kept by his father in his own room. He has specifically denied that the gun and cartridges used to be at a place accessible to all family member and the gun was to be used by any of them. He has stated that the distance between the place where his mother was lying down in the kitchen and door of the kitchen is about 7 feet. He has admitted that he has not seen the gun fire with his own eyes. He has stated that the marriage of his parents took place 23 years ago and the relations between them were generally good, but quarrels used to take place on account of his father taking liquor. The quarrels used to be wordy one, but sometime his father used to beat his mother with '*danda*'. He has admitted that his mother never filed any complaint with the police. He has denied that no compromise was taken place two years back. He has admitted that partition of the land has taken place between his father and his uncle. He has denied that he does not possess a double barrel gun. He has admitted that his mother not met him in the morning of 29.5.2010 before this incidence. He has stated that he had not heard any such quarrel taken place in the kitchen on that day. He had taken off his clothes in the bathroom, when he heard the gun shot. He has stated that his brother used to go to School at 8:30-8:45 AM, but he has denied the suggestion that his brother never used to go to graze cattle in the morning. He has specifically stated that he used to graze cattle in a field at a distance of 50-60 meters from their house and no one else used to graze cattle there. He has denied that accused was not present, when the incidence has taken place.

10. PW-2 Virender Verma, second son of the accused deposed that they are two brothers and one sister. He deposed that his sister studying in ITI, Shimla. He stated that his father used to quarrel with his mother on account of liquor. He deposed that on 28.5.2010, his father left the house around 7:00 PM and on the next day, he has gone to graze cattle in a nearby forest, when he left the house, his mother was present in the kitchen. He heard a loud call at about 7:30 AM that his mother had been killed by his father, when he came to the house, he saw his father was on the stairs with a gun in his hands, whereas mother was lying unconscious in the kitchen. She had received a gun shot

injuries. He has stated that Nirmla is '*Chachi*' and Khem Raj-uncle reached at the spot together. He deposed that his uncle and aunt resided in the same building. He found blood was oozing out from the wound of his mother. He stated that his bother telephonically informed Bala Nand, about the incidence who also came to the spot. The accused tried to flee from the spot, but his uncle and brother tried to catch the accused. In this process, the accused received injuries while fleeing away from the spot. He deposed that accused was not carrying gun with him while fleeing. Thereafter, Vidya Prakash, Vidya Sagar and Prakash, also came on the spot. He stated that his mother had told Vidya Sagar, Pradhan of Gram Panchayat, Dhar-Kandru that accused used to quarrel with his mother after taking liquor. In his cross-examination, he has stated that he is studying in 10+1. He deposed that he used to go School from house around 9-9:15 AM. He deposed that when he reached his house, his mother alongwith brother were present there. Police recorded his statement in his house. He has stated that he is not in a position to take his mother to the hospital, as there was no occasion to take her to the hospital. He has denied the suggestion that he has not gone to the forest in the morning. He stated that the gun used to be kept in a room, where the accused normally used to sleep. He stated that our house is double storyed and in the ground floor, cattle are kept. He has stated that he does not know where his father used to keep the cartridges. He does not know about the loading of gun. He stated that the relationship of his mother and father were cordial, but sometime they used to quarrel on the point of liquor. He has denied that no such quarrel took place on 28.5.2010.

11. PW-3, Vidya Sagar, President of Gram Panchayat, Dhar Kundru and Advocate by profession. As per this witness, on 29.5.2010, at about 8:00 AM, he received a phone call from Vidya Prakash, husband of Up-Pradhan of Panchayat that gun shot had been fired on a lady. He immediately telephonically informed Police Post, Matiyana about it. He went to Kalyai, in a vehicle of Station House Officer, Theog, the police of Police Post, Matiyana, reached at place Kalayai, almost simultaneously many persons had collected at the spot, the accused was standing nearby his kitchen and he had been detained by the people. PW-1, Rakesh Kumar, got his statement recorded before the police. He remained associated with the police when blood was taken with the cotton swab and put into a bottle. The '*dhatu*' (head gear) was taken into possession, which was smeared with blood and recoveries were effected. As per this witness, the accused also made disclosure statement in his presence and on the basis of disclosure statement, gun was recovered from the ceiling. He identified the gun and cartridges to be the same in the court on that day. He also identified the '*dhatu*' (head gear), and the cartridge Ex.P4, which was recovered from the spot. He also deposed that he appended his signatures on the parcel. He deposed that Pradhan of Panchayat, had gave information that the accused used to beat the deceased. Earlier, the deceased had gone to the house of her parents after getting annoyed from the conduct of the accused, as he had beaten her. He deposed that he has also gone to the house of the parents of deceased in order to get the matter compromised and pursuant to the compromise, the deceased had joined the company of the accused. He deposed that written compromise was effected at that time and copy thereof was given to the parties and one copy was retained with the Panchayat, but now it was misplaced, while the record was shifted to new Panchayat Ghar. In his cross-examination, he deposed that he know all the residents of the area in the capacity of Pradhan of Gram Panchayat. At that time, 20-25 persons of the locality had collected there. He stated that just adjoining to the house of the accused, the other house located at some distance of about 5-10 minutes walk. He deposed that gun was taken into possession from the ceiling and at that time, he was present in that room. In his cross-examination, he admitted that 15-20 persons are authorized to possess this type of gun in his Panchayat, but he do not know the kind of guns they have. He has stated that his statement was recorded on the spot. They remained on the spot till 8:00 PM. He stated that it is incorrect that no proceedings were prepared in his presence. He has

denied the suggestion that accused never used to quarrel with his wife and used to give beatings. He has denied that no compromise was got effected by the Panchayat. He stated that police recorded his statement twice. He has denied the suggestion that being Pradhan of the Panchayat, he made his false statement.

12. PW-4, Nirmla Devi, sister-in-law of the accused, deposed that accused used to quarrel with his wife (Kanta Devi) after taking liquor, as Kanta Devi, used to ask the accused not to drink. She deposed that on 29.5.2010, at about 7:30 AM, she rushed to the spot immediately, on hearing gun shot and cries and there put Kanta Devi in her lap, tied '*dhatu*' (head gear) on the wound and then Kanta Devi made dying declaration to her that *"Inhone Mar Diya"*. PW-5, Sanjeev Verma, in whose presence the articles of the deceased i.e. ornaments were handed over to Bittu Verma, vide memo, Ex.PG. PW-6, Karam Chand, Halqua Patwari, Patwar Circle Dhar Kundaru, who prepared copy of *jamabandi,* Ex.P5 and prepared *tatima* Ex.P6, of the spot and handed over them to the Investigating Officer, SI Ram Phal (PW-21). PW-7, Ishwari Devi, mother of the deceased to show that there had been quarrels between the accused and the deceased regarding liquor and even Kanta Devi had left the matrimonial house, when the accused gave beatings to her. PW-8, Dr. Peeyush Kapila, Assistant Professor, Department of Forensic Medicine, I.G.M.C, Shimla, who conducted autopsy upon the deceased and prepared report Ex.PW8/C. The observations during the postmortem examination are as under :

> "166 cm, female body was brought with blood soiled clothes on back. Body had cooled down to room temperature. Hypostasis was present on back, fixed. Rigor mortis present in smaller joints. No evidence of decomposition present. Skiagrams of Xray were taken before autopsy.
>
> Antemortem Injury :
>
> 1. 11 x 4 cms Lacerated penetrating gunshot wound present on left back, medial end of injury 2 cms from midline at the level of L3-4 vertebrae, lateral end having grazed and medial and having avulsion, 60 cms from top of head, 102 cm from heel and 2 cms from midline, placed transversely.
>
> After opening the body wad 3.5 x 1.5 cm, black made of plastic & rubber was present in the retroperitoneal space on right side. There was fracture of spine and transverse processes of L3-4 vertebrae. Some pallets were present on right lumbar region just below the skin, taken out and preserved to be handed over to the police. Individual pellet wounds 3 in number present in mesentery of small intestine lacerating liver on right inferior lobe. There was contusion of pancreas and perinephric area of right side. Gross laceration of vessels of abdomen present in the tract which directed from left side of back to right side lacerating skin, muscles, then fracturing L3-4, transacting spinal cord completely, lacerating major vessels in retroperitoneal space and reaching almost horizontally to right side just below skin. No blackening, singeing, scorching or tattooing were present on the skin.
>
> Contents of Cranium and thorax were grossly normal except that they were pale.
>
> One pallet/bone fragment have exited from skin of right lumbar area measuring .05 cms.
>
> No food or fluid was present in stomach without any smell or congestion.
>
> Laceration of right lobe of liver by pallets was present.

Peri-nephric contusion was present without injury to kidney.

Uterus was non pregnant size and was normal."

13. PW-9, Dr. Naseeb Singh Patial, Ballistics Expert, examined Fire Arm i.e. gun Ex.P2, cartridge case, Ex.P4, traces of gun shot on cotton swab as well as the clothes, jacket and shirt Ex.P7 of the deceased and then prepared report Ex.PW9/A. PW-10, Dr. Kuldeep, who conducted the postmortem in Civil Hospital, Theog and gave his report, Ex.PW10/B. He also examined the accused and prepared MLC, Ex.PW10/E. PW-11, Mohinder Kumar, salesman of Theog Gun House from where the accused purchased cartridges on 29.12.2009 produced the entries of the relevant register, which is Ex.PW11/A. PW-12, Jeet Ram, Junior Assistant of SDM Office, Theog, to prove the report Ex.PW12/B, regarding the verification of gun licence of the accused. PW-13, HHC Ranjeet Singh of Police Post, Matiana, to prove entries of Roznamacha Ex.PW13/A, which were made on the basis of intimation given in Police Post, Matiana, regarding the incidence. Further, he brought rukka Ex.PA from the spot for registration of FIR in Police Station, Theog and after registration of the same and handed over to Investigating Officer, SI Ram Phal (PW-21). The gun licence, Ex.P1 of the accused was taken into possession on 31.5.2010, vide memo, Ex.PB. PW-14, Constable Surinder Singh got the autopsy conducted upon the body of the deceased in Civil Hospital, Theog and thereafter, in I.G.M.C, Shimla. The parcels handed over to him by Medical Officers were deposited by him with MHC of Police Station, Theog on 1.6.2010. PW-15, Constable Damodar Dass, who carried different sealed parcels alongwith sample seals and dockets mentioned in Ex.PW15/A and deposited them in FSL, Junga on 4.6.2010. PW-16, Constable Rajesh Kumar, who brought one sealed parcel alongwith samples of seal and docket to FSL, Junga and deposited them on 2.7.2010. PW-17, Constable Manoj Kumar, who recorded the departure report Ex.PW17/A, when the police party headed by SI Ramphal Yadav, left the Police Station to Village Kaliyai, on getting intimation of this incidence. PW-18, ASI Laiq Ram, recorded FIR Ex.PW18/A in Police Station, Theog, on the receipt of rukka Ex.PA. PW-19, MHC Het Ram, with whom different sealed parcels were deposited by the Police Officers during the course of investigation and then sent them to FSL, Junga, for the purpose of analysis on different dates, vide R.C Ex.PW15/A and Ex.PW16/A. PW-20, ASI Ajay Kalia, who partly investigated the case and took into possession gun licence, Ex.P1, vide memo, Ex.PB. PW-21, SI Ram Phal, deposed that on 29.5.2010 at about 8:20 AM, ASI Ajay Kalia, informed regarding murder of a lady, on the basis of which, entry in the daily diary was made, which is, Ex.PW17/A. He deposed that the dead body was inspected by him and then recorded the statement of Rakesh Verma, Ex.PA and made endorsement, Ex.PW21/A. The rukka was sent to Police Station, Theog, for registration of FIR through HHC Ranjit Singh (PW-13). He stated that the blood with cotton swab and one blood stained '*dhatu*' (head gear), which was tied on the wound of the deceased was taken into possession by him. The said articles were sealed separately in different parcels and sealed with seal 'X' and taken into possession, vide memo, Ex.PC in the presence of Bala Nand, Vidya Sagar and Sunil Kumar. He prepared spot map Ex.PW21/B, which bears his signatures. He has stated that during the course of investigation, accused disclosed that he could get the gun as well as empty cartridge recovered, his statement was recorded, which is Ex.PD, in the presence of Vidya Sagar, Chaman Prakash and HC Sunil Kumar. He deposed that the gun was double barrel and on it W.J. JEFFERY & Co. Ltd. was written. He stated that the gun was taken into possession, vide memo, Ex.PE, after being recorded at the instance of accused. In his cross-examination, he has stated that the spot is at a distance of 35 KM from Police Station, Theog. He stated that no quarrel took place between the accused and his wife on 28.5.2010, when accused went to the house of his relatives. However, it is correct that there is no statement of any witness to this effect. He stated that the accused did not make any disclosure statement. He denied the suggestion that the finger prints were not taken by him from the gun. He stated that he cannot tell, if a person

fires a gun shot from 12 bore gun, then fire residue will stick to his hands. There was no hand wash of the accused for determining gun shot residue. He stated that the accused was got medically examined in the intervening night on 29/30.5.2010. He stated that he remained present there at the spot till 8:45 PM and came to Police Station, Theog and reached there 11:30 PM.

14. After analyzing the above record, including the evidence of the parties and exhibits, it is clear that the following circumstances emerge for consideration :

a) The deceased used to request the accused not to take liquor, but the accused never listen to her. Rather, he resorted to her beatings after taking liquor.

b) The complainant, Rakesh Kumar, who was about to take bath in the adjoining bathroom on hearing gun shot and cries of his mother, immediately, came out and saw that accused was standing at the door of kitchen with a gun in his hands.

c) The deceased while in the lap of Nirmla Devi, PW-4, made a dying declaration to the effect that the accused killed her.

d) The accused made disclosure statement, while in police custody and got recovered a gun as well as the used cartridge in the presence of witnesses.

15. In the present case, family members are the best persons to depose about the affairs of the family. Complainant, Rakesh Kumar (PW-1) has categorically stated that accused, his father, is a dead drinker and there used to be quarrels on this ground between his parents. He has further stated that about two years before, a quarrel had taken place and thereafter, his mother left the house and went to the house of her parents. She returned back only when a compromise was effected in the presence of Pradhan and other respectable persons. PW-7, Ishwari Devi, mother of the deceased has also stated that her daughter and the accused remained happy for 8-9 years and thereafter, accused-Kamla Nand, started quarreling with her and he used to beat his wife after taking liquor. Further, about two years before this incidence, her daughter was beaten by the accused and then, she came to her house. She has further stated that the matter was settled in the Panchayat by way of written compromise in the presence of Vidya Sagar, Pradhan. Nirmla Devi (PW-4), who is *devrani* (sister-in-law) of the deceased and resided in the same building, has also deposed that the matter regarding quarrels between the accused and his wife was taken by the Panchayat and conciliation was effected pursuant to the assurance of the accused, that he would not take liquor in future and not to beat his wife. PW-3, Vidya Sagar, Pradhan of Gram Panchayat, Dharkundru, has also stated that accused had beaten his wife, and the deceased, getting annoyed with his behaviour, had gone to the house of her parents. He has further stated that he had gone to the house of the parents of the deceased and got the matter conciled pursuant to which, she joined the company of the accused. Complainant, Rakesh Kumar (PW-1), elder son of the accused and his statement was recorded during trial of the case on 13.12.2010. He has stated that on 28.5.2010, his father left the house around 6:00 PM without telling anything and he did not return even during night. On 29.5.2010, his brother Virender, went to graze cattle, whereas, mother was preparing food in the kitchen. He has further stated that at about 7:30 AM, when he was in the bath room to take bath, he heard gun shot and cries of his mother "*Mar Diya*" from kitchen side. He has elaborated his statement and stated that he came out of the bathroom and found that his father (accused) was standing just outside the door of the kitchen with gun in his hands. Further, when he went to kitchen, he saw his mother lying on the floor and a gun shot had

hit her on the back. He made a call loudly to his brother, who was grazing cattle in a nearby fields. He has further stated that on hearing gun shot, his uncle Khem Raj and aunt, Nirmla (PW-4) came there and immediately thereafter, his brother Virender Verma (PW-2) came. He has stated about the arrival of police to the spot and making to them, statement Ex.PA. This is what, he has deposed to about the material aspects of the case, i.e. about the person, who killed his mother. It is evidently clear that if his statement is accepted as correct, it leaves no doubt that it was the accused who, killed his wife with gun shot.

16. Statements of PW-1, Rakesh Kumar and PW-2, Virender Verma, also show that their versions are true, they had spoken truth and nothing else, so their versions are fully reliable and trustworthy. PW-2, Virender Verma, has specifically stated that he had gone to forest for grazing cattle, thereafter, when he came home, he had to go to School. In villages, generally children do domestic works before going to the School. His statement is that he was grazing cattle in the field and the forest is adjoining to the field, he reached back within two minutes and found his father standing there and mother lying unconscious. Similarly, statement of PW-1, Rakesh Kumar, is trustworthy, reliable and there is no reason, whatsoever, to discard his version. It is not in dispute that the complainant was family member of the accused and he was residing in that house at the relevant point of time. His presence in the house was natural. The incidence has taken place in the early hours of the morning around 7:30 AM and it is quite natural that at that time people used to take bath. Site plan Ex.PW21/B, prepared by SI Ramphal, Investigating Officer (PW-21) depicts that bathroom at point 'j' is adjoining to kitchen and one of the wall between the two is joint. The distance between the doors of the kitchen and the bathroom is just 8 feet. The wall between the kitchen and the bath room there was a '*kachha*' wall, as has been stated by the complainant. So, there is nothing doubtful, in the deposition of the complainant that he heard the gun shot and the cries of his mother in the bathroom. There was nothing unusual and unnatural if the complainant immediately came out of the bathroom and rushed towards the kitchen. The distance between the doors of kitchen and bathroom is just 8 feet and it would have been covered by the complainant within a second. The complainant, immediately came out of the bathroom on hearing gun shot. He saw his father standing at the door of kitchen. No other person was found standing with him at that time. The accused was alone, therefore, there is no ground to believe that some other person might have used the gun and committed the crime. PW-2, Virender Verma, younger son of the accused was studying in a School. He has stated that on 29.5.2010, at about 7:00 AM, he went to nearby field to graze cattle and on the loud call, at about 7:30 AM, of his brother, that father had killed the mother, he came to house and saw the accused on the stairs with a gun. His statement has been disputed by the defence on the ground that he was a student of a Senior Class at that time and he could not have afforded to graze cattle, that too in the morning, when he was also required to go to School. There is substance in the defence. His statement shows that he, his aunt, Nirmla Devi, PW-4 and Uncle Khem Raj, reached the place of incidence almost simultaneously, within a minute or two. The important thing to take note of his statement is that he had seen his father with a gun on the stairs, shown at point 'm', which connect the upper floor of the building with court yard. So, it is evident that after committing crime, the accused tried to flee *via* these stairs, shown at point 'm' and he was seen with gun by Virender Verma (PW-2) at that point of time. The mere fact that Nirmla Devi (PW-4), has not supported the prosecution case on the point that she had seen the accused standing with a gun outside door of the kitchen, does not dilute the statement of Virender Verma (PW-2). The accused was having sufficient time to conceal the weapon after committing the crime, as everyone was busy looking after the deceased, who may be unconscious at that time and healing her wound. So, we do not find any force in the arguments of learned counsel appearing on behalf of the appellant that he was having no time to conceal the recovery of weapon, on this disclosure statement is not believable.

Rather, disclosure statement made by the accused leading to the recovery of weapon is in the presence of witnesses and duly proved on record. The recovery of weapon is a fact, which is proved by the prosecution on record. At the same point of time, the accused has purchased cartridges. FSL report shows that the cartridge was fired from the gun and it was owned and possessed by the accused. The dying declaration of Kanta Devi-deceased to her *'devrani'* when she was lying in the kitchen. Points to her husband only as the Hindu ladies do not refer their husbands by names, whenever their reference comes in a talk. They have devised an easiest expression to refer them i.e. '*Inhone'*. The deceased had sufficient time to see the accused, because it was a broad summer day and the accused was very close to her i.e. within a gap of 02 mtrs. Therefore, when she told Nirmla Devi (PW-4) "*Inhone Mujhe Maar Diya",* she clearly conveyed that it was her husband, who killed her with gun shot. PW-4, Nirmla Devi, had heard the cries and weeping of Rakesh, immediately after the gun shot as also of his making call to his brother Virender. She has further stated that Virender also reached the spot almost simultaneously with her, which also shows that Virender Verma (PW-2) was not present in the house, when the incidence had happened. This belies that defence plea that expression '*inhone'* is referable to Rakesh and Virender also. Nirmla Devi (PW-4), sister-in-law of the deceased that she always considered the deceased as her elder sister. So, there were reasons for the deceased to confine in her and tell what had happened to her. So, there is no vagueness or ambiguity in dying declaration and it necessarily refers to the accused alone. There is due corroboration of the dying declaration on material particulars of the case i.e. presence of accused at the door of the kitchen with gun by Rakesh Kumar (PW-1) and death of the deceased on account of gun shot etc. The wife of the accused was fired at about 7:30 AM on 29.5.2010, when she was in the kitchen and preparing food. The accused was found with a gun in his hands outside the kitchen, by none else, but his son Rakesh Kumar. The deceased told few minute, thereafter her sister-in-law, that she had been killed by her husband. The accused was not present in the house on the previous night, but his presence on the spot at the relevant point of time is proved. The injuries were found sufficient in the ordinary course of things to cause death. Strange is the human behaviour and a person may resort to heinous crime for small and trifling matters. The accused wanted to lead free and unbridled life and did not like day-to-day interference of his wife in matters relating to liquor etc. and for this reason, he went to the extent of killing her. The accused used a gun from a very short distance and fired at his wife, who received gun shot and died. The intention to kill his wife, on the part of the accused is very evident on record. The accused, admittedly, was granted licence Ex.P1, in respect of double barrel gun bearing No.34535 W.J. Jeefary for self/crop protection by the competent authority. He used it, as is evident from the statement of Dr. Nasib Singh Patial and the report of FSL, Ex.PW9/A, for unlawful purpose. Therefore, accused committed the offence within the ambit of Section 27 (1) of the Act.

17. In view of the above facts and circumstances of the case, it is amply clear that the prosecution has proved the guilt of the accused conclusively and beyond the shadow of reasonable doubt. The only conclusion is that it was the accused, who has killed his wife by firing gun shot with his licencee gun, knowingly fully well in all probabilities that the gun shot will cause death of his wife (Kanta Devi-deceased).

18. In our considered view, the prosecution has been able to prove the guilt of the accused, beyond the shadow of reasonable doubt, by leading clear, cogent, convincing and reliable evidence. We, thus, do not find any merit in this appeal, which is accordingly dismissed. Pending application (s), if any, also stand (s) disposed of.

19. Copy of this judgment be send to the convict free of cost, through DGP (Prisons), as prayed for by Mr. Rajesh Mandhotra, learned Legal Aid Counsel.

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

Balbir Singh ...Appellant
Versus
State of Himachal Pradesh & Ors. ...Respondents.

RSA No.654 of 2012.
Reserved on: 26.9.2018.
Date of Decision : 24th October, 2018.

**Specific Relief Act, 1963-** Section 34 - Suit for declaration and mandatory injunction – Correction of date of birth in Service Records and Matriculation certificate – Trial Court dismissing suit and District Judge dismissing plaintiff's appeal also - RSA – On facts, none of witnesses could tell exact date of birth of plaintiff - No other document proved on record qua date of birth claimed by him as being the actual date of birth – Held, suit/appeal rightly dismissed by lower Courts. (Paras-13 & 15)

**Indian Evidence Act, 1872-** Section 35 -Entries in voter & ration cards – Evidentiary value – Held, these documents merely show approximate age of person in a given year without indicating actual date of birth. (Para-13).

For the appellant : Mr. Ajay Sharma, Advocate.
For the respondents : Mr. Ashwani Sharma and Mr. P.K. Bhatti,
Additional Advocate Generals, for respondents No.1 to 3, 5 and 6.
Ms. Manisha Thampta, Advocate vice
Mr. Kuldip Singh Rathore, Advocate, for respondent No.4.
Mr. Malay Kaushal, Advocate vice
Mr. Yudhbir Singh Thakur, Advocate, for respondent No.7.
Mr. Vijay Arora, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

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**Chander Bhusan Barowalia, Judge.**

By way of the present appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Kangra at Dharamshala, in Civil Appeal No.67-I/XIII/2011, dated 5.9.2012, vide which, the learned lower Appellate Court, has affirmed the judgment and decree passed by the learned Civil Judge (Junior Division) Indora, District Kangra, in Civil Suit No.161/2007, dated 22.11.2011.

2. Material facts necessary for adjudication of this Regular Second Appeal are that appellant/plaintiff (hereinafter referred to as 'plaintiff') maintained a suit for declaration against the respondents/defendants (hereinafter referred to as 'defendants') alleging that plaintiff is an employee of Engineers India Limited, New Delhi i.e. defendant No.8, which is under the Ministry of Petroleum & Natural Gas and serving as Senior Manager. The plaintiff averred that his date of birth, as per service records has been recorded as 10.4.1962. Reference has also been made in the plaint regarding visit to Haridwar on the occasion of death of plaintiff's grandfather and recording of his age by the concerned Purohit. Reference

is also made in the plaint qua his date of birth as 23.4.1964 in the identity card issued by the Panchayat Officer as well as Ration Card issued to plaintiff's by Food & Supply Officer. It is further pleaded that his date of birth recorded in Government Primary School, Bari Kandrori, District Kangra, was 2.1.1963. The plaintiff moved an application, under Section 13 (3) of Registration of Births and Deaths Act, before Sub Divisional Magistrate, Nurpur and the said application was forwarded to defendant No.3, who directed Executive Magistrate i.e. defendants No.5 & 6 to issue birth certificate on the basis of matriculation certificate to the plaintiff. Plaintiff also issued a notice to the said authorities, under Section 80 of the Code of Civil Procedure and ultimately invoked the jurisdiction of Civil Court and by virtue of present suit seeks declaration to the effect that his actual date of birth is 23.4.1964 and date of birth has been wrongly recorded in his service record as 10.4.1962, which needs to be corrected. In addition, mandatory injunction is also sought directing defendants No.1 & 3 to issue birth certificate to plaintiff showing his date of birth, as 23.4.1964 and to issue matriculation certificate.

3. Defendants No.1 to 3, 5 & 6 filed joint written statement whereby all the allegations of the plaintiff has been denied. The claim of the plaintiff on the basis of record maintained by Purohit at Haridwar is not sustainable and the plea regarding Identity Card and Ration Card is also vague, since it reflects age of the plaintiff, at a given point of time, without indicating actual date of birth. The plaintiff could not produce any proper proof regarding his different date of birth, as claimed by him and accordingly his application, under Section 13 (3) of Registration of Births and Deaths Act was rightly dealt with. Separate written statement was filed by defendant No.7 i.e. Punjab School Education Board, the authority which issued the matriculation certificate, which is the prime proof of date of birth. They have no knowledge regarding claim of the plaintiff that his date of birth is 23.4.1964. Defendant No.7 further averred that they cannot change the date of birth in the matriculation certificate without orders of the competent authority.

4. From the pleadings of parties, the learned trial Court framed following issues :

"1. Whether the date of birth of the plaintiff recorded in the matriculation certificate as 10.4.1962 is wrong and incorrect and liable to be corrected, as alleged ? OPP.

2. Whether the plaintiff is entitled to the relief of declaration that his date of birth as 23.4.1964, as alleged ? OPP.

3. Whether the plaintiff is entitled to the relief of mandatory injunction against the defendants regarding correction of date of birth as prayed ? OPP.

4. Whether this Court has no jurisdiction to adjudicate the *lis* ? OPD.

5. Whether the plaintiff has no locus standi to file the instant suit ? OPD.

6. Whether the suit is not maintainable in the present form, as alleged ? OPD.

7. Whether the plaintiff has no cause of action to file the present suit ? OPD.

8. Whether the plaintiff is *estopped* by his act and conduct to file the present suit ?OPD.

9. Whether the suit is barred by limitation ? OPD.

10. Whether the suit is bad for non-compliance of Section 80 (2) of the CPC ? OPD.

11. Relief."

5. The learned trial Court after deciding Issues No.1 to 10 in negative, dismissed the suit.

6. Feeling aggrieved thereby the plaintiff maintained first appeal before the learned District Judge, Kangra at Dharamshala, assailing the findings of learned Court below being against the law and without appreciating the evidence and pleading of the parties to its true perspective. The learned lower Appellate Court affirmed the findings of the learned Court below. Now, the appellant has maintained the present Regular Second Appeal, which was admitted for hearing on 7.3.2013 on the following substantial questions of law:

"1. Whether both the impugned judgments and decrees passed by Courts below stand vitiated on account of mis-reading and mis-appreciation of Section 13 (3) of the Registration of Births and Deaths Act, 1969?

2. Whether rejection of application for appointment of commission by trial Court vitiated the impugned judgment and decree and, in turn, judgment and decree passed by ld. District Judge also, as despite taking specific ground, same was not addressed ?

3. Whether dismissal of application under Order 41 Rule 27 CPC by ld. First Appellate Court vitiated the impugned judgment and decree ?

4. Whether impugned judgments and decree stand vitiated on account of complete mis-reading and mis-appreciation of statements of PW1 to PW6 and mis-reading and mis-appreciating documents, Ex.PW6/G (yellow card), Ex.PW6/E (Ration Card of the plaintiff), Ex.PW6/F (Ration Card of the father of the plaintiff), Ex.PW6/C and Ex.PW6/D (voter lists) and Ex.P1/A and Ex.P1/B ?"

7. Learned counsel appearing on behalf of the appellant has argued that the learned Courts below have committed illegality in not taking the date of birth of the appellant, as 1964, as by no imagination, a person will pass matriculation at the age of 19 years, but always a person passes matriculation at the age of 17 years. To further emphasize, learned counsel appearing on behalf of the appellant has submitted his written arguments, relevant portion of which is quoted hereinbelow :

"The appellant-plaintiff sought declaration by filing suit that he is entitled to get his birth entry recorded in the birth register maintained in the office of Chief Medical Officer-cum-District Registrar, Births and Deaths, Kangra-defendant No.2 and is entitled to get his date of birth certificate issued depicting the date of birth as 23.4.1964. The said suit was filed on the premise that application dated 9.5.2007, as per provisions of Section 13 (3) of the Registration of Births & Deaths Act, 1969, came to be filed before respondent No.2, but without any results and in the suit consequential relief of mandatory injunction is also prayed, directing defendants No.1 to 3 to issue date of birth certificate and defendant No.7 to carry out necessary corrections in

matriculation certificate and furthermore mandate to defendant No.8 to effect the change of date of birth in service records.

Defendants came with the plea that date of birth of the plaintiff, as per letter of Director of Health Services be taken as 10.4.1962. Defendant No.4 filed written statement stating that date entered in the matriculation certificate is an authentic proof and said defendant is in agreement with decision taken by defendant No.3.

When the matter came up for hearing before this Court, directions came to be passed to the authorities concerned to produce the register maintained for the purpose as per provisions of the Act by defendant No.2 and defendants No.5 & 6 to produce on record action on the application of plaintiff dated 9.5.2007. As per the provisions of Section 13 (3) of the Act, if are gone into on the request of the appellant/plaintiff, in the event of entry of birth being not there from the date of occurrence within a period of one year, an application for the purpose can be filed, as is in the case in hand, dated 9.5.2007 and as per provisions of the Act and Rules, inquiry is required to be made, in the case in hand by defendant No.5 for verifying the correctness of the birth on payment of prescribed fees and thereafter the same is required to be registered by defendant No.2. The ends of justice will be met in case, at this stage only directions are issued to defendant No.5 to conduct an independent inquiry *de hors* of whatever evidence has come on record of this case and conclusions so arrived at may be ordered to be forwarded to defendant No.2 for making an entry, that will clinch the issue.

The judgments and decrees impugned in the present appeal stand vitiated on account of; a) non consideration of application dated 9.5.2007 filed by the plaintiff inconsonance with provisions of Section 13 (3) of the Act and making entry on the directions of Director of Health Services, who in fact, exceeded the jurisdiction vested in him, thereby vitiating the entry, as made with respect to the birth of appellant/plaintiff; b) affidavit of the mother of the plaintiff in examination-in-chief, being the star witness was on records, but despite that courts below did not examine her in witness box and the fault being of the court, as per settled law, in the case in hand, appellant/plaintiff may not be allowed to suffer and her evidence may be read in evidence. An application having been filed with the request for appointment of a Commission to verify affidavit of Mukesh Bhardwaj, but dismissal of the said application vide order dated 26.10.2010 being contrary to the provisions of Order 26 Rule 4A of the Code of Civil Procedure and said decision again vitiated the impugned decision.

An application, under Order 41 Rule 27 CPC as filed, vide para-16 of the impugned judgment having been dismissed by learned First Appellate Court below, but contrary to the said provisions as case of the appellant/plaintiff is covered per order 41 Rule 27 (1) of CPC."

8. On the other hand, learned Additional Advocate General has argued that the date of birth, as mentioned in matriculation certificate of the appellant is correct, as the same has

been recorded, as per the statement of guardian, who admitted the appellant in School and as per the appellant, few years ago, he admitted his date of birth and now, he was nearing to retire, he has maintained the present suit.

9. Learned counsel appearing on behalf of the respondent has vehemently argued that there is no proof with respect to the alleged date of birth and his date of birth has relied upon, which appears in the matriculation certificate is the correct date of birth.

10. In rebuttal, learned counsel appearing on behalf of the appellant has argued that date of birth of the appellant may be corrected, as otherwise the appellant suffered irreparable loss and the findings of the learned Courts below, which are perverse may be set aside.

11. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

12. In order to prove its case, PW-1, Sudesh Kumari, deposed that she has brought the School record pertaining to admission entry of plaintiff-Balbir Singh. PW-2, Rakhi Devi, deposed that Amriti Devi, gave birth to the plaintiff at her house. She deposed that plaintiff was born to her daughter on 23.4.1964. In her cross-examination, she deposed that she does not know the name of calendar months in English nor in local dialect. She has further deposed that she cannot recollect the date, month and year of birth of her grand-son i.e. plaintiff. She deposed that she cannot recollect the date, month and year of birth of her grand son i.e. plaintiff. PW-3, Munshi Ram, deposed that at the time of birth of the plaintiff, he was present and the plaintiff was born on 23.4.1964. In his cross-examination, he deposed that he does not remember the date of birth of plaintiff. PW-4, Malhar Singh, deposed that plaintiff was born in the house of his father-in-law, Ram Lal and stated that date of birth of the plaintiff is 23.4.1964. He deposed that he does not know on which date, he was born. He deposed that he has six children and he cannot tell the date of birth of each of them or any of them. In his cross-examination, he deposed that he is illiterate and does not know as to when his son (plaintiff) was born. PW-5, Noori, deposed that as per the School admission register, date of birth of the plaintiff is recorded, as 10.4.1964 and admission form Ex.PW5/A, which is the admission register, shows the date of birth of plaintiff as 10.4.1962. PW-6, Balbir Singh, deposed that the actual date of birth is 23.4.1964 and date of birth recorded in matriculation certificate, as 10.4.1962 is wrong. In his cross-examination, he deposed that he joined the service in the year 1987. He deposed that at the time of joining, he mentioned his date of birth, as 10.4.1962. DW-1, Ashwani Kumar, deposed that as per public notice Ex.D-5, it is stated by the Education Board that any correction in the matriculation certificate should be applied within five years of the declaration of result. Further, thirty days were given as per public notice Ex.D-5. As per Ex.D-4, which is notification of defendant No.7, it is mentioned that correction in date of birth shall only be made within two years from the date of declaration of result by the Board, but not beyond five years in any case.

13. From this evidence on record, it is clear that none of the witnesses could state exactly what is the date of birth of the appellant. Even, PWs 2 to 6, in their cross-examination could not say about the date of birth of the appellant. There is no other proof brought on record, which substantiate the allegations of the plaintiff that he was born on 23.4.1964 and date of birth recorded in the matriculation certificate i.e. 10.4.1962, are wrong. The plaintiff has to prove his case and no decree can be granted, which is just on the basis of surmises and conjectures. It is quite clear that the plaintiff seeking declaration regarding his date of birth. The plaintiff assailing date of birth, which is 10.4.1962, as recorded in his matriculation certificate and also recorded in his service record with

defendant No.8. The plaintiff averred that the said date of birth recorded in matriculation certificate is wrong and he was actually born on 23.4.1964. It is a settled law that the date of birth recorded in the matriculation certificate is the best evidence regarding date of birth. The date of birth, as recorded in matriculation certificate of plaintiff is 10.4.1962, which is also evident from Ex.PW5/A, which is the admission register proved on record by the said witness. The date of birth recorded in the matriculation certificate is wrong and actual date of birth is different. The plaintiff has not proved on record any document showing his date of birth, as 23.4.1964. The plea that voter cards, ration cards reflect his age, as 41 years in particular year is not sufficient to indicate the date of birth of plaintiff, as 23.4.1964. These documents merely show that approximate age of the plaintiff in a given year without indicating the actual date of birth. No document reflects the date of birth of the plaintiff, as alleged by him to be 23.4.1964. PWs 2 to PW4 have stated in their cross-examination that they do not know about the actual date of birth of the plaintiff. There is no evidence on record on behalf of the plaintiff to show his actual date of birth, as 23.4.1964. It is also clear that the present suit was filed in the year 2007, whereas the plaintiff has joined services in the year 1987. There is considerable delay in filing the plaint also. In these circumstances, this Court finds that the judgments and decrees passed by both the learned Courts below are in accordance with law. Substantial question of law No.1, is answered holding that the findings recorded by the learned Courts below are after appreciating the evidence properly and to its true prospective and Section 13 (3) of the Registration of Births and Deaths Act, 1969 is correctly interpreted. Substantial question of law No.2, is answered holding that rejection of the application for appointment of Commission has not vitiated the appeal, as the Court has not to create evidence. Substantial question of law No.3, is answered holding that the learned lower Appellate Court has dismissed the application, under Order 41 Rule 27 of the Code of Civil Procedure, as there was no evidence, which the plaintiff could not produce without exercising due diligence and so, this Court finds that there is no infirmity with the rejection of application, under Order 41 Rule 27 of the Code of Civil Procedure. Substantial question of law No.4, is answered holding that the judgments and decrees passed by the learned Courts below are after appreciating the evidence and pleadings correctly and other documents i.e. Ex.PW6/E to Ex.PW6/G, as there is nothing on these documents, which show that date of birth of the appellant is not recorded, as averred by the plaintiff, as there is no positive proof with respect to the date of birth, as averred by him. The learned Courts below have not mis-appreciated and mis-interpreted the documents, Ex.PW6/E to Ex.PW6/G.

14. In view of the above discussion, the appeal of the appellant is without merit, deserves dismissal and is accordingly dismissed. In the peculiar facts and circumstances of the case, parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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**BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.**

Neer ...Appellant.

Versus

State of Himachal Pradesh . ...Respondent.

Cr. Appeal No.656 of 2017.

Reserved on : 29.10.2018.
Date of Decision : 05.11.2018.

**Narcotic Drugs & Psychotropic Substances Act, 1985-** Section 20- Recovery of charas- Proof – Prosecution alleging recovery of commercial quantity of charas by police from bag carried by accused – Trial Court convicting and sentencing accused for said offence – Appeal against – Accused alleging mis-appreciation of evidence by trial court – On facts, found that (a) Independent persons at spot available but not joined in process of search and seizure (b) Statements of police witnesses contradictory on material particulars (c) Delayed delivery of Special report to Competent Authority – Held, recovery of contraband from accused as alleged by prosecution highly suspicious – Appeal allowed – Conviction and sentence set aside. (Paras. - 17 to 21).

***Cases referred:***
State of Punjab vs. Hari Singh and others (2009) 4 Supreme Court Cases 200

For the appellant : Mr. Inder Rana, Advocate.
For the respondent : Mr. Vikas Rathore, Additional Advocate General
with Mr. J.S. Guleria, Deputy Advocate General.

The following judgment of the Court was delivered:

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**Chander Bhusan Barowalia, Judge.**

The present appeal is maintained by the appellant/accused/convict (hereinafter referred to as "the accused"), laying challenge to judgment dated 12.7.2017, passed by learned Special Judge-II, Kinnaur at Rampur Bushehar, H.P., in Sessions Trial No.1-R/3 of 2014/16, whereby the accused was convicted for the commission of the offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act").

2. The key facts necessary for adjudication of this appeal can tersely be summarized as under:

On 2.2.2014 at about 4:15 PM near Bhangidwar on Chawai road, District Kullu, accused was found in exclusive and conscious possession of 1.600 Kg. of *charas*, when PW-9, SI Bhag Singh alongwith other police officials were traveling in official vehicle bearing No.HP34A-3830, on routine patrolling duty. At that time, accused came from Chawai side and was going towards Anni, he was holding a bag of green colour in his right hand, when he noticed the police party, he got perplexed and turned back. Thereafter, he was apprehended by the police party and on inquiry, he disclosed his name, as Neer-accused. Investigating Officer, got suspicion regarding the possession of narcotic substance and on asking about the contents of bag, he could not give any satisfactory explanation. The accused was apprised of his legal right to be searched either in the presence of Magistrate or any Gazetted Officer, vide memo Ex.PW7/A, however, the accused consented that he wants to give search to the police party on the spot. The place was secluded and no independent witness was available, so PW-9, Bhag Singh, was directed to bring independent witness from Chawai side, but he returned back after 20 minutes, but no independent witness could be found. Thereafter, PW-9, Investigating Officer, Bhag Singh, associated PW-7, HC Anoop Ram and PW-8 HHC Pritam Singh, both official witnesses gave personal search to the accused, vide memo Ex.PW7/B, but nothing incriminating was recovered in his

possession. Thereafter, the bag of the accused, in which words '*Gagan Basmati Rice*' was scribed, was checked. After opening the zip of bag Ex.PB, black colored substance was found in two transparent polythene bags Ex.PC and Ex.PD, which were wrapped with cello tape. The back colored substance was in the shape of balls and on checking, it was found to be *charas*. It was weighed and found to be 1.600 Kg *charas*. The recovered *charas* alongwith carry bag was put into a cloth parcel Ex.PA and cloth parcel was sealed with six seal impressions of 'O' and seal impression 'O was also taken on separate piece of cloth Ex.PW7/C. Thereafter, Investigating Officer, filled NCB form Ex.PW3/C, in triplicate and sample of seal was also drawn on NCB form. The entire contraband alongwith sample seal and NCB form was taken into possession, vide memo Ex.PW7/D. Thereafter, Investigating Officer, Bhag Singh (PW-9) prepared rukka Ex.PW6/A and sent to Police Station, Anni through PW-6, Constable Prittam Singh and after receipt of rukka in the Police Station, on the basis of which, FIR Ex.PW6/B was registered. Investigating Officer, Bhag Singh (PW-9) prepared site plan Ex.PW9/A, recorded the statement of witnesses and arrested the accused, vide memo Ex.PW9/B. Thereafter, Investigating Officer, produced the accused alongwith case property to PW-6, Rohit Mrigpuri, who resealed the parcel with three seal impression of 'X'. However, in the relevant column in NCB form and impression of seal 'X' was also taken on separate piece of cloth Ex.PW6/C and thereafter, he deposited the entire case property alongwith sample seals and NCB form in Malkahana Incharge, PW-3, MHC, Pushap Raj. On 3.2.2012, MHC, Pushap Raj, handed over the case property to PW-1, Constable Jaswant Singh to deposit in SFSL, Junga, vide RC Ex.PW3/B. PW-1, Constable Jaswant Singh deposited the case property in SFSL, Junga, and handed over the receipt to PW-3, Pushap Raj. PW-9, SI Bhag Singh, has also sent Special Report Ex.PW2/B to Additional Superintendent of Police, Kullu, through HHC Darshan Singh. The report of SFSL, Junga, Ex.PX, was received in Police Station Anni, in which, the recovered substance was found to be *charas*. After completion of investigation, *challan* was prepared and presented in the Court.

3. The prosecution, in order to prove its case, examined as many as nine witnesses. Statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, wherein he pleaded not guilty. The accused lead evidence in his defence.

4. The learned Trial Court, vide impugned judgment dated 12.7.2017, convicted the accused for the commission of the offence punishable under Section 20 of the NDPS Act, and sentenced him to undergo rigorous imprisonment for ten years and to pay fine of rupees one lac and in default of payment of fine, accused was further ordered to undergo simple imprisonment for a period of three months.

5. Mr. Inder Rana, learned counsel for the accused/appellant has argued that the judgment of conviction passed by the learned Trial Court is complete mis-appreciation of evidence on record. He has argued that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. In support of his arguments, he has also relied upon the judgment in ***State of Punjab vs. Hari Singh and others (2009) 4 Supreme Court Cases 200,*** on this aspect.

6. Conversely, Mr. J.S. Guleria, learned Deputy Advocate General has argued that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt and thus, well reasoned judgment of learned Trial Court is not required to be interfered with.

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

8. PW-1, Constable Jaswant Gupta, deposed that on 3.2.2014, seal parcel having 10 seal impressions 'O' and three seals of seal impression 'X' alongwith docket and documents was handed over to him by MHC Pushap Dev (PW-3) at FSL, Junga and he, after depositing the same, handed over the receipt to MHC.

9. PW-2, HHC Kashmi Ram, deposed that while he was working as Reader to Additional Superintendent of Police, Kullu on 4.2.2014, Special Report with respect to case FIR No.12/14, was received by Additional Superintendent of Police, Kullu, Nihal Chand, who after making endorsement on the spot handed over Special Report to him and he made entry with respect to Special Report in the register at Sr. No.14, copy of the relevant entry of the register, Ex.PW2/A. In his cross-examination he has denied that there was delay in sending Special Report, which was not received by the Office of Deputy Superintendent of Police, Anni.

10. PW-3, ASI Pushap Dev, who remained posted as MHC at Police Station, Anni, has deposed that he received sealed parcel duly sealed with 10 seal impressions of seal 'O' and three seals of seal impressions 'X', NCB-1 form in triplicate and specimen seals 'O' and 'X' for their deposit in Malkhana and after entering them at Sr. No.343 in the Malkhana register and had deposited the case property safely. He exhibited the relevant entry of abstract, Ex.PW3/A. He deposed that on the next date i.e. 3.2.2014, he had sent sealed parcel alongwith NCB-1 form in triplicate, sample seals 'O' and 'X' for their safe deposit at FSL, Junga through Constable Jaswant Gupta (PW-1), after preparing Road Certificate and filling the relevant NCB form. Constable Jaswant Gupta, after depositing the same in FSL, Junga and handed over the seal to him.

11. PW-4, Narender Kumar, who has partly investigated the matter and recorded the statement of ASI Pushap Dev (PW3) and Constable Jaswant Gupta (PW-1). He deposed that he recorded the statement of witnesses as per their version. PW-5, HHC Darshan Singh, stated that he has taken Special Report to ASI Bhag Singh on 4.2.2014.

12. PW-6, Inspector Rohit Mrigpuri, deposed that on 2.2.2014, at about 6:00 PM, on receipt of *rukka* Ex.PW6/A, from PSI Bhag Singh through Constable Pritam Singh, he registered FIR Ex.PW6/B, which bears his signatures in red circle 'A'. He deposed that he made endorsement in rukka Ex.PW6/A, which bears his signatures. Thereafter, he deposed that on the same day, at about 9:15 PM, accused alongwith the case property, NCB-1 form in triplicate and sample seal 'O' were produced before him by PSI Bhag Singh. The seal impressions having 10 seals of impression 'O', stated to be containing *charas*. Thereafter, he resealed the seal impression 'X' and filled in the relevant column of NCB-1 form in triplicate, Ex.PW3/C and put impression of seal 'X'. He took specimen of seal 'X' which was taken on a piece of plain cloth and is Ex.PW6/C and deposited the case property with MHC at the Police Station. He further deposed that he prepared *challan* and presented the same in the Court. He has stated in his cross-examination that he has not associated any witness while resealing the sample neither he weighed the parcel.

13. PW-7, HC Anoop Ram, deposed that on 2.2.2014, he alongwith ASI Bhag Singh, LHC Hans Raj, Constable Pritam Singh had gone towards Gugra Chawai for routine patrol checking in official vehicle bearing registration No.HP34-A-3830, which was being driven by Constable Mukesh Kumar, when they reached near Bhangi Dwar, at about 4:15 PM, one person came towards them from Chawai side, on foot carrying a bag on his right hand and noticed the police, he started fleeing towards Chawai side, the man was over powered by the police official. The police enquired about his whereabouts and disclosed his name, as Neer-accused, present in the Court on that day. He has asked the accused that he being suspected that he was carrying narcotics substance, but the accused could not give

any satisfactory answer. The accused opted to be searched before the police party and memo regarding option Ex.PW7/A was prepared. He has stated that there was lonely place and no independent witness was found. Investigating Officer, Bhag Singh (PW-9) sent Constable Prittam Singh (PW-8) to search for independent witnesses, but he could not found independent witness for 20 minutes, when he came back 20 minutes, no independent witness was found. Investigating Officer, Bhag Singh (PW-9) associated Constable Prittam Singh (PW-8), as witness gave personal search to the accused, vide memo Ex.PW7/E and thereafter, the bag of the accused was searched, which was containing two transparent parcels wrapped with cello tape, these two bags were having round shaped black substance, on checking, it was found to be cannabis. On being weighed with electronic weighing machine, it was found to be 1 Kg & 600 grams *charas*, which was again put in the same envelope and bag was put in cloth parcel and sealed with 10 seal impressions 'O'. Impression of seal 'O' was also taken on separate piece of cloth, Ex.PW7/C. Investigating Officer, Bhag Singh (PW-9) prepared NHC form Ex.PW3/C and the same was filled in triplicate and seal impressions 'O' was also drawn. He identified the recovered substance in the Court to be the same. In his cross-examination, he has stated that they started from Police station at 3:00 PM and reached on the spot at 4:15 PM. He has stated that they had gone to Chawai on that day, which is 02 KM away from the alleged place of occurrence. He has denied that there are houses beyond '*nullah*'. He has stated that houses are approximately 02 KM away from the alleged place of recovery. He has admitted that Anni is 12 KM from Chawai by road. He has stated that Constable Prittam Singh (PW-8) went towards Chawai in search of independent witnesses. He has denied that accused was arrested in white Xylo car bearing No.HP-01K-4343, which was being driven by one Govind of Chawai area. He has denied that Govind is indulged in illegal activities under police protection. He has denied that the contraband was recovered from the stereo of said Xylo vehicle.

14. PW-8 HHC Prittam Singh, deposed that he remained posted as Constable General Duty at Police Station, Anni. On 2.2.2014, when he alongwith HC Anoop Ram, LHC Hans Raj, PSI Bhag Singh, had gone towards Shamshar, Gugra and Chawai in official vehicle bearing registration No.HP-34A-3830 driven by Constable Mukesh Kumar, when they reached at Bhangi Dwar, at about 4:15 PM, accused came from Chawai side, the accused was carrying bag in his right hand. On asking the police party, he started running back, whereas, other police officials over powered and caught him. On enquiry, he disclosed his name as Neer-accused and the same person, who was present in the Court on that day. Investigating Officer, Bhag Singh (PW-9) suspected that he was carrying contraband in the bag, so he gave option to be searched before any Magistrate or Gazetted Officer, vide memo Ex.PW7/A. Investigating Officer, Bhag Singh (PW-9) asked him to bring independent witness and went towards Chawai side in search of witnesses, but no independent witness was found and he returned back after 20 minutes. He stated that Investigating Officer, Bhag Singh (PW-9) associated with Anoop Ram (PW-7) as witnesses and gave personal search to the accused, vide memo Ex.PW7/B, which bears his signature at point 'B'. Thereafter, when the accused was searched, cannabis was found in the bag in two transparent bags in the shape of balls, which were scrapped with cello tape. The carry bags were having round shaped substance, on checking, it was found to be cannabis, which was weighed with electronic weighing machine and it was found 1 Kg. 600 grams *charas*. The recovered contraband was put in the same polythene bag and was put in the same manner in that bag and bag was put in the cloth parcel and parcel was sealed with seal impressions 'O' at 10 places. Investigating Officer, Bhag Singh (PW-9) also filed NCB form in triplicate , the sample of seal was also drawn on separate piece of cloth, Ex.PW7/C and the documents were prepared, which bears his signatures and thereafter, Investigating Officer, Bhag Singh (PW-9) prepared rukka Ex.PW6/A and handed over the same to him. He took rukka to

Police Station and handed over to MHC, Police Station, Anni, on the basis of which, FIR was registered. In his cross-examination, he has deposed that there are shops and houses at Gugra. He has stated that Chawai, is situated at approximately 2 KM away from the place of recovery. He has admitted that there are three villages in between Chawai and alleged place of occurrence. He has stated that he does not know how many persons passes during that time. The time between 4:15 PM to 5:30 PM, when they remained on the place of occurrence. He stated that he went to Police Station, on small vehicle by lift, which was on the same place. He stated that he does not know the number and owner of the vehicle. He stated that he does not remember whether Investigating Officer, Bhag Singh (PW-9) had given option to the accused to search before the Police or not. He has denied that accused was apprehended in Xylo vehicle.

15. PW-9, SI Bhag Singh, deposed that he remained posted as Investigating Officer in Police Station, Anni, in the year 2014. On 2.2.2014 at about 4:15 PM, he alongwith HC Anup Ram, Constable Hans Raj, while traveling in a official vehicle bearing No.HP34A-3830, being driven by Constable Mukesh Kumar, were on routine patrolling duty. They noticed that at place Chawai road near Bhangidawar around 4:15 PM, one person coming from Chawai side and was going towards Anni side, he was holding the bag of green in colour in his right hand, on noticing, the police party got perplexed and turned back. On enquiry, he disclosed his name, as Neer-accused and the same person, who was present in the Court on that day. Being suspicion that he was carrying some contraband and on asking about the contents of the bag, the accused was unable to give satisfactory explanation, the accused was apprised of his legal right to search in presence of Magistrate or Gazetted Officer, vide memo Ex.PW7/A. The accused gave his option to search before the police, thereafter, the bag which was being carried by the accused and having words 'GAGAN PURE BASMATI RICE' and was searched after opening the zip of the bag, the black colour substance was found in two transparent polythene bags, which were wrapped by cello tapes. The recovered contraband was weighed alongwith transparent polythene and the cello tape on electronic weighing machine and it was found 1 Kg. 600 grams. The recovered contraband was repacked in the same manner and the same was put in the same green coloured bag and green coloured bag put in cloth parcel. The cloth parcel was sealed with ten impressions of seal 'O'. Sample of seal 'O' Ex.PW7/C, was taken on separate piece of cloth. NCB form Ex.PW3/C in triplicate were filled in on the spot and impression of seal 'O' was put on the NCB form. The seal 'O' after its use was handed over to Constable Prittam Singh (PW-8). The said cloth parcel alongwith sample of seal 'O' and NCB form in triplicate were taken into possession, vide memo Ex.PW7/D. Thereafter, he prepared rukka Ex.PW6/A and sent the same through Constable Prittam Singh to Police Station, Anni. During the course of investigation, he prepared spot map Ex.PW9/A. He also recorded the statement of witnesses, as per their version. The accused was interrogated and arrested vide memo Ex.PW9/B. Thereafter, he proceeded towards Police Station, Anni, on the way near bus stand alongwith the case file. Thereafter, he recorded the statement of Constable Prittam Singh, as per his version. He sent Special Report to Additional Superintendent of Police, Kullu Ex.PW2/B and handed over the case file to Station House Officer, Rohit Mrigpuri, to re-seal the case property and sent the Special Report Ex.PW2/B to Additional Superintendent of Police Kullu, through HHC Darshan Singh. In his cross-examination, he has stated that they reached at the spot 5-10 minutes prior to when they noticed the accused. He stated that there was no prior information. He has stated that there are many curves on the road. He stated that he does not know that there are shortcuts road from Chawai to Anni *via* Khamarala and Shamshur. He stated that accused might be going to some another place and not at Anni. He stated that he prepared site plan on the spot. He stated that as to where Gogra village on the spot map Ex.PW9/A. He admitted that there are 10-15 shops and houses at Gogra Chowk. He also admitted that there are apple orchard

and houses near the alleged spot. He noticed the bag in the hand of the accused at the first instance. He has stated that he does not conduct the personal search of the accused before searching of his bag. He stated that accused voluntarily expressed his consent to be searched by the police present on the spot. He stated that accused did not try to throw away his bag or to run away from the spot. He has further stated that he turned back and tried to run. He has denied that cannabis was recovered from the stereo of Xylo vehicle bearing No.HP01K-4332 driven by Govind Singh. He denied that Bhag Chand son of Het Ram, was also present in the vehicle. He stated that in NCB form Ex.PW3/C, the time of seizure has been stated to be 5:30 PM, thereafter, the time of sending of rukka has been inadvertently written and the seizure was made at about 5:00 PM. He stated that rukka was scribed and sent at about 5:30 PM. He stated that he does not notice any vehicle or any pedestrian on the spot during the proceedings. He stated that he does not remember, who had recorded the statement of Constable Prittam Singh. He has stated that he had instructed Constable Prittam Singh to produce the seal 'O' in the Court.

16. The accused, in his statement, under Section 313 of the Code of Criminal Procedure has denied the case in totality and witnesses have deposed falsely, he is innocent and false case has been planted against him. DW-1, Bhag Chand, deposed that accused dealing with clothes and purchase of garlic in the area. On 2.2.2014, he was going to Shimla, in connection with his treatment of gangrene in Xylo vehicle, one Govind, who was residents of Chawai and he boarded the taxi from Dhar. The accused boarded taxi from Chawai, at a place near Gugra, which is about 3 KM away from Chawai. The police stopped the vehicle and on checking, the police recovered cannabis from the speaker box of stereo of the vehicle. Thereafter, he returned home and Govind remained on the spot and the accused was taken away by the police in another vehicle. In his cross-examination, he has denied that his monthly medical expenses are `2300/- to `4800/-. He further stated that he hired taxi, as his condition was bad. He has stated that he has again agreed to pay `4000/-, as taxi fair to Govind, but he refused to go ahead, as accused was known to him.

17. From this evidence of the prosecution and defence, following points emerge :

a) that there were houses and orchards of the villagers near the place of occurrence, which is admitted by the witness of recovery and Investigating Officer, Bhag Singh (PW-9);

b) As per Investigating Officer, Bhag Singh (PW-9) place known as Gugra is 2 KM away from the place of occurrence;

c) If one has come on foot, there are shortcuts also;

d) Independent witnesses, as per Investigating Officer, Bhag Singh (PW-9) and HHC Prittam Singh (PW-8), could not be associated as they were not available on the spot;

e) PW-8, HHC Prittam Singh, has deposed that he had gone to Police Station from the place of occurrence in a small vehicle, which was on the spot. Investigating Officer, Bhag Singh (PW-9) has deposed that he could not notice, how many vehicles passes through the spot in between 4:00 PM to 5:30 PM, when they were present on the spot;

f) Investigating Officer, as per PW-8, Prittam Singh, has given *rukka* to MHC for registration of FIR, but as per PW-6, Inspector Rohit Mrigpuri, he received *rukka* through Constable Pritam Singh and registered FIR. Investigating Officer, Bhag Singh (PW-9) has stated that he has not given option to the accused to be searched by the police, but PW-7, HC Anoop Ram, has stated

that he does not know whether Investigating Officer, Bhag Singh (PW-9) had given option to the accused that he can be searched by the police or not.

18. Now, in the light of above facts, it is amply clear that independent witnesses were available on the spot, when PW-8 HHC Prittam Singh, has stated that there was a small private vehicle standing on the spot, when Investigating Officer, Bhag Singh (PW-9) has stated that he does not know how many vehicles passes through. PW-7, HC Anoop Ram, PW-8, HHC Prittam Singh and Investigating Officer, Bhag Singh (PW-9) have specifically stated that houses and apple orchards are near by the place. It is a clear case that there is bazaar at place Gugra, at a distance of 2 KM and vehicle was available with the police. Now, when independent witnesses were available, but not associated, even then, if the statement of official witnesses are confidence inspiring, conviction can be based upon their un-shattered testimony. Now, we have analyzed the testimony of police official.

19. As has been discussed hereinabove, PW-8 HHC Prittam Singh, has not given the number of private vehicle, in which time police came from the spot. At the same point of time, he has stated that he does not know, who was driver and owner of the vehicle, which statement is not believable, when he knows each and every count, what has happened on the spot. The delivery of Special Report on the third day to the Additional Superintendent of Police, Kullu and not to Deputy Superintendent of Police, there is a specific suggestion, when Deputy Superintendent of Police, has refused Special Report unexplained, but ignorance of PW-7, HC Anoop Ram, whether Investigating Officer, Bhag Singh (PW-9) has given option to the accused searched before the police officer is also one of the ingredient, which makes the prosecution case unreliable. In these circumstances, we also find that the sample seal with which, parcel was sealed with ten impressions of seal 'O', as per Investigating Officer, Bhag Singh (PW-9) was given to PW-8, Prittam Singh, has deposed that he has asked PW-8, HHC Prittam Singh to bring the seal in the Court. At the same point of time, HHC Prittam Singh, (PW-8) has not stated anything on record, whether the seal is with him or he has lost the seal or whether he has not brought the seal in the Court. Though, non-production of the seal is not such a serious consequence, however, in the present case, when the recovery is suspicious, non-production of seal is to be considered to hold the accused innocent.

20. The arguments of learned counsel appearing on behalf of the parties is considered *viz-a-viz* and the evidence, as discussed hereinabove shows that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and that accused was found in exclusive and conscious possession of 1 Kg. 600 grams of *charas,* as alleged. The statement of police witnesses is not confidence inspiring and are full of contradiction, at the same point of time, independent witnesses, which were abundantly available were not associated and seal was not produced in the Court, makes out a case to set aside the judgment of conviction and sentence passed by the learned Trial Court, as the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt.

21. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and the findings of guilt, as recorded by the learned Trial Court, needs to be set aside. Accordingly, the appeal is allowed and the judgment of the learned Trial Court is set aside. The accused is acquitted and ordered to be released forthwith. Fine amount, if already deposited, be refunded to the accused. Since the accused is in jail, he be released forthwith, if not required in any other case.

22.The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned in conformity with this judgment forthwith.

23.In view of the above, the appeal, so also pending application (s), if any, stand (s) disposed of.

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

1. **CMPMO No. 439 of 2018**
   M/s Brijsons Hetreat .....Petitioner
   Versus
   The Himachal Pradesh Micro, Small and Medium Enterprise, Facilitation Council and Anr. .....Respondents

2. **CMPMO No. 442 of 2018**
   Himachal Wire Industries Pvt. Ltd. .....Petitioner
   Versus
   The Himachal Pradesh Micro, Small and Medium Enterprise, Facilitation Council and Anr. .....Respondents

3. **CMPMO No. 444 of 2018**
   M/s TCM Steels (India) .....Petitioner
   Versus
   The Himachal Pradesh Micro, Small and Medium Enterprise, Facilitation Council and Anr. .....Respondents

CMPMO Nos. 439, 442 and 444 of 2018
Decided on 06.11.2018

**Micro Small and Medium Enterprises Development Act, 2006**- Section 15 – Held, for supply of goods or services, buyer bound to make payment for same to seller on or before date agreed upon inter se parties – Period agreed upon for payment cannot exceed forty five days from acceptance or deemed acceptance of goods or services by buyer. (Para 11).

**Micro Small and Medium Enterprises Development Act, 2006** - Section 16 – Non-payment – Interest on payment – Award thereof – Held, where buyer fails to make payment to seller for supply of goods or services in consonance with provisions of section 15 of Act, buyer shall notwithstanding anything contained in agreement or any law for time being in force be liable to pay compound interest with monthly rests from date agreed upon at rate three times of bank rates notified by Reserve Bank. (Para. 11).

**Micro Small and Medium Enterprises Development Act, 2006**- Section 18 – Dispute as to payment – Adjudication thereof – Held, in case of dispute between buyer and seller regarding amount due, parties shall make reference to Micro and Small Enterprises Felicitation Council (Council) – If no Conciliation is effected, Council shall take up dispute for Arbitration by itself or to send it to some Arbitrator – Order of Council dropping reference of petitioners against denial of interest on delayed payment, set aside – Council directed to send matter for Arbitration. (Paras 11 & 15).

For the petitioner(s) : Mr. Atul Jhingan, Advocate.
For the respondent(s) : Mr. S.C. Sharma and Mr. Sanjeev Sood, Additional Advocate Generals, for the State.

The following judgment of the Court was delivered:

**Sandeep Sharma, Judge** (oral):

By way of above captioned petitions, filed under Article 227 of the Constitution of India, challenge has been laid to orders dated 23.8.2018 and 25.4.2018, passed by the H.P. Micro, Small and Medium Enterprise, Facilitation Council, H.P., (in short "the Council") in reference No. 35/2017, titled *M/s Brijsons Hetreat V.P.O., Badroya, Tehsil Nurpur, Distt. Kangra H.P. v. The Executive Engineer, Flood Protection Division, IPH Department, Gagret, District Una, H.P.,* reference No.36 of 2017 titled *M/s Himachal Wire Industries (P) Ltd. G.T. Road, Damtal, Distt. Kangra, H.P. v. Executive Engineer, Flood Protection Division, IPH Department, Gagret, District Una, H.P* and reference No. 51 of 2017 titled *M/s TCM Steels (India) v. Executive Engineer, Flood Protection Division, IPH Department, Gagret, District Una, H.P*, whereby Council dropped the reference from the proceedings.

2. Before adverting to the factual matrix of the case, it may be noticed that vide orders dated 30.10.2018, 31.10.2018 and 1.11.2018, this Court afforded opportunity to the learned Additional Advocate General to file reply or have instructions in the matters. Pursuant to aforesaid orders, Mr. Sanjeev Sood, learned Additional Advocate General, has placed on record instructions dated 5.11.2018, received by him from the office of Deputy Director of Industries, H.P. Micro Facilitation Council, H.P., which has been taken on record.

3. In nutshell, case of the petitioners as projected in the aforesaid petitions, is that Controller of Stores, H.P. Directorate of Industries, Udyog Bhawan, Bemloe, Shimla-1, issued rate contract number 4-IND/SP-3(M-02)37/2013/43 dated 19.2.2014 valid upto 29.5.2015 for supply of Hot Dip Galvanized Mild Steel Wire on annual rate contract basis (Annexure P-2). Rate of contract was further extended upto 31.8.2015 vide letter No. 4-IND/SP-3(M-02) 37/2013 dated 29.5.2015. While issuing the rate contract in favour of the petitioners-company, following clause No.2, was reflected in the terms and conditions of rate contract reads as under; clause No.2: "*100 % payment will be made within 21 days against physical delivery of inspected/accepted stores duly supported with satisfactory inspection note and after receipt of correct goods at consignee's site/destination*.

4. The Engineer-in-Chief (Projects) Irrigation and Public Health Department, H.P., placed various purchase orders with the petitioners for supply of Hot Dip Galvanized Mild Steel Wire @ Rs. 59050/- per metric ton, exclusive of Excise Duty and VAT. As per the petitioners, material was duly inspected and approved as per procedure by the IPH Department and thereafter, it made prompt supply and requisite material was dispatched to Executive Engineer, Flood Protection Division, Gagret and Amb. As per the terms and conditions of the rate contract and supply order, the payment with respect to the materials supplied was to be made to the supplier by the department within a period of 21 days from the receipt of the material. But since in the case at hand, payment qua the material supplied by the petitioners never came to be made within the stipulated period, it approached the High Court of HP by way of CWP No. 4235 of 2015 (along with connected matters), which came to be decided on 23.2.2016 (Annexure P-5 colly.), whereby Division Bench of this Court having taken note of the statement made by the proxy counsel on behalf of the petitioners that petitioners have received the entire payment and their grievance stands redressed, disposed of the writ petition along with the connected matters.

5. Since pursuant to filing of aforesaid writ petitions by the present petitioners before the Division Bench of this Court, only the principal amount was paid, it vide communication dated 4.2.2017 (Annexure P-6), requested the Executive Engineer Flood Protection Division Gagret and Amb, to make payment of interest for delay in payment under the Micro, Small and Medium Enterprises Development Act, 2006 ( in short "the Act"), however fact remains that aforesaid authority failed to accede to the aforesaid request having been made by the petitioners and as such, petitioners vide communications dated 28.7.2017 and 8.12.2017, made a reference under Section 18 of Act, to Council, praying therein for issuance of appropriate direction to the department to pay interest for delay in payment under the Act against various supplies. Council by way of notice called for reply of respondent-department, who by way of filing reply (Annexure P-9) disputed the claim of the petitioner on the ground that since counsel representing the petitioner had made a statement before the High Court that entire payment stands received and grievance of the petitioner stands redressed, nothing remains to be paid to the petitioner.

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

7. Having taken note of the aforesaid reply filed by the respondent-department, the Council vide orders dated 23.8.2018 and 25.4.2018, ordered that reference may be dropped. In the aforesaid background, petitioners have approached this Court in the instant proceedings, praying therein to issue direction to the council to refer the matter to the arbitrator for adjudication of the dispute with regard to the payment of interest inter-se parties.

8. Mr. Atul Jhingan, learned counsel representing the petitioners while inviting attention of this Court to Sections 15, 16 and 18 of the Act as well as award passed by the sole arbitrator in similar case i.e. reference No. 29.2017 dated 12.6.2018 (Annexure P-10), wherein similar kind of objection was raised by the department, contended that respondent-department cannot be allowed to adopt the policy of pick and choose. Mr. Jhingan argued that in case titled M/s Partap Industrial Products v. The Executive Engineer, Flood Protection Division Gagret, District Una, H.P., similar kind of objection was raised by the department before the learned Arbitrator, but learned Arbitrator in para-13 of the award categorically stated that as per Section 16 of the Act, petitioners are entitled to interest for delayed payments. Mr. Jhingan while referring to the impugned order passed in case of the petitioners, contended that statement, if any, given by the counsel representing the petitioner before the Division Bench, could not be a ground for the Council to reject reference, especially, when Section 16 of the Act, provides for payment of interest on account of delay in payment.

9. Question whether petitioner is entitled to interest on account of delay in payment or not, is definitely not to be decided in the instant proceedings, rather same is required to be decided in the proceedings, if any, before the Council under Section 18(1) or before the Arbitrator to be appointed in terms of Section 18 (3) of the Act. But question which needs to be decided by this Court in the instant proceedings is that whether action of council in dropping the reference made by the petitioners vide orders dated 23.8.2018/25.4.2018, is justified in light of reasoning recorded in the same or not.

10. Careful perusal of judgment dated 23.2.2016, passed by the Division Bench of this Court in CWP No. 4235 of 2015, clearly suggests that proxy counsel appearing on behalf of the petitioners had made a statement before the court that payment stands received, which fact was otherwise acknowledged by the learned Additional Advocate General representing the State but definitely, there is no mention, if any, with regard to the interest, which is being claimed in terms of Section 16 of the Act on account of delay. Section 16 of the Act specifically provides for interest in the event of delay in payment. Careful perusal of order dated 23.8.2018, nowhere suggests that council while passing order

dealt with issue of payment of interest on account of delay, rather it simply having taken note of the fact that the statement was made by the learned counsel for the petitioners that entire payment stands received, dropped the reference, whereas as has been taken note herein above in similar facts and circumstances, the case of another firm, who had also approached the High Court and had made similar kind of statement before the Court, was referred to the Arbitration under the Act. At this stage, it would be apt to take note of Sections 15, 16 and 18 of the Act, which read as under:-

> *"15.**Liability of buyer to make payment**.—Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:*
>
> *Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.*
>
> *16.**Date from which and rate at which interest is payable**.—Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.*
>
> ***18.Reference to Micro and Small Enterprises Facilitation Council.**—(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council. (2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act. (3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section(1) of section 7 of that Act. (4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between*

> *the supplier located within its jurisdiction and a buyer located anywhere in India. (5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."*

11. Careful perusal of Section 15 of the Act clearly provides that where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment on or before the date agreed upon between him and the supplier but in no case, the period agreed upon between the supplier and buyer shall exceed 45 days from the day of acceptance or the day of deemed acceptance. Section 16 clearly provides that where any buyer fails to make the payment amount to the supplier, as required under Section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, shall be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank. Similarly, Section 18 of the Act provides that in the event of dispute, if any, inter-se parties with regard to the amount due, if any, under Section 17 of the Act, parties to dispute shall make a reference to the Council, who on receipt of reference under Sub-Section (1) shall either itself conduct conciliation in the matter or seek assistance of any institution or centre providing alternate dispute resolution services by making reference to such an institution or centre for conducting conciliation. Section 18 (3) of the Act, further provides that where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section(1) of section 7 of that Act.

12. Undisputedly, in the case at hand, dispute inter-se parties is with regard to payment of interest on account of delay in payment and as such, parties approached the council in terms of Section 18 of the Act but as has been taken note herein above, council without application of mind in hot haste manner, dropped the reference. At this stage, it would be appropriate to take note of instructions dated 5.11.2018, whereby council has made an endeavor to justify its decision by stating:-

> 2. Whereas the Council in its 32nd meeting held on 22.9.2017 called the case/reference. Sh. Atul Jhingan, Advocate appeared on behalf of supplier. Sh. Sudhir Kumar, EEFPWD appeared on behalf of buyer. Advocate appeared on behalf of the supplier informed the Council that principal amount has been paid however interest portion is still pending. The representative of buyer also asked by Council about the payment of interest due however he could not ensure whether interest amount would be paid or not due to non-availability of budget. Council took note of the same and it seems that buyer is not willing to solve the matter amicably and all efforts of conciliation have failed and broken down and there seems no scope for reconciliation. Accordingly, the decision was unanimously taken by the Council to refer this matter to arbitration and adopted the procedure under Section 18 (3) of the MSMED Act, 2006, by referring the matter to an arbitrator out o the panel notified by the State Government.

3. Whereas the State Government vide letter No. Ind.A (F) 19-21/2005-I dated 18.09.2015 has issued notification regarding empanelment of Arbitrators for the expeditious disposal of arbitration cases.

13. Aforesaid justification having been rendered on record by the council cannot be accepted being totally unreasonable and erroneous. Interestingly, in the aforesaid instructions, there is no reference/discussion, if any, with regard to case of the present petitioners, whose reference admittedly came to be dropped on flimsy grounds. No plausible explanation has been rendered on record by the respondent-department that why only case of M/s Partap Industrial Products, was referred to arbitration, whereas references of other similarly situate persons like present petitioners were dropped.

14. Having perused reasoning recorded by the council in its orders dated 23.8.2018 and 25.4.2018, this Court has no hesitation to conclude that authority concerned has decided reference petition of the petition in slip shod manner without proper application of mind as such, same cannot be allowed to sustain.

15. Consequently, in view of the above, present petitions are allowed and impugned orders dated 23.8.2018 and 25.4.2018, passed by the H.P. Micro & Small Facilitation Council, H.P., Himachal Pradesh, are quashed and set-aside and respondent-council is directed to refer the matter of present petitioners to the Arbitrator in terms of Section 18 (3) of the Act, as has been done in the case of similarly situate person for adjudication of dispute with regard to payment of interest on account of delay. Petitions stand disposed of, so also pending application(s) if any.

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

Vikram Khimta .....Appellant
Versus
State of H.P. .....Respondent

Cr. Appeal No. 579 of 2016
Reserved on 5.10.2018
Decided on 01. 11.2018

**Indian Penal Code, 1860- Section 376 –** Rape – Proof – Trial Court convicting and sentencing accused of rape – Appeal against on ground of misappreciation of evidence by Trial Court – Evidence revealing (i) that accused and victim were in same college (ii) Victim intended to marry accused and on his call, went in taxi from Rohru to Shimla with him (iii) Victim falsely telling her parents of her staying with her cousin at Rohru though she accompanied accused for Shimla (iv) Story of sexual assault as propounded by her found inherently doubtful (v) Victim major and thus knew consequences of her actions (vi) Medical and forensic evidence not linking accused with crime (vii) Possibility of victim having registered case on refusal of parents of accused for their marriage cannot be ruled out - Held, evidence on record does not prove allegations of rape – Coitus if any was consensual – Presence of seminal stains of accused on towel inconsequential - Appeal allowed – Accused acquitted. (Paras 13 to 20, 22, 23 & 33).

***Cases referred:***
Abbas Ahmad Choudhary v. State of Assam (2010) 12 SCC 115

Bhagwan Singh and Ors v. State of MP (2002) 4 SCC 85
C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645
Deelip Singh @ Dilip Kumar v. State of Bihar, 2005 (1) SCC 88
Dinesh Jaiswal v. State of MP, (2010) 3 SCC 232
Jayanti Rani Panda vs. State of West Bengal [1984 Crl.L.J. 1535
Jose alias Pappachan v. Sub-inspector of Police, Koyilandy and Anr. (2016) 10 SCC 519
Narender Kumar v. State (NCT of Delhi), 2012 (7) SCC 171
P. Satyanarayana Murthy v. District Inspector of Police State of Andhra Pradesh and Anr. (2015) 10 SCC 152
Radhu v State of Madhya Pradesh, (2007) 12 SCC 57
Rai Sandeep @ Deepu v. State (NCT) of Delhi, 2012 (8) SCC 21
Rajoo v. State of MP, AIR 2009 SC 858
Suraj Singh v. State of U.P., 2008 (11) SCR 286 (SCC) 704
T. Subramanian vs. State of Tamil Nadu, (2006)1 SCC 401
Tameezduddin alias Tammu v. State of NCT of Delhi, (2009) 15 SCC 566
Tukaram & Anr. v. The State of Maharashtra,, AIR 1979 SC 185
Uday v. State of Karnataka, AIR 2003 SC 1639
Vimal Suresh Kamble v. Chaluverapinake Apal SP (2003) 3 SCC 175

For the appellant: Mr. Anoop Chitkara, Advocate.
For the respondent: Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocate Generals.

The following judgment of the Court was delivered:

**Sandeep Sharma, J.**

Instant criminal appeal filed under Section 374 (II) Cr.PC, is directed against the judgment dated 30.9.2016, passed by the learned Additional Sessions Judge-I Shimla, in Sessions trial No. 8-R/7 of 2013, whereby learned court below while holding the appellant-accused guilty of having committed offence punishable under Section 376 of IPC, convicted and sentenced him to undergo imprisonment as under:-

> ***"Under Section 376 of IPC***
>
> *To undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 50,000/- and in default of payment of fine, to further undergo simple imprisonment for a period of one year.*

2. Facts of the case as emerge from the record are that allegedly on 13.6.2013, appellant/accused kidnapped/abducted the prosecutrix from bus stand at Rohru, falling in jurisdiction of police station Rohru, District Shimla, with an intention to compel her to marry him. As per initial complaint, Ext.PW2/A, which ultimately culminated into FIR No. 36/ 2013 dated 16.6.2013 (Ext. PW22/A), at Police Station Rohru, prosecutrix as well as accused were studying together at Government College Sawara, District Shimla, H.P. Allegedly, on 13.6.2013, accused called the prosecutrix and prosecutrix went to Rohru to meet accused, where he instigated/pressurized her to solemnize marriage with her and for this purpose, he took her to Shimla. Subsequently, accused took the prosecutrix to the room of his friend namely Atul (PW25). She alleged that they had started from Rohru on 13.6.2013, during evening time and reached cemetery, Shimla on 14.6.2013, at about 5:00 AM. Though prosecutrix made an attempt to make accused understand, but he under the

pretext of solemnization of marriage not only abducted her, but sexually assaulted her against her wishes. During this period, accused allegedly developed physical relations with the complainant-prosecutrix. In the aforesaid background, complainant-prosecutrix by way of complaint Ext.PW2/A prayed that legal action be taken against the accused and she also intended to get herself medically examined**.** It may be noticed that aforesaid complaint was filed at police post Sanjauli. PW23 LHC Sarita forwarded the same alongwith rukka to HAG Rajinder (PW9) for registration of case. Endorsement with regard to registration of zero FIR is Ext.PW24/A.

3. Careful perusal of FIR Ext.PW7/A reveals that accused had threatened the complainant-prosecutrix that in case she did not come, he will consume the poison and accordingly, prosecutrix left the home by asking her parents that she is going to take admission in the college, but she did not go to the house in the evening and told her parents that she will stay with her cousin at Rohru. Prosecutrix came to the bus stand Rohru, whereafter accused took her to Shimla in a private vehicle belonging to person namely Atul PW25. Prosecutrix reached Shimla alongwith accused as well as person namely Atul (PW25) on 14.6.2013 at about 5:00 am. Allegedly, accused took the prosecutrix to the room of Atul and had sexual intercourse with her against her wishes. Thereafter, accused took her to the house of his god sister Minakshi (PW8) and again committed sexual intercourse with her against her wishes. Allegedly, prosecutrix had been insisting upon solemnization of marriage, but the accused after having committed sexual assault upon her fled away and parents of the accused gave beatings to the prosecutrix and threatened her to eliminate her in case she discloses the alleged incident to anybody.

4. After registration of FIR, police got the prosecutrix medically examined and procured MLC Ext.PW16/B. Similarly, accused was also medically examined and his MLC Ext. PW21/B was obtained. As per opinion rendered by the medical officer, there were no signs of prosecutrix's having undergone recent sexual intercourse, whereas medical officer, who examined the accused opined that there is nothing suggestive of the fact that accused is not capable of performing the sexual intercourse. After completion of investigation, police presented challan in the court of learned JMIC Rohru, who vide order dated 15.10.2013, committed the case to the court of learned Sessions Judge, Shimla. Ultimately, matter came to be assigned to the Court of learned Additional Sessions Judge, Shimla, for disposal, who on being satisfied that prima-facie case exists against the accused, charged the present petitioner-accused for having committed offences punishable under Sections 366 and 376 of IPC, whereas co-accused Sikandar Khimta and Sunita Khimta were charged for having committed offences punishable under Sections 323 & 506 read with Section 34 of the IPC, to which they pleaded not guilty and claimed trial.

5. Prosecution with a view to prove its case examined as many as 28 witnesses, whereas accused did not lead any evidence in support of their defence.

6. Learned Additional Sessions Judge on the basis of material adduced on record by the prosecution held the petitioner-accused guilty of having committed offence punishable under Section 376 of IPC and accordingly, vide judgment dated 30.9.2016, convicted and sentenced him as per description given herein above, however fact remains that learned court below acquitted the petitioner-accused of the offences punishable under Sections 366 of IPC. Learned court below also acquitted the other co-accused Sikandar Khimta and Sunita Khimta for the offence punishable under Sections 323, 506 and 366 of IPC. It may be noticed that no appeal, whatsoever, came to be filed against the acquittal of the co-accused Sikandar Khimta and Sunita Khimta, who happened to be the parents of the present accused, under Sections 323, 506 and 366 of IPC and as such, same has attained finality. In the aforesaid background, appellant-accused has approached this Court in the

instant proceedings, praying therein for his acquittal after setting aside judgment of conviction recorded by the court below.

7. Mr. Anoop Chitkara, learned counsel representing the accused while referring to the judgment of conviction recorded by the court below vehemently argued that learned counsel below while holding accused guilty under Section 376 IPC, miserably failed to appreciate the evidence in its right perspective, as a result of which, erroneous findings to the detriment of the accused have come to the fore. With a view to substantiate his aforesaid argument, Mr. Chitkara while making this Court to peruse the statements having been made by the various prosecution witnesses, contended that prosecutrix had lodged false FIR with a view to compel the appellant to marry her. He further argued that though allegations in the FIR are concocted but even if allegations contained in the FIR are read in its entirety, they are of consensual coitus on misconception of fact of promise of marriage. While referring to the statement having been made by the prosecutrix PW2, Mr. Chitkara, made a serious attempt to persuade this Court to agree with his contention that both the appellant-accused and prosecutrix were closely known to each other and prosecutrix was also active partner in the consensual sexual intercourse, which took place with the will and consent of the prosecutrix. While referring to the age of the prosecutrix i.e. 21 years, Mr. Chitkara contended that she was fully informed about the consequences and implications, be it social or getting pregnant of having joined the company of the accused and thereafter, having sexual intercourse with him. Learned counsel while making this Court to peruse the statement of prosecutrix in its entirety, pointed out certain discrepancies to demonstrate that there are material contradictions in the statement of prosecutrix. While making this Court to read statements of prosecutrix made in Court juxtaposing her initial statement given to the police, Mr. Chitkara argued that there has been consistent effort on behalf of the prosecutrix to improve her case, especially to impress upon the court that her relationship with the accused was far older than she as earlier stated 2-3 weeks. While referring to the initial complaint having been filed by the prosecutrix as well as statement given to police and magistrate under Section 164 Cr.PC, Mr. Chitkara contended that her statement given before the court is in total contradiction to earlier statements as referred above and probably, same was done because prosecutrix realized that 2 to 3 weeks is too short a time for settlement of marriage. Mr. Chitkara also argued that prosecutrix is absolutely incredible witness because she substantially improved her initial story while deposing before the court below during trial and her untruthfulness is proved by various contradictions. While referring to the medical examination Ext.PW16/B of prosecutrix by PW16 Dr. Minakshi Sharma, Mr. Chitkara contended that there is no medical evidence suggestive of the fact that prosecutrix had undergone intercourse as alleged by her, rather he further argued that PW16 while giving her final opinion has categorically opined that she is of the view that there is no finding suggestive of the fact that prosecutrix has undergone recent sexual intercourse. While referring to the report of FSL with regard to the evidence collected from the spot, Mr. Chitkara contended that save and except DNA on towel, nothing matched with the DNA collected from the accused. While referring to the report submitted by the FSL qua Ext.P5 i.e. double bed sheet which came to be recovered vide seizure memo Ext.PW2/C upon which, rape was allegedly committed on the night of 14.6.2013 in the building of Ramesh Chuahan, Mr. Chitkara argued that two DNA profiles pertaining to male individuals were obtained from Ext.P5 i.e. double bed sheet and both these profiles did not match with the DNA obtained from the accused. Lastly, Mr. Chitkara argued that though as per report of FSL, DNA profile obtained from the towel used for cleaning the private parts matched with DNA obtained from the 10 FTA (accused), but that could not be a ground to conclude that accused committed sexual intercourse with the prosecutrix.

8. Mr. S.C. Sharma, learned Additional Advocate General, while refuting the aforesaid submissions having been made by the learned counsel representing the accused strenuously argued that bare perusal of the impugned judgment of conviction recorded by the court below, clearly suggest that court below not only appreciated the evidence in its right perspective, rather dealt with each and every aspect of the matter meticulously and as such, there is no scope left for this Court to interfere with the findings returned by the court below. With a view to refute the contention put forth on behalf of the accused that there are material contradictions in the statement of prosecution witnesses, Mr. Sharma, while making this Court to peruse statement of prosecution witnesses, contended that story put forth by PW2 (complainant-prosecutrix) stands fully corroborated by other prosecution witnesses. He further contended that version putforth by the prosecutrix is consistant, cogent and natural and at no point of time, defence was able to shatter her testimony. Mr. Sharma further contended that though medical evidence collected on record by the prosecution also corroborates the version put forth by the prosecution, but even if for the sake of arguments, it is presumed that nothing emerged against the accused in the medical evidence that may not be a ground to hold accused not guilty of having committed offence punishable under Section 376 IPC. He further argued that there is ample evidence on record that accused on the pretext of marriage not only abducted the prosecutrix, rather repeatedly, sexually assaulted her against her wishes. While referring to Section 375 IPC, wherein rape has been defined, Mr. Sharma, made a serious attempt to persuade this Court to agree with his contention that mere fondling of body parts of the prosecutrix by the accused against her wishes amounts to rape and as such, learned court below rightly held the accused guilty of having committed offence under Section 376 IPC.

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

10. In her examination-in-Chief, prosecutrix (PW2) deposed that she was called by the accused on 12.6.2013, and thereafter, she met the accused at Rohru market on 13.6.2013, at 11:30 am, whereafter at 5:00 pm accused called her and persisted her to perform marriage. Prosecutrix deposed that accused threatened her that in case she does not solemnize marriage with him, he will end up his life. As per prosecutrix, accused brought her to Shimla in a vehicle of person namely Atul (PW25). They reached Shimla on 14.6.2013, at about 5:00 am. At this stage, it may be noticed that if the line of defence taken by the accused is considered/analyzed, there appears to be no dispute with regard to the factum of prosecutrix having accompanied accused from Rohru to Shimla. As per prosecutrix, she was taken to the room of Atul, which was situated in Cemetery at Shimla. Allegedly, Atul (PW25) left the room in the morning, whereafter accused committed sexual intercourse with the prosecutrix against her wishes. As per prosecutrix, she asked the accused to perform marriage first but her request was ignored by the accused, who thereafter committed forcible intercourse by laying mattress on the floor of the room. Prosecutrix deposed before the court below that accused committed intercourse first time by using condom and thereafter, second time without condom. As per prosecutrix, accused used brown colored towel to clean his private part. She further deposed that after 3-4 hours, accused took her in a private taxi to the house of his god sister Minakshi PW8 at Indernagar, Dhalli Shimla. Accused told his god-sister that he and his girl friend (prosecutrix) are going to perform marriage and as such, she allowed them to stay in her house. She deposed that in the house of Minakshi, accused again committed rape with her 3-4 times on the mattress, which was lying on the ground in the room. She also stated that accused used one white colour muffler to clean the private parts. On 15.6.2013, prosecutrix again requested the accused to perform marriage, but he on one pretext or the other refused and thereafter, at about 2:00 pm, parents of the accused i.e. accused Sikander Khimta and

Sunita Khimta, came to the house of Minakshi, to whom prosecutrix disclosed that accused brought her to Shimla to perform marriage. Mother of the accused Sunita Khimta slapped the prosecutrix and allowed accused to run away from there, whereafter accused Sikandar Khimta asked prosecutrix to go home and not to disclose anything to anyone otherwise, they will kill her and her family members. She also stated that at that time Minakshi (PW8) was not at home.

11. This Court with a view to ascertain the correctness of argument advanced by Mr. Chitkara that there are material contradictions in the statements of the prosecutrix, perused statement of prosecutrix made in Court juxtaposing same with her initial statement recorded under Section 154 Cr.PC. i.e. complaint Ext.PW2.A (mark-B statement made under Section 164 Cr.PC). At this stage, it may be noticed that since statement (mark-B) was not bearing the signatures of the prosecutrix, it was not exhibited, rather marked as mark-B. In her initial statement Ext.PW2/A prosecutrix alleged that she was on talking terms with the accused for the last 3 weeks. Similarly, in the statement recorded under Sectionb164 Cr.PC, she stated that she met the accused, who is her senior in college for last 2-3 weeks, however, before court prosecutrix deposed that accused was personally known to her as they were students of Govt. College Sawara Hatkoti. It appears that prosecutrix purposely did not state the period with regard to her relationship while deposing before the court below with a view to impress upon the court that her relationship was far older than she earlier stated it was 2-3 weeks. Similarly, Ext.PW2/A reveals that complainant alleged that on 13.6.2013, she went to Rohru to meet accused, whereas in her statement recorded under Section 164 Cr.PC (mark-b), she stated that on 13.6.2013, accused called her to home. While deposing before the court, PW2 complainant stated that on 12.6.2013, accused called her through mobile phone at about 9 pm and on the next morning, i.e. 13.6.2013, at about 6:30 am, he again called her to meet him at Rohru, whereafter on the pretext of getting admission in college, she came to Rohru to meet the accused. PW2 also stated in her statement before the court that accused met her at Rohru bazar.

12. If the aforesaid three statements having been made by the prosecutrix are read juxtaposing each other, definitely there appears to be attempt on the part of the prosecutrix to improve her version given in her initial statement to the police and to the magistrate under Section 164 Cr.PC. Similarly, this Court finds that there is contradiction with regard to the date on which allegedly, accused had called the prosecutrix to Rohru. In complaint Ext.PW2/A, prosecutrix alleged that on 13.6.2013, accused called her from her home, whereas in her statement recorded under Section 164 Cr.PC, she stated that on 13.6.2013, accused called her to his home, but interestingly, in her statement given before the Court, she stated that on 12.6.2013, accused called her through mobile phone at about 9 pm, whereafter on the next morning by 6:30 am, accused again called her to meet him at Rohru, whereafter on the pretext of getting admission in college, she came to Rohru to meet the accused Vikram Khimta.

13. If aforesaid versions given by the prosecutrix are read in conjunction, it clearly suggests that there is no mention, if any, of phone call given by the accused on 12.6.2013 in the complaint Ext.PW2/A and thereafter in statement recorded under Section 164 Cr.PC before the magistrate. Similarly, this Court finds that prosecutrix in her statement recorded under Section 154 Cr.PC (mark-B) claimed that accused had told her that in case she does not come, he will consume the poison, whereas this aspect is totally missing in her initial complaint Ext.PW2/A. Subsequently, while deposing before the Court, she stated that accused met her at Rohru Bazar on 13.6.2013, at about11:30 pm and thereafter, they visited Rohru Bazar and took lunch. She further stated that after having lunch, they remained together for some time and thereafter , by saying bye to accused, she

went to room of her cousin Kalpana Walia, accused again called her to come to the bus stand Rohru, otherwise he will commit suicide by consuming poison. At this stage, it would be appropriate to take note of statement of PW1 Ram Lal, who stated that on 13.6.2013, prosecutrix came to Sarswati Nagar for getting admission in BA in the college situate In Sarswati Nagar. He stated that prosecutrix told him before leaving the home that she will go to the house of Kalpana, who is in her relations for stay and will not come back in the night. At the time of registration of FIR, there is no mention, if any, by the prosecutrix that accused had threatened her of consuming poison on her not visiting him but subsequently, she narrated aforesaid story. In FIR, prosecutrix did not state that she had gone to meet accused due to fear that in case, she would not go, accused would consume poison. Rather her statement made before the court clearly suggests that she of her own, after having received call from the accused had come to Rohru bazaar, whereafter they after having taken lunch remained together for some time. She category stated that accused called her at the house of Kalpana to come to bus stand Rohru, otherwise he will commit suicide by consuming poison. On this aspect, if statement made under Section 164 Cr.PC (mark-B), given by the prosecutrix is examined, she stated that she went due to fear that in case, she does not go, accused would consume the poison.

14. Careful perusal of FIR lodged at the behest of the prosecutrix suggests that prosecutrix alleged that accused had allured her to elope but interestingly, while deposing before the court she improved her version by deposing that he had not allured to perform marriage but had also threatened her that if she would not accompany him, he would consume poison. This Court may take note of the fact that prosecutrix at the time of alleged commission of offence was 23 years of age and it is highly improbable that she had come under the pressure of the accused solely because of threat of suicide extended by the accused. Leaving it apart, PW2 complainant in her cross-examination admitted that she left Rohru with the accused as she was interested to perform marriage with him. Having carefully perused the statement of prosecutrix made before the trial court as well as her initial version given in complaint, which subsequently culminated in FIR Ext.PW22/A and statement made under Section 164 Cr.PC, this Court is persuaded to agree with the learned counsel for the petitioner that prosecutrix had prior acquaintance with the accused and she of her own volition, joined the company of the accused. As has been taken note herein above, it has come in the cross-examination of prosecutrix that she herself was interested to perform marriage with the accused. Otherwise also, statement of prosecutrix itself revels that she of her own volition joined the company of the accused for leaving towards Shimla. She deposed before the court that accused persisted to perform marriage, but she refused to marry. She stated that accused called vehicle of Atul (PW25) and thereafter, they left Rohru in the said vehicle of the Atul (PW25) being driven by Atul (PW25). This version put forth by the prosecutrix does not appear to be correct, especially, in view of the statement of PW25 Atul, who deposed that on 13.6.2013, at about 5 pm, he received telephonic call from the prosecutrix and then, he met her at Rohru. He specifically stated that one boy (accused) was accompanying the prosecutrix. He also stated that he was in his Bolero vehicle bearing No. HP 10-A 2024. He stated that accused and complainant asked him to drop them to Shimla and then he took them to Shimla and dropped them at his quarter at Cemetery road. Most importantly, it has come in the statement of PW25 that he dropped prosecutrix and accused on the request of the prosecutrix**.** This witness categorically denied suggestion put to him in his cross-examination that he knows the accused as he has studied with him in DAV School. He also stated that prosecutrix was my god sister. He also stated that for the first time, he saw the accused on the said date i.e. 13.6.2013. Having carefully perused the statement of prosecutrix juxtaposing the statement of Atul PW25, who remained alongwith the prosecutrix and accused during their journey from Rohru to Shimla, this Court has no

hesitation to conclude that statement of prosecutrix does not inspire confidence, rather story put forth by her appears to be untrustworthy.

15. At this stage, this Court may also take into consideration statement of PW8 Minakshi, who deposed that she knows the family of Kalpana Walia, who is in relation of the prosecutrix. She stated that she used to visit the shop of Kalpana Walia at upper Bazar Rohru, wherein she came in contact of the prosecutrix. This witness deposed that on 14.6.2013, at about 4.45pm, she received a call from the prosecutrix, who sought her help by stating that she has performed marriage with the person namely Vicky Khimta. She deposed that prosecutrix told her that she has no place to stay and she does not have money and as such, she requested her to meet her at Dhalli near tunnel. She further stated that jeep came from Dhalli side at about 7 am which was being driven by Atul (PW25), wherein prosecutrix alongwith another person Vicky were sitting inside the jeep. She further stated that she joined their company and thereafter they all went to the room of Atul (PW25) near cemetery at Shimla. If aforesaid version put forth by this witness is examined in light of statement given by the prosecutrix, this completely demolishes the case of the prosecution because, in nutshell case of the prosecution as projected before the court is that accused allured the prosecutrix and thereafter, took her to Shimla on the pretext of marriage and in this process, he was helped by PW8 Minakshi, who was alleged to be god sister of the accused and PW25 Atul Rokta (friend of the accused), but as has been noticed herein above, both the aforesaid prosecution witnesses i.e. PW25 and PW8, have categorically deposed before the court below that they had prior acquaintance with the prosecutrix, not with the accused and they had joined the company of prosecutrix as well as accused at Rohru and subsequently, at Shimla at the insistence/askance of the prosecutrix and not at the asking of the accused.

16. There is another material contradiction, which compels this Court to conclude that story put forth by the prosecutrix is unreliable, as per PW2 prosecutrix, accused took her to the room of Atul (PW25), which was situate at Cemetery Shimla, whereas PW8 Minakshi deposed before the Court below that she met prosecutrix and accused at Dhalli near Tunnel, whereafter she joined their company and they all went to the room of Atul (PW25) near Cemetery at Shimla. To the contrary Atul (PW25) stated that when they reached at Cemetery Shimla, prosecutrix talked with her friend Minakshi on mobile. PW25 further stated that Minakshi accompanied her to his room and remained there up to leaving of his room by the prosecutrix, accused and Minakshi (PW8). As per version put forth by Atul (PW25), he remained in his room till the time prosecutrix, accused and Minakshi left for the house of Minakshi (PW8) at Indernagar, whereas as per Prosecutrix, Atul (PW25) after leaving them in his room went away and accused sexually assaulted her on two occasions against her wishes. Factum with regard to the presence of PW2 and PW25 Atul in the room of PW25 Atul, wherein prosecutrix was allegedly taken by the accused at the first instance stands duly corroborated with the versions put forth by PW8 and PW25. PW8 and PW25 both in their depositions made before the Court below categorically stated that they all went to the room of Atul (PW25) near Cemetery at Shimla with the prosecutrix, which version of them totally belies the version put forth by the prosecutrix that she was alone with the accused in the room with Atul on the date of alleged incident. PW25 Atul categorically deposed that he remained in his room till the time prosecutrix, accused and Minakshi left the room, meaning thereby story putforth by the prosecutrix that accused sexually assaulted her in the room of PW25 Atul is highly unbelievable, rather appears to be concocted one. Interestingly, if the statement of PW8 Minakshi is read in its entirety, it reveals that PW8 Minakshi, Prosecutrix and the accused took bath in the room of PW25 Atul and thereafter, they found nothing to eat in the room of Atul (PW25) and as such, PW8 Minakshi took the prosecutrix and accused to her room at

Indernagar. She further stated that Atul (PW25) left the room and she alongwith prosecutrix and Vicky came to her room. Since PW8 Minakshi remained throughout with the prosecutrix and accused at the room of Atul (PW25), story put forth by the prosecutrix with regard to the forcible sexual intercourse committed by the accused in the room of Atul (PW25), appears to be highly improbable and could not be believed. There is no mention, if any, about use of condom by the accused while making sexual intercourse with the prosecutrix in her initial statement i.e. complaint PW2/A and her statement made under Section 164 Cr.PC (Mark B), whereas in her deposition made before the Court, she claimed that accused for the first time committed sexual intercourse by using condom and thereafter, second time without condom. Similarly, there is no mention, if any, of use of brown coloured towel by the accused for cleaning his private part in his statement made under Sections 154 and 164 CrPC, whereas in her statement made before the Court, she claimed that accused used brown coloured towel to clean his private part. Though, prosecutrix deposed that accused committed sexual intercourse with her without her consent forcibly and she had requested the accused to first perform marriage, but accused ignoring her request forcibly committed sexual intercourse by laying mattress on the floor of the room, but she admitted in her cross-examination that there are so many residential accommodations around the building of Naveen Manta(PW4) at Cemetery. She also admitted that there are other persons residing in the same building but it is not understood that if she was being sexually assaulted against her wishes, what prevented her from raising hue and cry. PW4 Naveen Manta (landlord of room of Atul PW25) in his statement deposed that he has four tenants on the same floor. He also stated that on the alleged date of incident, other tenants were also residing in his building and his building is surrounded by other residential buildings. He also deposed that nobody told him about the incident, whether occurred or not.

17. Prosecutrix in her initial version recorded in her complaint (Ext.PW2/A) alleged that accused confined her in a room of his friend namely Atul, whereas in her statement recorded under Section 164 Cr.PC (Mark B), she alleged that accused kept her in the room of Atul for 3-5 hours, whereafter he took her to the house of his cousin/god sister Minakshi (PW8) at Indernagar, Dhalli. If the aforesaid version put forth by her is tested with her statement given in the court, it creates suspicion on the correctness and genuineness of the story put forth by the prosecutrix. PW2 in her statement before the Court stated that after 3-4 hours, accused took her in private taxi to the house of god sister Minakshi at Indernagar Dhalli. She further deposed that accused had told his god sister that he and his girl friend are going to perform marriage and as such, she allowed them to stay in her house, whereas PW8 Minakshi stated that they all took bath in the room of Atul and thereafter when they found nothing eatable in the room of the Atul (PW25), she took prosecutrix and Vicky (accused) to her room but Atu l(PW25) left his room. She further stated that they took meal in her room and in the evening, one person namely Rohit came to her room and took dinner and thereafter Vicky (accused) and Rohit went to sleep in another room, whereas she and prosecutrix slept in a separate room. If the aforesaid version put forth by PW8 Minakshi is considered vis-à-vis statement of PW2 complainant prosecutrix, it creates serious suspicion with regard to the allegation of prosecutrix that accused had committed sexual intercourse with her on two occasions in the room of Minakshi (PW8). As per initial story put forth by the prosecutrix, she had undergone intercourse twice in the house of Minakshi ( PW8), whereas in the court, prosecutrix improved her statement by saying that accused committed sexual intercourse 3-4 times, but statement of PW8 is totally contrary to the probability of accused and prosecutrix sleeping together. PW2 in her statement claimed that in the house of Minaskshi in the night, accused again committed sexual intercourse with her 3-4 times on the mattress, which was lying on the ground in the room having black and white bed sheet with red flowers, but her aforesaid statement is

totally contrary to version putforth by her before PW16 Dr. Monika at the time of her examination. PW16 deposed that prosecutrix's alleged history disclosed that she had undergone intercourse twice but if the version putforth by the prosecutrix, wherein she alleged that on two occasions, she was sexually assaulted at the room of Atul and thereafter 3-4 times at the house of Minakshi (PW8) is examined in light of statement of PW16 Dr. Monika, it completely belies the version of prosecutrix.

18. Having carefully perused statements of PWs i.e. complainant and PW8 Minakshi, and PW25 Atul, who are the material witnesses with regard to the commission of offence , if any, committed by the accused under Section 376 IPC, vis-à-vis statement of complainant-prosecutrix PW2, this Court is compelled to agree with the contention of Mr. Chitkara, that story put forth by the prosecution with regard to her having subjected to sexual intercourse initially at the room of the Atul (PW25) and subsequently, in the room of Minakshi (PW8) is highly doubtful and could not be accepted merely being the statement of prosecutrix. If the version put forth by the prosecutrix with regard to her having made request to Vicky to perform marriage and arrival of parents of the accused in the house of PW8 Minakshi, is examined/analyzed in the light of statements made by PW8, it again creates serious doubt with regard to the correctness of version putforth by the prosecutrix (PW2). Prosecutrix in her statement deposed that on 15.6.2013, she again requested the accused to marry her, but he on the one pretext or the other, refused and thereafter, at 2 pm, parents of accused i.e. Sikander Khimta and Sunita Khimta, came in the house of Minakshi PW8, and she told them that accused brought her to Shimla to perform marriage, whereas PW1 Ram Lal (father of the complainant), in his statement stated that prosecutrix disclosed to her that accused called her parents at Shimla, who after reaching Shimla threatened the prosecutrix not to disclose the incident to anyone, otherwise they will kill her and her family. PW8 in her statement stated that in the next morning, parents of Vicky (accused) came to her room and prosecutrix started weeping and told that they want to perform marriage. This witness also stated that prosecutrix stated she will commit suicide, in case her marriage was not solemnized with the accused. Interestingly, this witness in her cross-examination admitted that when parents of the accused came to her room, she along with prosecutrix and accused was present there, whereas PW2 stated in her statement that parents of the accused slapped her and allowed the accused to run away. Most importantly, this has come in the statement of this witness that at that time, PW8 was not at home. She deposed that Sikander Khimta and Sunita Khimta also left the house, whereafter Minakshi came there. This version of her is in total contradiction to the statement of PW8 Minakshi, who while acknowledging the presence of parents of the accused, categorically stated that she was present in the room along with prosecutrix and accused, during visit of the parents of the accused.

19. Having examined aforesaid aspect of the matter, this Court finds force in the argument of learned counsel representing the accused that prosecutrix wanted to marry accused, but since parents of the accused were not ready for the same, she lodged false complaint against the accused with a view to pressurize him to marry her. Otherwise also, PW2 in his statement categorically admitted that she lodged FIR only with an intention to perform marriage with the accused and get justice. He also stated that today, she is not interested to perform marriage with the accused Vikram. Though prosecution with a view to prove its case examined as many as 28 witnesses but having perused the record this Court finds that only statements of PWs1, 2, 8, 12 and 25 are material witnesses to determine the correctness of story put forth by the prosecution with regard to the alleged commission of offence under Section 376 IPC by the accused, because other witnesses are formal witnesses in nature and their statements may not be very important to determine the guilt, if any, of the accused under Section 376 IPC.

20. Conjoint reading of statements made by PW1, PW2, PW8 and PW25 clearly reveals that there are material contradictions in the statements having been made by the aforesaid material prosecution witnesses. If the statement of PW2 (prosecutrix) is examined/analyzed juxtaposing statements of PW8 and PW25, who admittedly remained, in and around, throughout with the prosecutrix and accused, at the time of the alleged commission of offence, this Court is not willing to accept the contention of learned Additional Advocate General that discrepancies, if any, are minor in nature and can be ignored. Rather, this Court having noticed material contradictions as have been taken note herein above is of the view that contradictions as have been noticed herein above, completely belie the story of the prosecution and compels this Court to draw inference that story put forth by the prosecution with regard to forcible sexual intercourse committed by the accused is concocted and far from the truth.

21. In the case at hand, entire story put forth by the prosecution appears to be untrustworthy and full of contradictions. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is also placed on Judgment passed by the Hon'ble Apex Court in ***C. Magesh and Ors. v. State of Karnataka*** (2010) 5 SCC 645, wherein it has been held as under:-

> *"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasise, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Suraj Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14)*
>
> > *"14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."*
>
> *46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses."*

22. Medical evidence adduced on record by the prosecution otherwise nowhere indicates towards sexual intercourse, if any, committed by the accused and as such, contradictions as have been taken note herein above, certainly suggest that story put forth

by the prosecution is not at all trustworthy and at no point of time, prosecutrix was subjected to sexual intercourse as alleged by her.

23. Now this Court would advert to the medical evidence led on record by the prosecution. At this stage, it would be appropriate to take note of medical examination i.e. MLC Ext.PW16/B of prosecutrix by PW16 Dr. Monika Sharma. PW16 in her opinion (Ext.PW16/B) categorically opined that on physical and chemical examination, no findings were suggestive that she had undergone intercourse as alleged by the prosecutrix. There were no fresh tears on the hymen area.

24. After having perused categorical analysis, Dr. Monika (PW16), also opined that *keeping in view the aforesaid chemical analysis report and findings of examination of the victim …., I am of the opinion that there are no finding to suggest that she (….) has undergone recent sexual intercourse*. It has also come in the statement of PW16 that *I have not found any struggle marks on the body of the prosecutrix. There were no external and internal injuries on the body of the prosecutrix. No spermatozoa were detected in the virginal swab and smear of the prosecutrix.*

25. It is also apparent from the medical evidence, especially, chemical analysis report given by the FSL that except DNA on towel, nothing else matched with the DNA collected from accused (Ex.PX & PZ).

1. ***Single bed sheet, green colour, with pink stripes:***

   *Ex. PW-1/A seizure memo of articles from the residence of Atul Kumar, on 17th June, 2013.*

   *Single bed sheet, green colour, with pink stripes:*

   *PW2 Pooja Steta, page 7, 9th line, "the mattress was covered with bed sheet green in colour and rose colour lines."*

   *Ex.PX. FSL Report:*

   *Result*

   *(2) Human Semen was detected on:*

   *Exhibit-6b (one gree and light pink) (bed sheet).*

   ***Ext PZ-FSL-DNA:***

   ***Report:***

   ***Exhibit-6b: one green, pink and grey coloured bed sheet. The exhibit was stated to be single bed sheet.***

   ***6. Exhibit-6b (Single bed sheet) yielded a DNA profile pertaining to a female and this profile does not match with the DNA profile obtained from Exhibit-3 (FTA, Pooja Stata)***

   *Conclusion:*

   *iii) Exhibit-6b (Single bed sheet) yielded a DNA profile pertaining to a female and this profile does not match with the DNA profile obtained from Exhibit-3 (FTA, Pooja Stata)*

2. ***Used Condom:***

   ***Ex. PW-1/A, seizure memo of articles from the residence of Atul Kumar, on 17 June, 2013***

   ***Condom:***

   *Used condom-subsequently sealed by police in a match box*

*Ex.PX, FSL Report:*

*Result*

*(3) Human semen was detected on:*

*Exhibit-7 (condom)*

*Blood was not detected on these exhibits.*

***Ext PZ-FSL-DNA:***

***Report:***

*Conclusion:*

*iv) Exhibit-7 (Condom) yielded highly degraded DNA from which a partial and mixed DNA profile was obtained, from which nothing specific could be inferred.*

3. ***White colour muffler:***

   ***Ex. PW-2/B, seizure memo of Muffler of accused and clothes from prosecutrix:***

   *PW-2 Pooja Steta, page 7, 25th line, "The accused Vikram has also used one white colour muffler to clean his private part."*

   *Ex.PX, FSL Report:*

   *Result*

   *(4) Blood and semen was not detected on:*

   *Exhibit –4 e (muffler, pooja)*

4. ***Clothes of prosecutrix:***

   *Cloths of prosecutrix: Slex (Green), Red coloured shirt, White coloured shirt, one brown coloured underwear, (All clothes were washed).*

   *Ex.PX, FSL Report:*

   *Result*

   *(5) Blood and semen was not detected on:*

   *Exhibit-4a (underwear, Pooja),*

   *Exhibit-4b (slacks, pooja),*

   *Exhibit-4c (vest, Pooja),*

   *Exhibit-4d (upper, Pooja),*

   *Exhibit-4e (muffler, Pooja)*

5. ***Black and white bed sheet, with red flowers:***

   *Ex.PW-2/C, seizure memo of bed sheet, upon which rape was committed on the night of 14 June, 2013, in the building of Ramesh Chauhan, on 18 June, 2013*

   *Black and white bed sheet, with red flowers,*

   *PW-8 Minakshi, page 28, 34th line, "It is incorrect that bed sheet Ex.P-17 was taken into possession by the police from my room. Self stated that said bed sheet not belongs to me."*

   *Ex.PX, FSL Report:*

   *Result*

   *(6) Human semen was detected on:*

*Exhibit-5 (one red, black and gray) (bed sheet),*

***Ext PZ –FSL-DNA:***

***Report:***

***Exhibit-5 one off white, black and red coloured double bed sheet***

***4. From Exhibit-5 (Double bed sheet) two male DNA profiles (pertaining to two individuals) were obtained. Neither of these profiles matches with the DNA profile obtained from Exhibit-10 (FTA, Vikram Khimta).***

*Conclusion:*

*i) Two DNA profiles (pertaining to male individuals) were obtained from Exhibit-5 (Double bed sheet) and both of these profiles matches with the DNA profile obtained from Exhibit-10 (FTA, Vikram Khimta)*

***6. One towel, colour brown (bhura), make ANNALDIS. Recovery of this towel is not proved:***

*Ex.PW01/A, seizure memo of articles from the residence of Atul Kumar, on 17 June, 2013*

***Towel:***

*One towel, colour brown (Bhura), make ANNALDIS:*

*PW-2 Pooja Steta, page 7, 14th line, "Accused Vikram has used brown coloured towel to clean his private part."*

*Ex. PX, FSL Report:*

*Result*

*(7) Human semen was detected on :*

*Exhibit -6a (towel),*

***Ext.PZ-FSL-DNA:***

***Exhibit-6a: one brown coloured towel. The exhibit was stated to be towel used by the accused for cleaning after intercourse.***

***Report:***

***Exhibit-6a: one brown coloured towel. The exhibit was stated to be towel used by the accused for cleaning after intercourse****.*

*5. The DNA profile obtained from Exhibit-6a (Towel, used for cleaning after intercourse) matches completely with the DNA profile obtained from Exhibit-10 (FTA, Vikram Khimta).*

*Conclusion:*

*i) The DNA profile obtained from Exhibit -6a (Towel, used for cleaning after intercourse) matches completely with the DNA profile obtained from Exhibit-10 (FTA, Vikram Khimta).*

26. If the aforesaid report/chemical analysis report is perused, it reveals that Ext.6/B (single bed sheet) yielded a DNA profile pertaining to female and this profile did not match with the DNA profile obtained from Ext. 3 FTA i.e. prosecutrix.

27. Allegedly, police had recovered one used condom Ext.PW1/A vide seizure memo of articles from the residence of Atul Kumar (PW25) on 17.6.2013, which was allegedly used by accused while committing sexual intercourse with the victim, however it has been categorically opined by the FSL that though Ext.7 (condom) yielded highly

degraded DNA from which, a partial and mixed DNA profile was obtained, from which nothing specific could be inferred.

28. If the aforesaid report is perused in its entirety, from Ext.P5 i.e. (double bed sheet), two male DNA profiles (pertaining to two individuals) were obtained, but neither the profiles matched with the DNA profiles obtained from Ext.10 FTA, of accused. FSL has categorically concluded that two DNA profiles pertaining to two male individuate were obtained from Ext.5 (double bed sheet) and both of them, did not match with DNA profile obtained from Ext.10 FTA Vikram (accused).

29. One brown coloured towel recovered from the residence of Atul Kumar (PW25) vide Ext.PW1/A (seizure memo of articles from the residence of Atul i.e. on 17.6.2013), was also sent for chemical analysis. DNA profile obtained from Ext.6A i.e. towel allegedly used for cleaning after intercourse matched completely with DNA profile obtained from Ext.10 (FTA, Vikram Khimta), but this Court is of the view that same could not be a ground for court below to arrive at a conclusion that accused forcibly committed sexual intercourse with the prosecutrix, especially when there is categorical finding by the medical officer based upon chemical analysis report that there is no evidence that prosecutrix had undergone intercourse as alleged by her. Since story put forth by the prosecutrix with regard to her being subjected to sexual intercourse in the room of PW25 Atul and thereafter in the room of PW8 Minakshi, does not appear to be trustworthy, as has been discussed herein above, mere matching of DNA profiles of the accused with DNA profile obtained from Ext.6A i.e. towel, is not sufficient to conclude the guilt, if any, of the accused, especially when factum if any of complainant having been subjected to sexual intercourse is highly doubtful.

30. Otherwise also, this Court finds from the record that recovery of towel allegedly used by the accused for cleaning his private parts after having sexual intercourse with the prosecutrix is highly doubtful. As per story of prosecution, Ext.6a (brown color towel) was recovered from the room of Atul on 17.6.2013. As per site plan Ext.PW26/A, residence of Atul Kumar was at third storey of the building of Naveen Manta. PW 1 Ram Lal in his statement deposed that when we reached the room, it was locked and the key was with the police. He further stated that said key was found in the purse of the accused but interestingly, as per own story of the prosecution, accused was not with the police. He also stated that he had not seen the key personally with the police and the lock was opened by the police. Prosecutrix/PW2 deposed that when we visited the building of Naveen Manta at Cemetery, room was already locked but I do not know who locked the same. Interestingly, she stated that the key was with her as the key was found by her in the room, which was situate in Indernagar, when she and Vikram left the room at Cemetery, she had not locked the said room. PW4 Naveen Manta, landlord of Atul (PW25), stated that room was not opened by the police in his presence and as such, he cannot say from where police obtained key of the room. He also stated that police had already entered into the room when he reached the spot. This witnesses (PW4) stated that police obtained his signatures at police station Dhalli and he cannot tell about the time when he visited the police station and the seal impression "T" was given to him by the police at the police station Dhalli. This witness though categorically stated that no proceedings took place at the spot/residence i.e. his building, PW26 Sub-Inspector, Madan Lal deposed that when we visited cemetery on 17.6.2013, in the quarter of Atul Rukta PW25, room was locked. He stated that key of the room was taken from owner of the building Naveen. He also admitted that neither he narrated this fact regarding taking of the key from Naveen Manta in the police challan nor he mentioned in the Ext.PW1/A. He also stated that Atul Rokta (PW25) met him on 23.6.2013 and prior to this, he did not consult him. He also stated that key of the room of

Atul was found near the door, which was kept there. He stated that he made statement to the effect that key of the room was obtained from the owner of the building Naveen Manta is incorrect. He admitted that Atul was not present and also was not contacted and as such, no permission was obtained to open the room, however, he self stated that we tried to contact, but he could not contact him.

31. If the aforesaid versions putforth by PWs1, 2, 4 and 26, who are witnesses to recovery Ext.PW1/A, are perused in conjunction, it creates suspicion with regard to the recovery of brown colored towel from the residence of Atul on 17.6.2013. All the aforesaid witnesses have in unison stated that when they visited the house of the Atul (PW25), room was locked. All the witnesses have given contradictory version with regard to their having procured key of the room. As per PW1 Ram Lal, key was found in the purse of the accused, who was admittedly not present on the spot at the time of the recovery of towel Ext.P1/A. To the contrary, PW2 complainant claimed that key was with her, which she found in the room situate at Indernagar, where she stayed with the accused. PW26 SI Madan Lal claimed that key of the room was taken from the owner of the building, who categorically denied that key was obtained by police from him, rather he deposed that room was not opened by the police in his presence.

32. Having carefully perused aforesaid version put forth by the witnesses of recovery, this Court finds considerable force in the argument of Mr. Chitkara, that recovery, if any, of towel is not proved in accordance with law, and as such, finding, if any, given by the FSL qua the same could not be taken into consideration by the court below while ascertaining the guilt of the accused.

33. After having perused statements/depositions having been made by the material prosecution witnesses i.e PW1, PW2, PW8 and PW25, this Court has no hesitation to conclude that prosecution has been not able to prove beyond reasonable doubt that on the date of alleged incident, prosecutrix, PW2 was subjected to sexual intercourse against her wishes repeatedly, initially at the room of Atul PW25 and subsequently, in the room of PW8 Minakshi. Statement of prosecutrix PW2, is full of contradictions and does not inspire confidence, rather version putforth by her is not at all probable but even if the same is examined/scrutinized in the light of the statements having been made by other material prosecution witnesses i.e. PW8 and PW25, it compels this Court to draw inference that story putforth by the prosecutrix is not worth credence and court below wrongly placed heavy reliance upon the sole testimony of the prosecutrix, while holding accused guilty of having committed offence punishable under Section 376 IPC.

34. There cannot be any quarrel with the proposition of law laid down by the Hon'ble Apex Court in catena of pronouncements that in case of rape, evidence of prosecutrix must be given predominant consideration, and finding of guilt in case of rape can be based upon the uncorroborated evidence of the prosecutrix, but apart from above, Hon'ble Apex court has also held that if the story put forth by the prosecutrix is improbable and belies logic, placing sole reliance upon her statement would be violence to the very principles which govern the appreciation of evidence in a criminal matter. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in case titled ***Tameezduddin alias Tammu v. State of NCT of Delhi, (2009) 15 SCC 566***, wherein it has been held as under:-

> "9.It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which

govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable.

10.We note from the evidence that PW.1 had narrated the sordid story to PW.2 on his return from the market and he had very gracefully told the appellant that everything was forgiven and forgotten but had nevertheless lured him to the police station. If such statement had indeed been made by the PW2 there would have been no occasion to even go to the police station. Assuming, however, that the appellant was naive and unaware that he was being lead deceitfully to the police station, once having reached there he could not have failed to realize his predicament as the trappings of a police station are familiar and distinctive. Even otherwise, the evidence shows that the appellant had been running a kirana shop in this area, and would, thus, have been aware of the location of the Police Station. In this view of the matter, some supporting evidence was essential for the prosecution's case.

11. As already mentioned above the medical evidence does not support the commission of rape. Moreover, the two or three persons who were present in the factory premises when the rape had been committed were not examined in Court as witnesses though their statements had been recorded during the course of the investigation.

12.In this background, merely because the vaginal swabs and the salwar had semen stains thereon would, at best, be evidence of the commission of sexual intercourse but not of rape. Significantly also, the semen found was not co-related to the appellant as his blood samples had not been taken. In this background the evidence of the defence witness, Mohd. Zaki becomes very relevant. This witness testified that there was no occasion for PW.2 to have come to the factory as no payment was due to him on any account. The courts below were to our mind remiss in holding that as no written accounts had been maintained by Mohd. Zaki and no receipt relating to any earlier payment to PW.2 had been produced by him, his testimony was not acceptable, the more so, as the factory was a small one and Mohd. Zaki was a petty factory owner.

13.We also see from the orders passed by this Court from time to time and particularly the Order of 25th October, 2004 that the counsel for the appellant had pointed out that though the appellant had been sentenced to imprisonment for a term of seven years, he had already exceeded that period but was still in custody and he was accordingly bailed out after verifying this fact on 16th November 2004. In normal circumstances we would not have passed a detailed order in this background but as an allegation of rape, is one of the most stigmatic of crimes, it calls for intervention at any stage."

35. Reliance is placed on judgment rendered by the Hon'ble Apex Court in case titled ***Rajoo v. State of MP, AIR 2009 SC 858***, wherein it has been held as under:-

9. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.

10. Undoubtedly, the charge under section 366 of the IPC has not been made out as per the findings of the courts below. We, however, find that the evidence of rape is distinct from the other charge and the matter should be examined in that background. We are, accordingly, of the opinion that merely because the accused have been acquitted for the offence punishable

under Section 366 of the IPC is ipso-facto no reason to disbelieve the entire prosecution story on this solitary ground.

11. The veracity of the story projected by the prosecution qua allegations of rape must, thus, be examined. It has come in the evidence of PW8 that the prosecutrix had been married while a child but her gauna had not been performed as her husband, had, in the meanwhile, taken a second wife. The Doctor PW1 Dr. Smt. Christian has, however, opined that the prosecutrix was so habituated to sexual intercourse that it was not possible to ascertain as to when she had last been subjected to it. It has also come in the evidence of PW8 that the police had often questioned the prosecutrix as to why she was indulging in prostitution. The prosecutrix herself also admitted that she had once been arrested in the Ajanta Hotel case but had been bailed out by Shri Bansal, Advocate. It is indeed surprising that though, as per her allegations, all 13 accused had assaulted her one after the other, but the doctor did not find even a scratch on her person. The trial court and the High Court have not accepted the plea raised by the accused as to the adverse character of the prosecutrix as the evidence on this score was not conclusive. We are of the opinion, however, that in the light of the facts mentioned above, it is probable that the prosecutrix was indeed involved in some kind of improper activity.

12. The other evidence in the matter would have to be examined in this background. Primary emphasis has been placed by Mr. Ranjit Kumar on the identification of the accused. It has been submitted that the identification itself was faulty whereas the State Counsel has argued to the contrary and submitted that as the accused were known to the prosecutrix she had been in a position to identify them. The question of identification is, to our mind, the determining factor in this case. In the FIR the prosecutrix has named four of the accused as having committed rape on her, they being Nandoo, Bindu, Pintoo and Raju. PW8, who was unsure, as to the identity of the accused, however, stated that she knew Nandoo, Pyaru, Pawan, Pintoo and Raju but conceded that she had not known any of the accused at the time of the incident but after the police had enquired about the names of the boys in her presence, she had come to know who they were. It is also significant that the Court had recorded a note that even after she had named the five accused she had been able to identify only Pawan and she had not been able to identify any of the other accused. She also stated that some of the boys had been arrested on the day of the incident and that she had been called to visit the police station several times to identify them and that the police had often threatened her and her daughter that if they did not come to the police station they would file a case against them. In the last paragraph of her examination-in-chief PW8 clearly stated that she was not in a position to identify the boys at the time of incident or even in Court. It is significant that the prosecutrix, her mother and all the accused were residents of Ruabandha and as per the

prosecutrix's evidence she was aware of the identity of only a few of them whom she had named in the FIR. It is also significant that in her examination-in-chief the prosecutrix stated that at the time when she had been taken away on the Luna she did not know the names of the accused who were taking her away and that she was not personally acquainted with any of the boys at the time of incident and did not know their names and was not in a position to recognize them. In paragraph 46 of the evidence, this is what she had to say:

"Police personnel had taken me to Police Station at about 2.30 O'clock in the night. Immediately after lodging the report there, they came at the place of occurrence taking me there and had got identified the accused persons having taken them out of their houses. Then the police personnel had taken the accused persons also at the Police Station. In that night nine boys had been brought having arrested. Remaining five boys had been brought by the police on the second day. I had identified those also in the Police Station.

After arrest of nine-ten boys, they had taken near the house where incident had taken place and they had asked to identify the remaining boys. Then I had identified 4-5 boys from that crowd. I had gone to the Police Station having sit in Daga with all those boys. Witness now states that 2-3 boys had been arrested from the houses, remaining 6-7 boys had been arrested from Dance site, remaining 4-5 boys had been brought having arrested on the second day.

I had not gone to the houses of the boys for identification. Police personals had called them in the hotel and I used to identify them there."

We are of the opinion that in the light of the categorical statements of the two main prosecution witnesses, the identification of the accused is extremely doubtful.

13. The test identification parade conducted by PW5 Sakharam Mahilong, Naib Tehsildar is equally farcical. This witness stated that 36 persons in all, including 9 of the accused, had been associated with the parade held by him on 30th December 1986 but he also admitted that the 9 accused had been covered with black and brown coloured blankets. To our mind the only inference that can be drawn from this admission is that similar and distinctive blankets had been provided so as to facilitate the identification of the accused. Moreover, in the light of the fact that the witness had been shown to the prosecutrix not once but several times while they were in police custody, the identification parade held by PW5 is even otherwise meaningless.

14. The learned State counsel has, however, placed special emphasis on the fact that the underwear handed over by the accused to the investigating officer were found by the chemical examiner to be stained with semen which corroborated the prosecution story. In the light of the fact that we have found

> the identification of the accused to be doubtful, the recovery of the underwear becomes meaningless. But we have nevertheless chosen to examine this submission as well. In this connection, we have gone through the evidence of Durga Prasad Shukla PW10, the investigating officer. We notice that the underwear of some of the accused had been produced by them on 29th December 1986 whereas the remaining accused had likewise produced their underwear on the 2nd of January 1987. We find it some what difficult to believe that the accused had themselves provided the evidence of having committed rape soon after the incident, and even more surprising, that some of them had done so three days after the incident. The recovery of the stained underwear is a factor which, by itself, cannot support a case of rape against the accused.
>
> 15. On an examination of the entire evidence, we are of the opinion that it would be difficult to conclusively show the involvement of each of the accused beyond reasonable doubt. To our mind the truth and falsehood are so inextricably intertwined, that it is impossible to discern where one ends and the other begins.
>
> 16. As already noted above Raju, son of M. Billya did not file an appeal in this court. In the light of the fact that we have found the prosecution story to be doubtful, Raju too must be given the benefit of doubt in the light of the judgments in Raja Ram & Ors. Vs. State of M.P. (1994) 2 SCC 568, Arokia Thomas vs. State of T.N. (2006) 10 SCC 542 and Suresh Chaudhary etc. vs. State of Bihar (2003) 4 SCC 128. We, accordingly allow the appeals and acquit the present appellants, as also Raju son of M. Billya.

36. Reliance is placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Radhu v State of Madhya Pradesh, (2007) 12 SCC 57***, wherein it has been held as under:-

> "6. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the

forearms, writs, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

7. Sumanbai (PW-3) stated in her evidence that when she entered the hut of Gyarsibai responding to her invitation, Radhu who was inside the hut, shut the door and forcibly committed rape by inserting his penis twice; that when she started crying, Radhu gagged her with cloth and kept her confined in the room during the night and released her only the next day morning; and that thereafter she went and informed her mother as to what happened. This version is in consonance with her report of the incident recorded in the FIR (Ex.P5) which was read over and accepted by her in her evidence. Lalithabai (PW-4) stated that when her daughter returned on Tuesday morning and told her that Radhu had raped her by force the whole night. Significantly, the prosecutrix, in her cross-examination, has given a completely different version. She stated that when Radhu committed the 'bad' act by inserting his penis twice, she fainted and remained unconscious throughout the night; that she came back to her senses only the next day morning; that she did not know what happened during the night; that when she regained consciousness and walked out of the place, Radhu was present but Gyarsibai was elsewhere. She also asserted that she told the police that she had become unconscious when the 'bad' act was committed. If she lost consciousness when the alleged act was committed, and if she regained consciousness only the next morning and left the house of Gyarsibai without any obstruction, the prosecution case that the prosecutrix was gagged by Radhu, that the prosecutrix was confined in his house during the entire night by use of force by Radhu, that she was freed by Radhu only the next morning, becomes false.

8. In her examination-in-chief, Sumanbai categorically stated that Gyarsibai called her to her house when she was going to the shop of Sony for buying sugar and tea. In her oral report of the incident registered as FIR (Ex.P5), she had stated that she went to Gyarsibai's house, while on the way to the shop. But in the cross-examination, she stated that Gyarsibai called her when she was coming back from the shop after purchasing tea and sugar. She also stated that she could not tell the value of the goods purchased by her at that time. Thus, the prosecution case that the incident occurred when she was going to the shop to purchase tea and sugar is not proved.

9. Sumanbai stated that the incident took place on Monday night, that she returned on Tuesday morning and her father

returned on Wednesday, that she and her father went to the house of Gulabbai and Ram Lal at Barud and she narrated the incident to Ramlal, that Ramlal also accompanied them to the Barud Police Station. Sumanbai's mother Lalita Bai (PW4) also stated that on Wednesday her husband took their daughter Sumanbai to Barud Police Station, and that after returning from the Police Station, her husband told her that they had also taken her brother Ram Lal, who resided at Barud, to the Police Station. Mangilal (PW-7) father of Sumanbai, did not mention about Ram Lal or his wife Gulabbai in his examination in chief. However, in his cross-examination, he stated that he went to the house of his relative Ramlal at Barud and Ramlal accompanied them to the police station. But, Ram Lal was not examined. Ram Lal's wife Gulab Bai, examined as PW-5, was declared hostile and she denied that Mangilal and Sumanbai visited their house and informed them about the incident. She also stated that neither she nor her husband accompanied Sumanbai to the Police Station. Therefore the prosecution case that Sumanbai and her father informed Ramlal about the incident on 30.1.1991 appears to be doubtful.

10. Sumanbai's mother Lalithabai states that when Sumanbai did not return on Monday night, she and her son-in-law Ramesh searched for her up to 3 a.m. on Tuesday morning. In her cross-examination, she stated that she searched for Sumanbai in the village, and that she also asked Gyarsibai about Sumanbai. In the cross-examination, she stated that she did not remember whose houses she went to enquire about her daughter, and that she did not remember whether she had gone to anyone's house at all. Lalithabai further stated that she told her son-in-law Ramesh about the incident and asked him to go to Chacharia to inform her husband about the incident and to bring him back. Mangilal also said his son-in-law came and informed him about the incident. Sumanbai stated that her brother-in-law was sent to bring back her father; that her brother-in-law's name is Ramesh but the SHO wrongly wrote his name as Dinesh in the FIR. Significantly, Dinesh or Ramesh, brother-in- law of Sumanbai was not examined to corroborate that there was a search for Sumanbai on the night of 28.1.1991 or that he was appraised about the incident by his mother-in-law on 29.1.1991 and that he went and informed his father-in-law about the incident.

11. Thus the two persons (other than the parents) who were allegedly informed about the incident namely Ramesh (on 29.1.1991) and Ramlal (on 30.1.1991) were not examined and consequently there is no corroboration.

12. Dr. Vandana (PW-8) stated that on examination of Sumanbai, she found that her menstrual cycle had not started and pubic hair had not developed, and that her hymen was ruptured but the rupture was old. She stated that there were no injuries on her private parts and she could not give any opinion

as to whether any rape had been committed. These were also recorded in the examination Report (Ex. P8). She, however, referred to an abrasion on the left elbow and a small abrasion on the arm and a contusion on the right leg, of Sumanbai. She further stated that she prepared two vaginal swabs for examination and handed it over along with the petticoat of Sumanbai to the police constable, for being sent for examination. But no evidence is placed about the results of the examination of the vaginal swabs and petticoat. Thus, the medical evidence does not corroborate the case of sexual intercourse or rape.

13. We are thus left with the sole testimony of the prosecutrix and the medical evidence that Sumanbai had an abrasion on the left elbow, an abrasion on her arm and a contusion on her leg. But these marks of injuries, by themselves, are not sufficient to establish rape, wrongful confinement or hurt, if the evidence of the prosecutrix is found to be not trustworthy and there is no corroboration.

14. Lalithabai says that when Sumanbai did not return, she enquired with Gyarsibai. Sumanbai also says that she used to often visit the house of Gyarsibai. She says that Radhu's parents are kaka and baba of her mother and Radhu was her maternal uncle. The families were closely related and their relationship was cordial. In the circumstances, the case of the prosecution that Gyarsibai would have invited Sumanbai to her house to abet her son Radhu to rape Sumanbai and that Gyarsibai was present in the small house during the entire night when the rape was committed, appears to be highly improbable in the light of the evidence and circumstances.

15. The FIR states that one Dinesh was sent by Lalithabai to fetch her husband. Lalitabai and Mangilal have stated that they did not know anyone by the name Dinesh. Sumanbai stated in her evidence that on 29.1.1991, as her father was away, her brother-in-law went to bring back her father, that the name of her brother-in-law is Ramesh, but the SHO wrongly wrote his name as 'Dinesh'. But none else mentioned about such a mistake. Neither Ramesh nor Dinesh was examined.

16. The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place. The learned counsel for the respondent submitted that defence had failed to prove that Mangilal, father of prosecutrix was indebted to Radhu's father Nathu and consequently, defence of false implication of accused should be rejected. Attention was invited to the denial by the mother and father of the prosecutrix, of the suggestion made on behalf of the defence, that Sumanbai's father Mangilal was indebted to Radhu's father Nathu and because Nathu was demanding money, they had made the false charge of rape, to avoid

repayment. The fact that the defence had failed to prove the indebtedness of Mangilal or any motive for false implication, does not have much relevance, as the prosecution miserably failed to prove the charges. We are satisfied that the evidence does not warrant a finding of guilt at all, and the Trial Court and High Court erred in returning a finding of guilt.

17. We, therefore, allow the appeal, set aside the judgments of the courts below and acquit the accused of all charges."

37. Reliance is placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Vimal Suresh Kamble v. Chaluverapinake Apal SP (2003) 3 SCC 175***, wherein it has been held as under:-

"18. However, the evidence of the prosecutrix does not inspire confidence. The occurrence took place at about 12.30 p.m. on a Sunday. The High Court has observed that on a Sunday, if the prosecutrix had raised an alarm it would have been heard by many persons who would have immediately come to her rescue, particularly in such a society where the respondent No.1 resided. On a Sunday most of the residents are at home at about 12.30 p.m. and, therefore, it was surprising that no one heard the cries of the appellant when she was raped by respondent No.1. There after also the conduct of the prosecutrix is rather surprising. She was loitering in the locality till about 2.30 p.m. i.e. for about 2 hours after the incident. She again went to the flat of respondent No.1 on the second floor after having come down immediately after the occurrence. The reason given by her is that she wanted to return the keys to respondent No.1. At one stage she stated she had decided to handover the keys to one of the neighbours, but actually she did not handover the keys to anyone. When she went up to the flat of respondent No.1 she met PW.2 and his wife. But she did not tell them about the incident. She then came back home and went to sleep. In the evening when her husband came she did not report the incident to him. At night, as usual, she cooked food for the family and went to sleep. Next morning she came to the society and attended to her routine work. Admittedly she worked in four flats on that day but she did not report the matter to anyone. Later in the afternoon she went to the house of her brother. It is there for the first time that she reported the matter to her sister-in- law Smt. Tarabai, who has not been examined. Only thereafter they went to the police station and lodged the report at about 3.00 p.m.

19.Respondent No.1 in his examination under Section 313 Cr. P.C. stated that the case had been fabricated only to extort money. He was a resident of the State of Karnataka and that is why PW.4 Manohar Sawant, a Shivsena leader, supported the prosecutrix. A false case had been lodged against him. On 25th April, 1992 the prosecutrix had asked him for some money but he refused to pay her saying that her salary had already been paid by his wife. On 26th April, 1992 she again came to him and

> again demanded money which he refused. She threatened him saying that if he did not give her money, he will have to face the consequences. In sum and substance, the defence of respondent No.1 appears to be that no such occurrence took place at all and a false case had been filed to extort money from respondent No.1 who was a government employee.
>
> 20.In cross-examination PW.1 (prosecutrix) asserted that she was determined to lodge a complaint. She also knew that taking bath would cause disappearance of the evidence of rape and yet she took a bath as she was feeling dirty. Thereafter she went to sleep.
>
> 21.On an overall appreciation of the evidence of the prosecutrix and her conduct we have come to the conclusion that PW.1 is not a reliable witness. We, therefore, concur with the view of the High Court that a conviction cannot be safely based upon the evidence of the prosecutrix alone. It is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. The evidence of the prosecutrix in this case is not of such quality, and there is no other evidence on record which may even lend some assurance, short of corroboration that she is making a truthful statement. We, therefore, find no reason to disagree with the finding of the High Court in an appeal against acquittal. The view taken by the High Court is a possible, reasonable view of the evidence on record and, therefore, warrants no interference. This appeal is dismissed."

38. It is quite apparent from the aforesaid exposition of law that ordinarily, the evidence of prosecutrix should not be suspected and should be believed and if the evidence is reliable, no corroboration is necessary, but the Hon'ble Apex Court in the aforesaid judgments, has very carefully observed that statement made by the prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court because rape cases cause the greatest distress and humiliation to the victim but at the same time, false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The Hon'ble Apex Court in ***Rajoo v. State of MP*** (supra), has categorically held that the accused must also be protected against the possibility of false implication and it must be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for presuming that the statement of such a witness is always correct or without any embellishment or exaggeration. In the case at hand, as has been discussed in detail, statement of prosecutrix is full of contradictions and story put forth by her is highly improbable. Evidence available on record clearly suggests that it was prosecutrix, who of her own volition, joined the company of the accused and thereafter, came to Shimla from Rohru. PW8 and PW25 have categorically deposed before the court below that they joined the company of the prosecutrix and accused on the askance of the prosecutrix as they were of her prior acquaintance. Statements having been made by PW8 and PW25 clearly suggest that they remained throughout with the accused and prosecutrix on the dates of alleged incident, coupled with the fact that nothing has emerged in the medical evidence suggestive

of the fact that prosecutrix was subjected to sexual intercourse in recent times. Leaving everything aside, it has specifically come in the statement of prosecutrix that she wanted to marry accused. She categorically stated in her cross-examination that she lodged FIR against the accused to pressurize him to solemnize marriage with her. If evidence, be it ocular and documentary, is read in its entirety, it nowhere indicates that prosecutrix was subjected to sexual intercourse by the accused and as such, her sole testimony being highly improbable, deserves to be rejected outrightly, especially, when same has been not corroborated by any of the material prosecution witnesses.

39. The Hon'ble Supreme Court in case titled ***Rai Sandeep @ Deepu v. State (NCT) of Delhi, 2012 (8) SCC 21***, has held that sterling witness should be of a very high quality and caliber, whose version should, therefore, be unassailable. The Hon'ble Apex Court has held that such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end. Relevant paras of the judgment is reproduced herein below:-

> *22. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material*

*objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.*

*23.On the anvil of the above principles, when we test the version of PW- 4, the prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests mentioned above. There is total variation in her version from what was stated in the complaint and what was deposed before the Court at the time of trial. There are material variations as regards the identification of the accused persons, as well as, the manner in which the occurrence took place. The so-called eye witnesses did not support the story of the prosecution. The recoveries failed to tally with the statements made. The FSL report did not co-relate the version alleged and thus the prosecutrix failed to instill the required confidence of the Court in order to confirm the conviction imposed on the appellants.*

*24. With the above slippery evidence on record against the appellants when we apply the law on the subject, in the decision reported in State of Punjab v. Gurmit Singh & Ors. (supra), this Court was considering the case of sexual assault on an young girl below 16 years of age who hailed from a village and was a student of 10th standard in the Government High School and that when she was returning back to her house she was kidnapped by three persons. The victim was stated to have been taken to a tubewell shed of one of the accused where she was made to drink alcohol and thereafter gang raped under the threat of murder. The prosecutrix in that case maintained the allegation of kidnapping as well as gang rape. However, when she was not able to refer to the make of the car and its colour in which she was kidnapped and that she did not raise any alarm, as well as, the delay in the lodging of the FIR, this Court held that those were all circumstances which could not be adversely attributed to a minor girl belonging to the poor section of the society and on that score, her version about the offence alleged against the accused could not be doubted so long as her version of the offence of alleged kidnapping and gang rape was consistent in her evidence. We, therefore, do not find any scope to apply whatever is stated in the said decision which was peculiar to the facts of that case, to be applied to the case on hand.*

*25. In the decision reported in Ashok Kumar v. State of Haryana (supra), this court while dealing with the offence under Section 376 (2) (g) IPC read with explanation held as under in Para 8:*

*"8.Charge against the appellant is under Section 376(2)(g) IPC. In order to establish an offence under Section 376(2)(g) IPC, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the*

*accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence."*

*26. Applying the above principle to the case on hand, we find that except the ipse-dixit of the prosecutrix that too in her chief examination, with various additions and total somersault in the cross examination with no support at all at the instance of her niece and nephew who according to her were present in the house at the time of occurrence, as well as, the FSL report which disclosed the absence of semen in the socks which was stated to have been used by the accused as well as the prosecutrix to wipe of semen, apart from various other discrepancies in the matter of recoveries, namely, that while according to the prosecutrix the watch snatched away by the accused was 'Titan' while what was recovered was 'Omex' watch, and the chain which was alleged to have been recovered at the instance of the accused admittedly was not the one stolen, all the above factors do not convincingly rope in the accused to the alleged offence of 'gang rape' on the date and time alleged in the chargesheet.*

*27. In the decision reported as State of Himachal Pradesh v. Asha Ram - AIR 2006 SC 381, this Court highlighted the importance to be given to the testimony of the prosecutrix as under in para 5:*

*5. .....It is now well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix*

*should not be a ground for throwing out an otherwise reliable prosecution case." (emphasis added)*

*28. That was a case where the father alleged to have committed the offence of rape on one of his daughters who was staying with him while his wife was living separately due to estranged relationship. While dealing with the said case, where the prosecutrix, namely, the daughter, apart from the complaint lodged by her, maintained her allegation against her father in the Court as well. This Court held that the version of the prosecutrix in the facts and circumstances of that case merited acceptance without any corroboration, inasmuch as, the evidence of rape victim is more reliable even that of an injured witness. It was also laid down that minor contradictions and discrepancies are insignificant and immaterial in the case of the prosecutrix can be ignored.*

*29. As compared to the case on hand, we find that apart from the prosecutrix not supporting her own version, the other oral as well as forensic evidence also do not support the case of the prosecution. There were material contradictions leave alone lack of corroboration in the evidence of the prosecutrix. It cannot be said that since the prosecutrix was examined after two years there could be variation. Even while giving allowance for the time gap in the recording of her deposition, she would not have come forward with a version totally conflicting with what she stated in her complaint, especially when she was the victim of the alleged brutal onslaught on her by two men that too against her wish. In such circumstances, it will be highly dangerous to rely on such version of the prosecutrix in order to support the case of the prosecution.*

*30. In the decision reported as Lalliram & Anr. v. State of Madhya Pradesh (supra) in regard to an offence of gang rape falling under Section 376 (2) (g) this Court laid down the principles as under in paras 11 and 12:*

*"11. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in Pratap Misra v. State of Orissa where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor and if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See Aman Kumar v. State of Haryana.)*

*12. As rightly contended by learned counsel for the appellants, a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In Aman Kumar case it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a*

*higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value, it may search for evidence direct or circumstantial." (emphasis added)*

*31. When we apply the above principles to the case on hand, we find the prevaricating statements of the prosecutrix herself in the implication of the accused to the alleged offence of gang rape. There is evidence on record that there was no injury on the breast or the thighs of the prosecutrix and only a minor abrasion on the right side neck below jaw was noted while according to the prosecutrix's original version, the appellants had forcible sexual intercourse one after the other against her. If that was so, it is hard to believe that there was no other injury on the private parts of the prosecutrix as highlighted in the said decision. When on the face value the evidence is found to be defective, the attendant circumstances and other evidence have to be necessarily examined to see whether the allegation of gang rape was true. Unfortunately, the version of the so called eye witnesses to at least the initial part of the crime has not supported the story of the prosecution. The attendant circumstances also do not co-relate to the offence alleged against the appellants. Therefore, in the absence of proper corroboration of the prosecution version to the alleged offence, it will be unsafe to sustain the case of the prosecution.*

32. In the decision reported as Krishan Kumar Malik v. State of Haryana (supra) in respect of the offence of gang rape under Section 376 (2) (g), IPC, it has been held as under in paras 31 and 32:

"31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her Section 164statement, Section 161 statement (CrPC), FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant." (emphasis added)

> 33. Applying the said principles to the facts of the case on hand, we find that the solitary version of the chief examination of PW-4, the prosecutrix cannot be taken as gospel truth for its face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellants.
>
> 34. The prosecution has miserably failed to establish the guilt of gang rape falling under Section 376(2) (g), IPC against the appellants. The conviction and sentence imposed on the appellants by the trial Court and confirmed by the impugned order of the High Court cannot, therefore, be sustained. The appeals are allowed. The judgment and order of conviction and sentence passed by the trial Court and confirmed by the High Court are hereby set aside. The appellants are acquitted of all the charges and they be set at liberty forthwith, if not required in any other case.

40. Reliance is also placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Narender Kumar v. State (NCT of Delhi), 2012 (7) SCC 171***, wherein it has been held as under:-

> 28. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.
>
> 29.However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: Tukaram & Anr. v. The State of Maharashtra,, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639).
>
> 30. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value,

> it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.
>
> 31.The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.
>
> 32. The instant case is required to be decided in the light of the aforesaid settled legal propositions. We have appreciated the evidence on record and reached the conclusions mentioned hereinabove. Even by any stretch of imagination it cannot be held that the prosecutrix was not knowing the appellant prior to the incident. The given facts and circumstances, make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances alongwith the other evidence on record, in which the offence is alleged to have been committed, we are of the view that her deposition does not inspire confidence. The prosecution has not disclosed the true genesis of the crime. In such a fact-situation, the appellant becomes entitled to the benefit of doubt.
>
> 33.In view of above, the appeals succeed and are allowed. The judgment and order dated 25.3.2009 passed by the High Court of Delhi in Criminal Appeal No. 53 of 2000 and that of the trial court dated 7.12.1999 are hereby set aside. The appellant is on bail, his bail bond stands discharged."

41. Reliance is placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Abbas Ahmad Choudhary v. State of Assam (2010) 12 SCC 115,*** wherein it has been held as under:-

> 9. We are however, of the opinion that the involvement of Abbas Ahmad Choudhary seems to be uncertain. It must first be borne in mind that in her statement recorded on 17th September, 1997, the prosecutrix had not attributed any rape to Abbas Ahmad Choudhary. Likewise, she had stated that he was not one of those who kidnapped her and taken to Jalalpur Tea Estate and on the other hand she categorically stated that while she along with Mizazul Haq and Ranju Das were returning to the village that he had joined them somewhere along the way but had still not committed rape on her. It is true that in her statement in court she has attributed rape to Abbas Ahmad Choudhary as well, but in the light of the aforesaid contradictions some doubt is created with regard to his involvement.
>
> 10.Some corraboration of rape could have been found if Abbas Ahmad Choudhary too had been apprehended and taken to the police station by P.W. 5 -Ranjit Dutta the Constable. The Constable, however, made a statement which was corraborated

> by the Investigating Officer that only two of the appellants Ranju Das and Md. Mizalul Haq along with the prosecutrix had been brought to the police station as Abbas Ahmad Choudhary had run away while en route to the police station. Resultantly, an inference can be rightly drawn that Abbas Ahmad Choudhary was perhaps not in the car when the complainant and two of the appellants had been apprehended by Constable Ranjit Dutta.
>
> 11.We are, therefore, of the opinion that the involvement of Abbas Ahmad Choudhary is doubtful. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.

42. Reliance is placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Dinesh Jaiswal v. State of MP, (2010) 3 SCC 232***, wherein it has been held as under:-

> "10.Mr. C.D. Singh has however placed reliance on Moti Lal's case (supra) to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one.
>
> 11.As already mentioned above, in our opinion, the story given by the prosecutrix does not inspire confidence. We thus allow this appeal, set aside the impugned judgments and direct that the appellant be acquitted."

43. Now, if this Court proceeds to test the version of prosecutrix (PW2) on the anvil of principles laid down in the aforesaid judgment, it has no hesitation to conclude that testimony of prosecutrix is not worth credence as there is total variation in her version; what was stated in the complaint and what was deposed before the court at the time of trial. Similarly, there are material contradictions in her version with regard to her having met accused for the first time at Rohru and her meeting PW25 Atul and PW8 Minakshi at Rohru and Shimla, respectively. Similarly, prosecution failed to prove the recovery of Towel Ext.6/A. Medical/FSL report nowhere co-relates the version of the prosecutrix that she was subjected to sexual intercourse by the accused and as such, prosecutrix failed to instill the required confidence to bring home the guilt, if any, of the appellant-accused.

44. Though having carefully perused and examined the evidence, available on record, this Court is of the definite view that prosecution has failed to prove that prosecutrix was subjected to sexual intercourse as alleged by her on the alleged date of incident but yet there is another aspect of the matter, if it is examined from another angle. It is not the case of the prosecutrix that she agreed to have sexual intercourse with the accused believing that he is likely to marry her and definitely, there was no mis-conception of fact, rather specific

allegation of prosecutrix is that she told accused to wait for sex until marriage, but he did not agree and forced him upon her and committed rape. Careful perusal of initial statement having been made by the prosecutrix under Section 154 Cr.PC/complaint Ext.PW2/A suggests that she alleged that accused forcibly established sexual relations with her at Cemetery at Shimla. She again in her statement recorded under Section 164 Cr.PC claimed that accused forcibly established physical relations with her despite her saying no to it and she requested him to wait till the marriage. In her statement before the court below, she stated that PW25 Atul left the room in the morning and thereafter, accused Vikram committed sexual intercourse with her without her consent forcibly. She further stated that she asked the accused to perform marriage first, but her request was ignored by the accused, who thereafter committed forcible intercourse by laying mattress on the floor of the room.

45. Though as has been categorically concluded by this Court (supra) that having perused evidence, this Court is convinced and satisfied that there is no evidence worth the name that prosecutrix was subjected to sexual intercourse on the date of alleged incident initially at the residence of PW25 and subsequently, at the room of PW8 Minakshi, but even if statement of PW2 Prosecutrix is presumed to be correct, it compels this Court to draw an inference that there is no mis-conception of fact as far as prosecutrix is concerned, rather statement of prosecutrix suggests that she of her own agreed to have intercourse with the accused, because she herself, stated that she requested accused to wait till marriage, but he forcibly committed intercourse. It has also come in her statement that she asked the accused to perform marriage first. Aforesaid statement having been made by prosecutrix does indicate that she was fully aware of the moral quality and inherent risk involved and she having considered the pros and cons of the act, subjected herself to wishes of the accused. It is not in dispute that at the time of alleged incident, prosecutrix was major and was capable of understanding the consequences of her having joined the company of the accused, especially when the accused had allegedly brought her to Shimla on the pretext of marriage. It also emerges from the statement of prosecutrix and PW8 Minakshi that she wanted to marry accused, but parents of the accused were not in favour of the same, that is why, they decided to elope, meaning thereby, the prospect of marriage proposal not materializing was very much in the mind of prosecutrix, but despite that she joined the company of the accused, who allegedly despite her opposition, sexually assaulted her, but as has been taken note herein above, statement of prosecutrix clearly reveals/indicates that her participation in the sexual act was voluntary and deliberate. In this regard, reliance is placed on judgment rendered by the Hon'ble Supreme Court in case title***d Deelip Singh @ Dilip Kumar v. State of Bihar, 2005 (1) SCC 88***, wherein it has been held as under:-

> *2.The victim girl lodged a complaint to the police on 29.11.1988 i.e., long after the alleged act of rape. By the date of the report, she was pregnant by six months. Broadly, the version of the victim girl was that she and the accused were neighbours and fell in love with each other and one day, the accused forcibly raped her and later consoled her saying that he would marry her, that she succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her and therefore continued to have sex on several occasions. After she became pregnant, she revealed the matter to her parents. Even thereafter the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl but the accused avoided to marry her and his father took him out of the village to*

*thwart the bid to marry. The efforts made by the father to establish the marital tie failed and therefore she was constrained to file the complaint after waiting for sometime.*

*27.On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375 IPC, we have the decision of Division Bench of Calcutta High Court in Jayanti Rani Panda vs. State of West Bengal [1984 Crl.L.J. 1535]. The relevant passage in this case has been cited in several other decisions. This is one of the cases referred to by this Court in Uday (supra) approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7:*

*"Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is..... why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when the girl conceived the accused might have felt otherwise. But even then the case in the petition of complainant is that the accused did not till then back out. Therefore it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged."*

*The discussion that follows the above passage is important and is extracted hereunder:*

*"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her." (emphasis supplied)*

*The learned Judges referred to the decision of Chancery Court in Edgomgtpm vs. Fotz,airoce (1885) 29 Ch.D 459 and observed thus:*

*"This decision lays down that a misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it. The particular observation at p. 483 runs to the following effect: "There must be a misstatement of an existing fact." Therefore, in order to amount to a misstatement of fact the existing state of things and a misstatement as to that becomes relevant. In the absence of such evidence Sec. 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact."*

*After referring to the case law on the subject, it was observed in Uday, supra at paragraph 21:*

*"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."*

Hon'ble Apex Court in judgment in ***Deelip Singh @ Dilip Kumar'*s** case (supra) while referring to various judgments, arrived at a conclusion that consent given by the prosecutrix to have sexual intercourse with a person, with whom, she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under mis-conception of fact. No doubt, Hon'ble Apex Court in aforesaid Judgment has stated that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under a misconception of fact, rather court must in each case consider the evidence before it and the surrounding circumstances, before arriving at a conclusion because each case has its own peculiar facts which may have a bearing on the question whether consent was voluntary or was given under a misconception of fact. In the case at hand, at the cost of repetition, though this Court has no iota of doubt after having closely/minutely analyzed evidence that prosecution miserably failed to prove that prosecutrix was subjected to sexual intercourse by the accused, but bare perusal of statement of prosecutrix, if considered solely, it itself suggests that she was deeply in love with the accused and wanted to marry him. There is ample evidence available on record that prosecutrix voluntarily joined the company of the accused with a view to marry him and she remained in the company of the accused for at least 2 days of her own volition and without there being any external pressure.

46. Leaving everything aside, prosecution invariably is under obligation to prove that prosecutrix is a reliable witness and her testimony is sufficient to hold accused guilty of the alleged crime and the burden to prove such, invariably lies on the prosecution, but in the case at hand, evidence brought on record by the prosecution, as has been discussed in detail, is wholly insufficient and does not inspire confidence at all, rather story put forth by the prosecution appears to be highly improbable and full of contradictions and as such, deserves outright rejection.

47. In the case at hand, though there is no iota of evidence to connect the accused with the commission of offence alleged to have been committed by him, but as has been discussed herein above, evidence of prosecutrix should not be suspected unless her evidence is not reliable, but in the instant case, sole testimony of prosecutrix, as has been examined herein above carefully, does not inspire confidence, rather appears to be highly improbable and compels this Court, to arrive at a conclusion that she of her own volition, with a view to perform marriage, had joined the company of the accused. Hence, having carefully perused the material available on record, this Court finds that two views are possible and as such, one being beneficial to the accused needs to be taken note of while determining the guilt of the accused. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in **P. Satyanarayana Murthy v. District Inspector of Police State of Andhra Pradesh and Anr. (2015) 10 SCC 152,** wherein it has been held that if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused. Relevant para whereof is being reproduced herein below:-

> *"26.In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in Sujit Biswas vs. State of Assam (2013)12 SCC 406 had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. It was held, that the Court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused."*

48. In the case titled "**Jose alias Pappachan v. Sub-inspector of Police, Koyilandy and Anr. (2016) 10 SCC 519,** the Hon'ble Apex Court, has held as under:-

> *"56.It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of "may be true" but has to essentially elevate it to the grade of "must be true". In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the*

*accused and the other to his innocence, the one favourable to the accused ought to be adopted."*

49. Reliance is also placed on judgment rendered by the Hon'ble Supreme Court in case titled ***T. Subramanian vs. State of Tamil Nadu, (2006)1 SCC 401,*** wherein it has been 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, relevant para of the judgment is reproduced herein below:

*10. The evidence throws out a clear alternative that the accused was falsely implicated at the instance of PWs.1, 2 and 6. If two views were possible from the very same evidence, it cannot be said that the prosecution had proved beyond reasonable doubt that the appellant had received the sum of Rs. 200/- as illegal gratification. We are, therefore, of the considered view that the trial court was right in holding that the charge against the appellant was not proved and the High Court was not justified in interfering with the same.*

*11. We, therefore, allow this appeal, set aside the order of the High Court and restore the order of the trial court, acquitting the appellant of the charge.*

50. In this regard, reliance is also placed on judgment rendered by the Hon'ble Apex Court in case titled ***Bhagwan Singh and Ors v. State of MP (2002) 4 SCC 85***, wherein it has been held as under:-

"*We do not agree with the submissions of the learned counsel for the appellants that under Section 378of the Code of Criminal Procedure the High Court could not disturb the finding of facts of the trial court even if it found that the view taken by the trial court was not proper. On the basis of the pronouncements of this Court, the settled position of law regarding the powers of the High Court in an appeal against an order of acquittal is that the Court has full powers to review the evidence upon which an order of acquittal is based and generally it will not interfere with the order of acquittal because by passing an order of acquittal the presumption of innocence in favour of the accused is reinforced. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Such is not a jurisdiction limitation on the appellate court but a Judge made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to reappreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether all or any of the accused has committed any offence or not. Probable view taken by the trial court which may not be disturbed in the appeal*

*is such a view which is based upon legal and admissible evidence. In the instant case the trial court acquitted the respondents by not relying upon the testimony of three eye-witnesses, namely, Kiran (PW7), Mukesh (PW12) and Jagdish (PW22) on considerations which apparently appeared to be extraneous. Such findings of acquittal apparently are based upon erroneous views or the result of ignoring legal and admissible evidence with the result that the findings arrived at by the trial court are held to be erroneous. The High Court has ascribed valid reasons for believing the statements of those witnesses by pointing out the illegalities committed by the trial court in discarding their testimonies. The High Court has also rightly held that the trial court completely ignored the basic principles of law in criminal jurisprudence which entitles the accused to claim the benefit of right of self-defence. Without there being any legal and admissible evidence but swayed by finding some injuries on the person of the accused, the trial court wrongly held that the respondents were justified in causing the death of three persons in exercise of their right of self-defence. No fault, therefore, can be found in the judgment of the High Court on this ground."*

51. Consequently, in view of the detailed discussion made herein above as well as law relied upon, this Court has no hesitation to conclude that learned court below has not appreciated the evidence in its right perspective and as such, findings returned by it deserve to be set-aside. Accordingly, present appeal is allowed and judgment passed by the Court below is quashed and set-aside and appellant-accused is acquitted of the offence punishable under Section 376 IPC. Bail bonds furnished by the appellants are discharged. Fine amount, if any deposited by the appellant, be refunded to him. Release warrants be prepared forthwith.

Present appeal stands disposed of, so also pending applications, if any.

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

Gulabjeet Singh & Ors.....Petitioners.
Versus
Ravel Singh ..... Respondent.

Cr. Rev. No. 383 of 2016
Reserved on: 31.10.2018
Date of decision: 13.11.2018.

**Code of Criminal Procedure, 1973 –** Section 258 –Negotiable Instruments Act, 1881, (Act) - Section 138 – Dishonour of Cheque –Complaint – Discharge of accused – Whether permissible ? Held, provisions regarding stoppage of proceedings and discharge of accused contained in Section 258 of Code attracted only in cases instituted on chargesheet – In complaint case for offence under section 138 of Act, Section 258 of Code would not apply save and except to extent spelt out in Meters and Instruments Private Limited and another vs. Kanchan Mehta 2018 (1) SSC 560. (Para 4)

**Code of Criminal Procedure, 1973** – Section 258 –Negotiable Instruments Act, 1881, (Act)- Sections 138 and 143 – Dishonour of Cheque – Complaint – Stoppage of proceedings – Scope – Held, stoppage of proceedings and discharge of accused can be ordered only if accused has paid cheque amount together with interest and costs – In other eventualities there is no scope of applicability of section 143 of Act, read with section 258 of Code. (Paras 8 & 9)

**Principle of Ratio decidendi** – what is ? – Held, it is only ratio of judgment which has binding effect on Court subordinate to Court that passed judgment – Ratio of any decision must be understood in background of facts of that case – Case is only an authority for what it actually decides and not what logically follows from it. (Paras 10 & 11)

***Cases referred:***

Ambica Quarry Works v. State of Gujarat and others (1987) 1 SCC 213
Arasmeta Captive Power Company Private Limited and another v. Lafarge India Private Limited AIR 2014 SC 525
Caledonian Railway Co. v. Walker's Trustees (1882) 7 App Cas 259 :46 LT 826 (HL)
Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697
Krishena Kumar v. Union of India and others (1990) 4 SCC 207
Meters and Instruments Private Limited and another vs. Kanchan Mehta, 2018 (1) SCC 560
Natural Resources Allocation, in Re, Special Reference No.1 of 2012 (2012) 10 SCC 1
Quinn v. Leathem (1901) AC 495
Som Mittal v. Government of Karnataka (2008) 3 SCC 574
State of Orissa v. Mohd. Illiyas (2006) 1 SCC 275
Union of India v. Amrit Lal Manchanda and another (2004) 3 SCC 75

For the Petitioners : Mr. K. S. Kanwar, Advocate.
For the Respondent: Mr. Satyen Vaidya, Sr. Advocate, with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

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**Justice Tarlok Singh Chauhan, Judge**

This petition takes exception to the order passed by the learned trial Magistrate dated 19.09.2016, whereby the application filed by the petitioner under Section 258 Cr.P.C. in proceedings under Section 138 of the Negotiable Instrument Act (for short the 'N.I. Act'), came to be dismissed.

2. However, the moot question is whether the provisions of Section 258 Cr.P.C. for stopping all the proceedings are applicable to the proceedings initiated under Section 138 of the N. I. Act.

3. Section 258 Cr.P.C. reads as under:-

> "Power to stop proceedings in certain cases- In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge."

4. The plain reading of the aforesaid section reveals that the same can be attracted only in cases filed other than upon complaint, meaning thereby, if prosecution is launched by the State then this Section will be attracted. However, where a complaint is filed by a private party e.g. complaint under Section 138 of the N.I. Act, then Section 258 Cr.P.C. would not apply and accused cannot be discharged under the aforesaid Section, save and except, to the extent as spelt out by the Hon'ble Supreme Court in its recent decision in ***Meters and Instruments Private Limited and another vs. Kanchan Mehta, 2018 (1) SCC 560***, wherein it was held as under:-

> 11. While it is true that in Subramanium Sethuraman versus State of Maharashtra, 2004 13 SCC 324, this Court observed that once the plea of the accused is recorded under Section 252 of the Cr.P.C., the procedure contemplated under Chapter XX of the Cr.P.C. has to be followed to take the trial to its logical conclusion, the said judgment was rendered as per statutory provisions prior to 2002 amendment. The statutory scheme post 2002 amendment as considered in Mandvi Cooperative Bank and J.V. Baharuni has brought about a change in law and it needs to be recognised. After 2002 amendment, Section 143 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the Court, where the accused tenders the cheque amount with interest and reasonable cost of litigation as assessed by the Court. Such an interpretation was consistent with the intention of legislature. The court has to balance the rights of the complainant and the accused and also to enhance access to justice. Basic object of the law is to enhance credibility of the cheque transactions by providing speedy remedy to the complainant without intending to punish the drawer of the cheque whose conduct is reasonable or where compensation to the complainant meets the ends of justice. Appropriate order can be passed by the Court in exercise of its inherent power under Section 143 of the Act which is different from compounding by consent of parties. Thus, Section 258 Cr.P.C. which enables proceedings to be stopped in a summons case, even though strictly speaking is not applicable to complaint cases, since the provisions of the Cr.P.C. are applicable "so far as may be", the principle of the said provision is applicable to a complaint case covered by Section 143 of the Act which contemplates applicability of summary trial provisions, as far as possible, i.e. with such deviation as may be necessary for speedy trial in the context.

5. It was on the basis of the aforesaid observation that the Hon'ble Supreme Court culled out the following principles:-

> [18] From the above discussion following aspects emerge:
>
> 18.1Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

> 18.2 The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.
>
> 18.3 Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.
>
> 18.4 Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.
>
> 18.5 Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

6. And thereafter concluded by making the following observation in para 19, which reads thus:-

> In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C. As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Cr.P.C. with sentence of less than one year will not be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

7. Shri K. S. Kanwar, learned counsel for the petitioner, would vehemently argue that the Hon'ble Supreme Court itself has held that Section 258 Cr.P.C. will be applicable to proceeding initiated under Section 138 of the N.I. Act and, therefore, the Court below could not have rejected the application so filed by the petitioner.

8. Apparently, the application filed by the petitioner before the learned Court below under Section 258 Cr.P.C. was not on the ground that the cheque amount together with interest and cost as assessed by the Court had been paid, therefore, the Court should have closed the proceedings in exercise of power under Section 143 of the Act, read with Section 258 Cr.P.C. Rather the allegations in the application were that the complaint itself was not maintainable as there was no legal enforceable liability and there was already a civil suit pending *inter se* the parties regarding the liability of the complainant or accused person contingently fixed upon the partnership deed on the basis of which the cheque amount of Rs. 21 lacs, which is the subject matter of the complaint, had been issued.

9. It would be noticed that the facts before the Hon'ble Supreme Court in ***Meters and Instruments' case (supra)*** were that the cheque amount with interest and cost had been paid and it was in those circumstances that the provisions of Section 258 of the Code were held to be applicable so as to entitle and enable the Court to close the proceedings and discharge the accused.

10. It is more than settled that it is only the ratio of the judgment which has binding effect on the court subordinate to the court that passed the judgment.

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

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

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

13. In ***Krishena Kumar v. Union of India and others (1990) 4 SCC 207,*** the Constitution Bench, while dealing with the concept of ratio decidendi, has referred to ***Caledonian Railway Co. v. Walker's Trustees (1882) 7 App Cas 259 :46 LT 826 (HL)*** and ***Quinn*** (supra) and the observations made by Sir Frederick Pollock and thereafter proceeded to state as follows:-

> "The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate

consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol.26, para 573)

> "The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi."

(Emphasis added)

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

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

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

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

16. The said authorities have been relied upon in ***Natural Resources Allocation, in Re, Special Reference No.1 of 2012 (2012) 10 SCC 1***.

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

18. The Hon'ble Supreme Court in ***Som Mittal v. Government of Karnataka (2008) 3 SCC 574*** observed that judgments are not to be construed as statutes. Nor words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a judge uses a phrase or expression with the intention of emphasizing a point or accentuating a principle or even by way of a flourish of writing style. Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation (*See:**Arasmeta Captive Power Company Private Limited and another v. Lafarge India Private Limited AIR 2014 SC 525**.)*

19. Moreover, it is not the Section but only the principles of Section 258 Cr.P.C. that have been held to be applicable to complaint cases that too only to the extent as enunciated by the Hon'ble Supreme Court in ***Meters and Instruments' case (supra)*** and in so far as the cases under Negotiable Instruments Act are concerned, then obviously it is only when the cheque amount with interest and cost as assessed paid by a specific date, the Court is entitled to close the proceedings in exercise of its power under Section 143 of the Act read with Section 258 Cr.P.C. and thereafter discharge the accused and not beyond that.

20. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed.

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**BEFORE HON'BLE MR. JUSTICE SURYA KANT, CJ AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.**

M/s Ambuja Cements Ltd. ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 1734 of 2008

Date of Decision : 2nd November, 2018.

**Mines and Minerals (Regulation and Development) Act, 1957-** Section 9 (2) – **Mineral Concession Rules,1960 (Rules)** – Rules 64-A and 64-B – Petitioner company granted lease for extracting limestone – Contract speaking of payment of royalty to Government – State levying interest on delayed payment of royalty and raising demand – Challenge thereto – Petitioner arguing that as per past practice, royalty was being paid on quarterly basis and demand for payment on monthly basis never raised by Government - Petitioner also having legitimate expectation of not paying interest on delayed payment – Held, since Government had not fixed any specific date for payment of royalty, it became due moment minerals were consumed or removed from site by lessee – Interest on delayed payment to be calculated after sixtieth day of such removal from leased area and not on quarterly basis by computing calendar months – Past practice has to be consistent with Rules – Levying of interest upheld – Petition dismissed. (Paras 8 & 9)

**Constitution of India, 1950**- Article 299 – Government Contract – Liability of Government - Held – Government acts on basis of written instructions – Oral understanding between individual and officials of Government if any has no significance. (Paras 10 & 11)

**Doctrine of Legitimate Expectation** – Applicability – Limitation - Held – Principle of legitimate expectation cannot be invoked against statutory provisions – Expectation based on sporadic, casual or random acts cannot be legitimate – State if not claiming interest on

delayed payments of royalty in past cannot be compelled to do so in future also. (Paras 12 & 20)

***Cases referred:***

Confederation of Ex-Servicemen Associations and others vs. Union of India and others (2006) 8 SCC 399

Food Corporation of India vs. Kamdhenu Cattle Feed Industries 1993 (1) SCC 71, AIR 1993 SC 1601

Madras City Wine Merchants' Association and another vs. State of Tamil Nadu and another (1994) 5 SCC 509

Navjyoti Housing Cooperative Group Housing Society and others vs. Union of India, 1992 (4) SCC 477

Ram Pravesh Singh and others vs. State of Bihar and others (2006) 8 SCC 381

Secretary, State of Karnataka and other vs. Umadevi (3) and others (2006) 4 SCC 1

South Eastern Coal Fields Ltd. vs. State of M.P. and others, 2003 (8) SCC 648

State of Uttar Pradesh and others vs. United Bank of India and others (2016) 2 SCC 757

Supreme Court Advocate-on-Record Association and others vs. Union of India 1993 (4) SCC 441

Union of India v. Hindustan Development Corporation and Ors. (1993) 3 SCC 499

Union of India and another vs. Lt. Col. P. K. Choudhary and others AIR 2016 SC 966

Union Territory of Chandigarh vs. Dilbagh Singh and others 1993 (1) SCC 154

For the petitioner : Mr. Sunil Mohan Goel, Advocate.

For the respondents : Mr. Ashok Sharma, Advocate General with Mr. Ajay Vaidya, Senior Additional Advocate General.

The following judgment of the Court was delivered:

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**Tarlok Singh Chauhan, Judge (Oral)**

The petitioner-Company has been granted a mining lease for mining of Limestone and Shale and aggrieved by the demand made by the respondents for recovery of Rs.18.15 lacs and Rs.14.28 lacs, respectively on account of interest on belated payment of royalty, has filed the instant petition for grant of following substantive reliefs:

(a) *Quash Rule 64-A of the Mineral Concession Rules, 1960, authorizing and/or permitting the respondents to recover interest on belated payment of royalty being ultra vires of the Minor Minerals (Regulation and Development) Act and/or beyond the legislative competence and without authority of law inasmuch as the statute Minor Minerals (Regulation and Development Act) does not authorize and/or provide for the same.*

*(b) Quash the demand made by the respondents for the recovery of Rs.18.15 lacs and Rs.14.28 lacs on account of interest on belated payment of royalty vide notices Annexures P-4, P-6, P-8, P-10 and P-12.*

*(c) Prohibit the respondents from taking any steps pursuant to or in furtherance of the impugned notices seeking to recover the interest on belated payment of royalty as arrears of land revenue.*

*(d) Declare that Clause 3 of Part VI of the said Mining Lease Agreement in favour of the petitioner Annexure P-2 hereto is ultra-vires, illegal, bad in law and null and void.*

*(e) Refund the interest at 15 per cent which the petitioner had been wrongly compelled to deposit under coercion and threat."*

2. However, during the course of hearing, counsel for the petitioner stated that he is under instructions not to press reliefs (a) and (d) in view of the judgment rendered by the Hon'ble Supreme Court in ***South Eastern Coal Fields Ltd.*** vs***. State of M.P. and others, 2003 (8) SCC 648.***

3. It is averred that the petitioner had been operating the minerals since March, 1995 and as mutually agreed between the officials of the petitioner-Company and the State Geologist, royalty was to be paid on quarterly basis and was being paid as such and once there was no direction to make the payment on monthly basis, therefore, the demand qua interest now raised by the respondents is not only bad in law as being contrary to the past practice but also against the doctrine of legitimate expectation.

4. On the other hand, the respondents have opposed the petition by filing a reply wherein it is averred that on conjoint reading of Section 9(2) of Mines and Minerals (Development and Regulation) Act, 1957 (for short 'Act'), Rule 64-A and Rule 64-B(2) of the Mineral Concession Rules, 1960 (for short 'Rules), it is evident that royalty becomes due from the movement the mineral is removed/consumed by the lessee from the leased area and it is the effective date for the calculation of the royalty due.

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

5. Section 9(2) of the Act, provides:

*"The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral".*

6. Section 64-A provides:

*"The State Government may, without prejudice to the provisions contained in the Act or may other rule in these rules, charge simple interest at the rate of twenty four percent per annum on any rent, royalty or fee (other than the fee payable under sub-rule (1) of rule 54) or other sum due to that Government under the Act or these rules or under the terms and conditions of any prospecting license or mining lease from the sixtieth day of the expiry of the date fixed by that Government for payment of such royalty, rent, fee or other sum and until payment of such royalty, rent, fee or other sum is made".*

7. Rule 64-B(2) provides:

*"In case run-of-mine mineral is removed from the leased area to a processing plant which is located outside the leased area, then, royalty shall be chargeable on the unprocessed run-of-mine mineral and not on the processed product."*

8. A combined reading of all the aforesaid provisions, makes it clear that if Government has not fixed any other date for payment of royalty, then the due date for payment of royalty shall be by the operation of Section 9(2) of the Act and Rule 64-B(2)

(supra), which provide that royalty is due the movement minerals are consumed/ removed by the lessee. Therefore, interest is to be calculated after sixtieth day, the mineral was removed from the leased area and not on quarterly basis by computing calendar month as due date of royalty for the purpose of calculating interest on belated payment.

9. As regards the plea of past practice and even if such practice is followed by the department has to be consistent with the interpretation provided to the relevant rule. The past practice, therefore, must be referable to the applicability of the rule and cannot be dehors the rules.

10. Apart from the above, in contractual matters of the instant kind, the petitioner could have cause to maintain a petition only in case there was any infraction of the Constitution or statutory provision or there had been any violation of a contract that had been validly executed inter se the parties under Article 299 of the Constitution. This is not the fact situation obtaining in the present case. Therefore, the plea of the petitioner that there was an oral understanding between the petitioner and the respondents, cannot be accepted, after all the Government only acts on the basis of written instructions.

11. That apart, therefore, even if it is assumed that any concession was given by the State Geologist as alleged by the petitioner, the same cannot bind the Government as it is unsafe to rely on the wrong or erroneous or wanton concession made by some officers of the State unless it is in writing, that too, from the competent authority.

12. As regards the plea of legitimate expectation, the same is clearly misconceived. For it is more than settled that in contractual spheres as in all other State action, State and its instrumentalities have no unfettered discretion, that too, to act against a statutory provision. Therefore, the petitioner has no right to insist that since the respondents were not enforcing the mandate of law by not charging interest on late payment of royalty w.e.f. March, 1995 upto the year 2008, they should continue to do so in perpetuity that too by invoking the doctrine of legitimate expectation.

13. The doctrine of legitimate expectation has been described in *Halsbury's Laws of England, 4th Edition*, in the following words:

> *"81. **Legitimate expectations**. – A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice."*

14. The same principle has been followed even by the Courts in India. Reference in this connection may be usefully made to the judgment of the Hon'ble Supreme Court in the case of ***Navjyoti Housing Cooperative Group Housing Society and others*** vs. ***Union of India, 1992 (4) SCC 477***, ***Supreme Court Advocate-on-Record Association and others*** vs. ***Union of India 1993 (4) SCC 441, Food Corporation of India*** vs. ***Kamdhenu Cattle Feed Industries 1993 (1) SCC 71*** and ***Union Territory of Chandigarh*** vs. ***Dilbagh Singh and others 1993 (1) SCC 154.***

15. In ***Madras City Wine Merchants' Association and another vs. State of Tamil Nadu and another (1994) 5 SCC 509*** the Hon'ble Supreme Court held that the legitimate expectation may arise:-

> "*(a) if there is an express promise given by a public authority; or*

*(b) because of the existence of a regular practice which the claimant can reasonably expect to continue;*

*(c ) such an expectation must be reasonable.*

*However, if there is a change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise."*

16. In ***Ram Pravesh Singh and others*** vs**. *State of Bihar and others (2006) 8 SCC 381***, the question as to what is the legitimate expectation was directly in issue before the Hon'ble Supreme Court and it was held as under:

*"15. What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a 'legitimate expectation' of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above 'fairness in action' but far below 'promissory estoppel'. It may only entitle an expectant : (a) to an opportunity to show cause before the expectation is dashed; or (b) to an explanation as to the cause for denial. In appropriate cases, courts may grant a direction requiring the Authority to follow the promised procedure or established practice. A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bonafide reason given by the decision-maker, may be sufficient to negative the 'legitimate expectation'. The doctrine of legitimate expectation based on established practice (as contrasted from legitimate expectation based on a promise), can be invoked only by someone who has dealings or transactions or negotiations with an authority, on which such established practice has a bearing, or by someone who has a recognized legal relationship with the authority. A total stranger unconnected with the authority or a person who had no previous dealings with the authority and who has not entered into any transaction or negotiations with the authority, cannot invoke the doctrine of legitimate expectation, merely on the ground that the authority has a general obligation to act fairly."*

17. In ***Secretary, State of Karnataka and other*** vs. ***Umadevi (3) and others (2006) 4 SCC 1,*** a Constitution Bench of the Hon'ble Supreme Court referred to the circumstances in which the doctrine of legitimate expectation can be invoked:

*"The doctrine can be invoked if the decisions of the administrative authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."*

18. In ***Confederation of Ex-Servicemen Associations and others*** vs. ***Union of India and others (2006) 8 SCC 399,*** another Constitution Bench of the Hon'ble Supreme Court referring to the doctrine of legitimate expectation held as under:

*"No doubt, the doctrine has an important place in the development of Administrative Law and particularly law relating to 'judicial review'. Under the said doctrine, a person may have reasonable or legitimate expectation of being treated in a certain way by an administrative authority even though he has no right in law to receive the benefit. In such situation, if a decision is taken by an administrative authority adversely affecting his interests, he may have justifiable grievance in the light of the fact of continuous receipt of the benefit, legitimate expectation to receive the benefit or privilege which he has enjoyed all throughout. Such expectation may arise either from the express promise or from consistent practice which the applicant may reasonably expect to continue."*

19. The same reiteration of law is found in a judgment of the Hon'ble Supreme in ***Union of India and another*** vs***. Lt. Col. P. K. Choudhary and others AIR 2016 SC 966*** wherein it was held as under:

*"42. In Food Corporation of India v. Kamdhenu Cattle Feed Industries (1993) 1 SCC 71: (AIR 1993 SC 1601) one of the earlier cases on the subject this Court considered the question whether Legitimate Expectation of a citizen can by itself create a distinct enforceable right. Rejecting the argument that a mere reasonable and legitimate expectation can give rise to a distinct and enforceable right, this Court observed:*

*"8.The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The*

*doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."*

*(emphasis supplied)*

*43. To the same effect is the decision of this Court in Union of India v. Hindustan Development Corporation and Ors. (1993) 3 SCC 499, where this Court summed up the legal position as under:*

> *" 28..... For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."*
>
> *33. On examination of some of these important decisions it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. In other words where a person's legitimate expectation is not fulfilled by taking a particular decision then decision-maker should justify the denial of such expectation by showing some overriding public interest. Therefore even if substantive protection of such expectation is contemplated that does not grant an absolute right to a particular person. It simply ensures the circumstances in which that expectation may be denied or restricted. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil. The protection is limited to that extent and a judicial review can be within those limits. But as discussed above a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case whether there*

> *are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made out then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so then what should be the relief is again a matter which depends on several factors."*
>
> *(emphasis supplied).*

20. It would be evident from the aforesaid exposition of law that the doctrine of legitimate expectation cannot be applied in cases of invalid expectation. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. For the application of doctrine of legitimate expectation, representation or promise should be made by an authority, a person unconnected with the authority, who had no previous dealing and who has not entered into any transactions or negotiations with the authority cannot invoke doctrine of legitimate expectation. Therefore, a person who bases his claim on the doctrine of legitimate expectation has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. (See: ***State of Uttar Pradesh and others*** vs***. United Bank of India and others (2016) 2 SCC 757).***

21. A person who bases his claim on the basis of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same, several factors which give rise to such legitimate expectation must be present. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. However, it is more than settled that where there is no promise, the doctrine of legitimate expectation does not apply.

22. Bearing in mind the aforesaid principles it would be noticed that there is practically no material placed by the petitioner on record which may even remotely indicate that any promise was made or any assurance at any point of time was ever held out by the respondents that the petitioner was not required to pay royalty in terms of the provisions of the Act and Rules supra.

23. In view of the aforesaid discussion and for the reasons stated above, we find no merit in this petition and the same is accordingly dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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**BEFORE HON'BLE MR. JUSTICE SURYA KANT, CJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.**

Chief Engineer, Bhakra Beas Management Board ...Petitioner

Versus

Souju Ram and others ...Respondents

CWP No. 2670 of 2018

Decided on: 12.11.2018

**Payment of Gratuity Act, 1972** – **Industrial Disputes Act, 1947** (Act) – Gratuity vis- a –vis Retrenchment Compensation – Inter se relationship – Controlling Officer directing employer to pay Gratuity with interest to employee- Appeal against – Appellate Authority dismissing appeal of employer – Petition – Employer submitting that services of employee, a dailywager were retrenched after paying Retrenchment Compensation and he is not entitled for any Gratuity under Payment of Gratuity Act – Held – Gratuity and Retrenchment Compensation are two independent and separate claims under different welfare legislations – Award of benefit under one Act does not deprive employee from benefit under other Act – Gratuity is payable for satisfactory service rendered by employee – Retrenchment Compensation is paid for retrenchment of services – Petition dismissed. (Para 3) .

**Payment of Gratuity Act, 1972**- Gratuity – Payment – Nature of service – Whether relevant ? Held, concept of "regular service" has no bearing so far claims of employee under Payment of Gratuity Act or Industrial Disputes Act are concerned – Benefits under various welfare legislations are admissible regardless of status of employee provided claimant fulfils conditions prescribed under statute for grant of such benefits. (Para 8).

For the petitioner: Mr. Aman Sood, Advocate.
For the respondents: Mr. Varun Rana, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

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**Surya Kant, Chief Justice.** *(Oral)*

Chief Engineer, Bhakra Beas Management Board (hereinafter referred to as 'BBMB') is aggrieved by the order dated 21st February, 2017 passed by the 'Controlling Authority' Under Payment of Gratuity Act, 1972 as well as the order dated 21st August, 2018 whereby the 'Appellate Authority' under the Act has upheld the order of the Controlling Authority. Vide these orders, the first respondent, who served BBMB as a daily wage Carpenter, has been held entitled to Gratuity for the period from 7th September, 1993 to 9th October, 1996 alongwith simple interest at the rate of 10% per annum in accordance with provisions of The Payment of Gratuity Act, 1972 (hereinafter referred to as '1972 Act'), and the petitioner's appeal preferred under Section 7 (7) of the 1972 Act has been turned down by the Appellate Authority by way of a self-speaking order. Both these orders are now under challenge in this writ petition.

2. Learned counsel for the petitioner vehemently contends that the first respondent was engaged on daily wage basis and his services were retrenched on 30th June, 1992 after complying with provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as '1947 Act'). It is urged that since retrenchment compensation under the 1947 Act was paid, the first respondent was not entitled to seek Gratuity under the provisions of 1972 Act.

3. Firstly, the contention appears to be totally misconceived and misdirected. The compensation payable to a workman as a result of his retrenchment under the 1947 Act can neither be set off nor adjusted against the amount of Gratuity which he is entitled to be paid for the satisfactory service rendered by him and further subject to such terms and conditions as are prescribed under the 1972 Act. These are two independent and separate claims under two different Welfare Legislations and award or grant of benefit under one Act does not deprive the claimant-employee from the benefit under the other Act.

4. Secondly, the petitioner's own case was that the first respondent was again engaged as per his seniority in the month of October 1992. Thereafter, respondent No. 1 alongwith some other employees filed a Writ Petition in this Court seeking various directions including to take them on the work charge establishment. The High Court passed an interim order on 7th September, 1993 not to disengage their services till further orders. The Writ Petitions were finally disposed of on 9th October, 1996 with certain directions to consider their claim for regularization of services. Though the said claim was eventually turned down but the fact remains that the first respondent served the petitioner from October, 1992 till 9th October, 1996 and thus was entitled to be paid Gratuity for the said period.

5. Thirdly, it is not the case of the petitioner that the respondent-employee does not fall within the ambit of 1972 Act or that the petitioner had adopted any other Welfare Scheme which was more beneficial than the provisions of 1972 Act. In the absence thereof, the first respondent is entitled to and has rightly been granted the benefit of 1972 Act.

6. The petitioner's contention that the service rendered under the interim orders of this Court cannot enure any benefit to the first respondent, is also totally misplaced. It was not a case where the writ petitions were eventually dismissed or the claim of the first respondent was found untenable. Be that as it may, he remained in service and actually served the petitioner till his claim for regularization was turned down. The service rendered by the first respondent falls within the four corners of Section 2A of the 1972 Act which defines 'Continuous Service', as it is not the case of the petitioner that the service rendered by the first respondent was interrupted by any cause attributable to him within the meaning of sub-Section (1) of Section 2A of the 1972 Act.

7. The next contention of the petitioner that the first respondent approached this Court against rejection of his claim for regularization and his Writ Petition was dismissed is totally alien to the issue adjudicated by the Controlling or Appellate Authorities under the 1972 Act.

8. In fact, the concept of 'Regular Service' has no bearing so far as the claims of an employee/workman under the 1947 Act or 1972 Act are concerned. The principle of 'Regular Service' is referable to 'Civil Employment' under the State or its Authorities. The benefits under various Statutes, like Industrial Disputes Act, Payment of Wages Act, Payment of Gratuity Act, Employees Provident Funds and Miscellaneous Provisions Act, Maternity Act, etc. etc. are admissible, regardless of the status of the employee provided that the claimant fulfills the conditions as may be prescribed under the Statute for the grant of these benefits.

9. Similarly, we do not find any merit in the petitioner's objection that the claim of the first respondent was time barred and ought to have been rejected on this ground alone. The 1972 Act casts a statutory duty on the Employer through Section 7(3) to arrange and pay the amount of Gratuity within thirty days from the date it becomes payable to a person. The onus is thus on the Employer to pay it and there is no corresponding obligation on the employee to claim it. The 1972 Act further contemplates that where the Employer has failed to discharge its duty under Section 7 (3), the employee can seek recovery thereof through the Controlling Authority under Section 8 and in that eventuality, the employee shall be entitled to interest as prescribed under sub-Section (3A) of Section 7. In fact, non-payment of Gratuity on time, is an offence for which penalties are prescribed under Section 9 of the 1972 Act. The Controlling Authority has very aptly observed that the Gratuity is not a bounty to be distributed by the Employer but is a valuable right acquired by the employee

on the basis of his satisfactory service. The Controlling Authority has, in fact, taken a lenient view by awarding only simple interest on the balance Gratuity amount.

10. For the reasons afore-stated, we do not find merit in this writ petition. Hence, the same is dismissed so also the pending miscellaneous applications.

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

Vidya Devi and another. ...Appellant
Versus
The Executive Engineer Electrical. ...Respondents

FAO No. 108 of 2012
Date of decision: 2.11.2018

**Employees Compensation Act, 1925** - Section 4(1) (a) & (b) (as amended vide Amendment Act, 2009 effective from 18.1.2010) - Notification dated 31.05.2010 - Motor accident- Claim- Assessment- Deceased dying on 31.4.2010 after amended provisions had come into effect - Compensation to be calculated at rate of amount equal to 50% of monthly wages of deceased multiplied by relevant factor or Rs.1,20,000/- whichever is higher - Notification dated 31.5.2010 under Section 4 fixing wages at Rs.8000/- for purpose of compensation not applicable in given case - On date of accident/ death i.e. 21.04.2010, there was no ceiling on monthly wages for purpose of compensation or on date, compensation became due - Order of Commissioner applying Ex.P-II, which stood omitted vide Amendment Act, set aside - Compensation awarded by taking 50% of monthly wages and multiplying with relevant factor. (Para 12).

***Cases referred:***
Oriental Insurance Company Limited Vs. Mohd. Nasir and Another, (2009) 6 SCC, 280

For the Appellant: Mr. Rajinder Singh, Advocate.
For the Respondent: Mr.Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

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**Vivek Singh Thakur Judge (oral)**

Present appeal has been filed against the award dated 31.1.2012 passed by Commissioner under the Employee's Compensation Act, 1923 (hereinafter referred to as "Commissioner" and the "Act", respectively), wherein for determining the amount of compensation payable to appellants/complainants, learned Commissioner has relied upon Explanation II to Section 4(1)(a) and (b) of the Act.

2. In present appeal following substantial question of law has arisen for determination:-

> "*(i) Whether the appellants-claimants are entitled for the enhanced amount of compensation in view of the amendment made in Section 4 of the Employees Compensation Act, 1923, which was made applicable w.e.f. 18.1.2010."*

3. Death of Narain Singh, an employee of respondent, on 21.4.2010, during the course of employment is admitted fact. It is also undisputed that at the time of death, he was drawing monthly salary at the rate of `18,016/-.

4. Certain amendments were carried out in the Act (earlier known as Workmen Compensation Act, 1923) through the Workmen Compensation (Amendment) Act, 2009 (herein after referred to as "Amendment Act, 2009"). Vide Section 7 of the Amendment Act in clause (a) in the words "eighty thousand rupees" the words "one lack twenty thousand rupees" was substituted and after clause (b) a proviso empowering the Central Government to issue notification in official gazette for enhancement of amount of compensation mentioned in clauses (a) and (b) was inserted and explanation (II) after clause (b) was omitted and this amendment came into force w.e.f. 18.1.2010.

5. For the purpose of adjudication of present appeal, Section 4(1) (a) and (b) is relevant. After 18.1.2010 on account of amendment made in the Act vide Amendment Act, 2009, Section 4(1)(a) and (b) was as under:-

*"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 [employees] multiplied by the relevant factor;*<br>*or*<br>*an amount of [one lakh and twenty thousand rupees], whichever is more;* |
| *(b)* | *where permanent total disablement results from the injury* | *an amount equal to [sixty per cent.] of the monthly wages of the injured [employee] multiplied by the relevant factor;*<br>*or*<br>*an amount of [one lakh and forty thousand rupees], whichever is more.* |

*Provided that the Central Government may, by notification in the Official Gazette, from time to time, enhance the amount of compensation mentioned in clauses (a) and (b).*

*Explaination-I.---For the purpose of clause (a) and clause (b), "relevant factor", in relation to [an employee] means the factor specified in the second column of Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the [employee] on his last birthday immediately preceding the date on which the compensation fell due.*

*Explanation-II omitted."*

6. Vide amendment Act, 2009, sub-section (1B) to Section 4 was also inserted, whereby the Central Government has been empowered to issue notification for specifying monthly wages in relation to an employee, as it may consider necessary, for the purpose of sub-section (1) of Section 4 of the Act. Exercising the power under this Section 4(1B) of the

Act, the Central Government has issued notification dated 31.5.2010 specifying the amount of monthly wages as "eight thousand rupees" for the purpose of sub-section (1) of Section 4 w.e.f. the date of publication of the notification in the Official Gazette. The same reads as under:-

> *"In exercise of the powers conferred by sub-section (1B) of section 4 of the Employees' Compensation Act, 1923 (8 of 1923), the Central Government hereby specifies, for the purpose of sub-section (1) of the said section, the following amount as monthly wages, with effect from the date of publication of this notification in the Official Gazette, namely:-*
>
> *"Eight thousand rupees"*

7. Explanation II to Section 4(1) (a) and (b) of the Act, restricting monthly wages of an employee for the purpose of clauses (a) and (b) to `4,000/- only, was omitted by the Amendment Act, 2009 w.e.f. 18.1.2010. Omitted Explanation II was as under:-

> *"Explanation II.---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."*

8. Monthly wages at the rate of `8,000/- for the purpose of clauses (a) and (b) of Section 4 of the Act was notified on 31.5.2010, which was applicable from the date of publication of the notification in the Official Gazette. In any case, for inability expressed by learned counsel for the parties to ascertain the date of publication of notification dated 31.5.2010 in Official Gazette, if it is considered that it was published on the same day i.e. date of notification, then it was effective from 31.5.2010.

9. Relevant provision i.e. Section 4(1) (a) and (b) of the Act as existing from 18.1.2010 to 31.5.2010 has been reproduced in para 5. At that time it was not containing any limit for the purpose of calculation of amount of compensation under this Section wherein it is provided that in case of death resulting from injury, amount of compensation shall be an amount equal to 50% of the monthly wages of the deceased employee multiplied by the relevant factor or an amount of `1,20,000/-, whichever is higher.

10. Before 18.1.2010 explanation II to Section 4 (1) (a) and (b) of the Act was providing that monthly wages for the purpose of clauses (a) and (b), where monthly wages of workman exceeds `4,000/-, shall be considered @ `4,000/- only. But such limit was not existing after omission of this Explanation II vide Amendment Act, 2009 w.e.f. 18.1.2010 and the notification limiting monthly wages maximum to `8,000/- was notified on 31.5.2010 only. On the date of accident i.e. 21.4.2010, there was no such ceiling on the monthly wages. The amount of compensation to the appellants/claimants fell due on expiry of one month after the date of accident i.e. on 21.5.2010. Therefore, as per law existing on the date of accident or on the date on which amount fell due, there was no ceiling either of `4,000/- or `8,000/- specified as maximum limit of monthly wages for the purpose of calculation of compensation under Section 4(1)(a) and (b) of the Act.

11. The Act applicable in present case is a beneficiary legislation and it is settled law that the provisions of the Act are to be interpreted in a manner which is beneficial to the beneficiary, i.e. workman. The Apex Court in ***Oriental Insurance Company Limited Vs. Mohd. Nasir and Another, (2009) 6 SCC, 280*** has held that Workmen's Compensation Act, 1923 being a beneficial legislation, as providing for payment of compensation to workmen employed by the employer deserves liberal construction and requires to be interpreted with a view to give effect to the legislative intent therein.

12. Learned Commissioner at the time of calculating the compensation has determined the amount by applying omitted Explanation II, which was existed prior to 18.1.2010, by giving reasoning that there is no notification issued by the Central Government specifying the monthly wages under sub-section (1B) of Section 4 of the Act or proviso to Section 4(1) (a) and (b) of the Act after omission of Explanation II. Learned Commissioner has committed a mistake by applying the non existing Explanation II, which is not on statute w.e.f. 18.1.2010. By applying the provisions of law as existing on the date of accident and also on the date when the amount of compensation fell due, the amount of compensation is to be calculated by multiplying 50% of the last drawn/payable monthly wages of deceased with relevant factor provided under the Act.

13. Learned counsel for the respondent has submitted that at the time of deciding the claim petition preferred by the appellants/claimants, notification dated 31.5.2010 was in existence and therefore, ceiling of monthly wages @ `8,000/-, for the purpose of calculating the amount of compensation under Section 4(1) (a) of the Act, was applicable and at the most appellants/claimants are entitled for amount of compensation calculated by taking monthly wages as 50% of maximum limit of `8,000/- i.e. @ `4,000/- per month. In my opinion, the plea of respondent is misconceived, as the entitlement of claimants is to be calculated on the date of accident and not on the date of decision of the claim petition. Even if, the entitlement is taken from the date on which the amount of compensation fell due, the situation remains the same as the notification dated 31.5.2010 is subsequent to the date 21.5.2010.

14. Learned commissioner has committed a mistake by relying upon the omitted explanation II to Section 4(1) (a) and (b) of the Act and appellants/claimants are entitled for the enhanced amount in view of amendment made in Section 4 of the Act. The substantial question of law is answered accordingly.

15. In view of above discussion, I hold that appellants/claimants are entitled for amount of compensation to be calculated on the basis of monthly salary of deceased at the rate of Rs.18,061/-, which shall be calculated as under:-

| | | |
|---|---|---|
| 50% i.e. half of monthly wages: | | `9,030/- |
| Relevant factor | : | 153.09 |
| Amount of compensation | : | 153.09X9,030=`13,82,402/- |

16. Respondent/employer had deposited interim compensation to the tune of `1,50,000/- on 22.6.2010, whereas appellants/claimants were entitled for compensation of `13,82,402/-. Therefore, appellants/claimants are also entitled for the interest at the rate of 12% per annum w.e.f. 21.5.2010 to 21.6.2010 on the entire amount of compensation i.e. `13,82,402/- and w.e.f. 22.6.2010 on remaining amount of `12,32,402/- till date of deposit of `1,56,180/- and thereafter on remaining amount of `10,76,222/- till full and final realization/payment of entire compensation.

17. Funeral charges of `5000/- and/or any other benefits granted by the Commissioner are kept intact, for which the appellants/claimants are entitled.

18. Respondent is directed to deposit balance enhanced compensation in Registry of this Court within eight weeks from today.

19. The appeal is allowed and disposed of in aforesaid terms.

**********

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

**CWP No. 24 of 2018**

Man Mohan ....Petitioner.
Versus
State of Himachal Pradesh and others .....Respondents.

**CWP No. 25 of 2018**

Garib Dass ....Petitioner.
Versus
State of Himachal Pradesh and others ....Respondents.

**CWP No. 27 of 2018**

Titlu Ram ....Petitioner.
Versus
State of Himachal Pradesh and others .....Respondents.

**CWP No. 28 of 2018**

Prem Lal ....Petitioner.
Versus
State of Himachal Pradesh and others .....Respondents.

**CWP No. 29 of 2018**

Jagdish and another ....Petitioners.
Versus
State of Himachal Pradesh and others .....Respondents.

**CWP No. 36 of 2018**

Basant Lal and others ....Petitioners.
Versus
State of Himachal Pradesh and others .....Respondents.

**CWP No. 144 of 2018**

Nand Lal and others ....Petitioners.
Versus
State of Himachal Pradesh and others .....Respondents.

**CWP No. 145 of 2018**

Basant Lal ....Petitioner.
Versus
State of Himachal Pradesh and others .....Respondents.

**CWP No. 197 of 2018**

Om Prakash and others ....Petitioners.
Versus
State of Himachal Pradesh and others .....Respondents.

**CWP No. 288 of 2018**

Lachhmi Dass ....Petitioner.

Versus

State of Himachal Pradesh and others .....Respondents.

CWP No. 24 of 2018 a/w CWP Nos. 25, 27, 28, 29, 36, 144, 145, 197

Reserved on: 19.09.2018

Date of Decision: 16.11.2018

**Constitution of India,1950 –** Articles 21 and 226 **–**Construction of Dam – Apprehension of danger to life and property – Directions – Petitioners apprehending danger to life and property on account of sinking of land their land– Allegedly sinking of land taking place because of reservoir built behind Kol Dam – Petitioners seeking directions to state to acquire their lands also – Apprehensions of petitioners found correct on basis of report furnished by Court appointed Joint Inspection Committee comprising of SDO (C) and State Geologist – Writ petitions disposed of with directions to Deputy Commissioner to convene meeting all Stakeholders including petitioners and Authorized representatives of NTPC and make endeavor for amicable settlement between parties or pass orders qua acquisition of lands or resettlement of persons in some other areas. (Paras 2 to 9).

For the petitioner(s): Mr. Ashwani Pathak, Senior Advocate,
with Mr. Sandeep K. Sharma, Advocate, in all the petitions.

For the respondent(s): Mr. Dinesh Thakur, Additional Advocate General, with
Mr. Amit Dhumal, Deputy Advocate General,
for the respondent- State.
Mr. Jagdish Thakur, Advocate, for
respondent No. 5 in all the cases.

The following judgment of the Court was delivered:

**Ajay Mohan Goel, Judge:**

As similar factual matrix and common issues of law are involved in these writ petitions, the same are being disposed of by a common judgment.

2. The petitioners are residents of villages which are adjacent to the reservoir which has been constructed for the Kol Dam by respondent-National Thermal Power Corporation Limited (hereinafter referred to as 'the NTPC'). The prayer made in the writ petitions is for issuance of a direction to the respondents to acquire the properties of the petitioners (detail of which has been given in the writ petitions), on the ground that the water level in the reservoir has caused damage to their properties/buildings and their houses can collapse any time. As per the petitioners, the damage which is being caused to their properties is accountable to the water level of the reservoir which is not stagnant and if timely action in this regard is not taken by the Authorities, it may result in any mishap.

3. During the course of arguments, on 19.07.2018, this Court passed an order directing the concerned Sub Divisional Officer (Civil) as also the State Geologist to carry out a joint inspection of the properties of the petitioners and thereafter file a comprehensive report in this regard in the Court. Pursuant to the directions so passed, the sites in issue

were visited by the concerned Sub Divisional Officer (Civil) as well as the Geologist and reports were also submitted in the Court on the affidavit of the State Geologist.

4. On the perusal of the report(s) so filed by the Joint Inspection Committee, this Court on 05.09.2018 passed the following order:

> *"Pursuant to the orders passed by this Court, report of joint inspection carried out by SDO (Civil) and State Geologist concerned, has been placed on record. A perusal of the report demonstrates that there is danger to the property of the persons referred to in the report, which includes the petitioners also. The relevant portion of the report is reproduced herein-below:-*
>
> *"Koldam Hydroelectric project is a project of national interest and the reservoirs created by dam construction serves to generate hydroelectric power, provide flood control, store water etc., but some time by forming a reservoir behind a dam not only changes the ecology of the reservoir site but also effects its surrounding area.*
>
> *The reservoir area near the said houses neither properly demarcated nor protected by the Dam authorities and there is confusion about the actually acquired land by the NTPC Koldam.*
>
> *All the said property or houses are located near to the reservoir. The slopes near the reservoir are quite gentle. The said house were constructed on River borne material (Terrace deposits), which consists of Boulders, Pebbles, silt, sand, clay. The whole area above the reservoir is a river borne terrace and no major rock formations has been noticed along the reservoir bank. The reservoir water level fluctuates between 642 (Highest) and 636 (lowest) meter levels and saturates the overburden material i.e. terrace deposit which leads to the sinking of land and sliding along the reservoir bank.*
>
> *The properties of Sh. Manmohan Singh, Sh. Prem Lal and Sh. Nand Lal are quite old but clearly shows that the houses are damages due to sinking of the land and thus unsafe, however the other house buildings have also been affected due to sinking of land to some extent, but they seems to be safe. It is therefore recommended that the reservoir banks required to be immediately protected and barricated to avoid any incident. It is strongly recommended that the said area should be monitored continuously and in case of any further settlement or sinking of land observed, then local people should be evacuated and re-settled at suitable location t avoid any damages or causalities."*
>
> *At this stage, learned Additional Advocate General submits that before the matter is heard any further, it will be in the interest of justice, if the matter is taken up after two weeks so that he can take up the matter with the appropriate authorities in view of the contents of the report. Request allowed.*
>
> *List on 19.09.2018, to enable learned Additional Advocate General to have instructions in the matter."*

5. On 19.09.2018, learned counsel for the parties were heard at length by this Court.

6. I have carefully gone through the pleadings of the writ petitions as also the report(s) which has been filed by the Joint Inspection Committee. The report(s) of the Committee is self speaking and in my considered view, taking into consideration the fact that the said report(s) has been submitted by a Committee comprising of the concerned Sub-Divisional Officer and the Geologist, contents thereof can be relied upon. It has been so mentioned in the report(s) that whereas houses of certain petitioners though are quite old, yet they have been damaged due to sinking of the land and have thus become unsafe, similarly, some other buildings though have been affected on account of sinking of the land, but they are quite safe. There is a recommendation in the report(s) that the reservoir banks require to be immediately protected as also barricaded to avoid any incident and in case of any further settlement or sinking of land, the local people be resettled to avoid any damages or casualties.

7. In my considered view, when it is borne out from the contents of the report(s) that in future there can be danger to the lives and properties of persons like the petitioners on account of settlement or sinking of the land because of the reservoir, it is prudent that Authorities initiate action at this stage itself to evacuate and resettle persons like the petitioners at a suitable location to avoid any damages or casualties. Even the Project proponent is expected to have a pragmatic view of the matter, rather than taking a myopic view thereof.

8. The sum and substance of the defence of NTPC is that it has acquired the land of private owners for the construction of reservoir upto the level of 646 meters from the sea level, whereas full reservoir level is 642 meters from the sea level. It is further the contention of the said respondent that the houses/trees of the petitioners are well above 646 meters from sea level and as such, there is no eminent threat to the same. However, in my considered view, in the peculiar facts and circumstances of the cases at hand, technicalities like fixation of full reservoir level etc. should not be construed with rigidity as the Joint Inspection Committee constituted by this Court has given its report(s) that there is danger to the property of the petitioners. Incidentally, no rebuttal to the said report(s) has been filed.

9. Therefore, here what is required is that all the stakeholders should sit together and thereafter take a decision which is in the interest of all. Accordingly, these writ petitions are disposed of with the following directions:-

> "(i) The Deputy Commissioner concerned shall convene a meeting of all the stakeholders within a period of one month from the date of receipt of a copy of this order. In the meeting, the petitioners, authorized representatives of respondent-NTPC, Sub Divisional Magistrate concerned, State Geologist or his representative and a competent officer of the Revenue Department from the area concerned should be associated,
>
> (ii) The Deputy Commissioner shall make an endeavour that an amicable settlement is arrived at between the parties with regard to acquisition of properties of the petitioners and/or their re-settlement in view of the report of the Joint Inspection Committee constituted by this Court; and
>
> (iii) In case the parties do not arrive at any amicable settlement, then Deputy Commissioner shall pass appropriate directions in this regard to ensure the safety of the life and property of the petitioners, be it by issuing directions for acquisition of land and/or their re-settlement/rehabilitation in some other area. This shall be done within a period of one month from the date, the meeting is convened.

Petitions stand disposed of in above terms, so also pending miscellaneous applications, if any.

**********

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

**CWP No. 3441 of 2012**

Pritpal ....Petitioner.
Versus-
M/s Federal Mogal Bearing India Ltd. .....Respondent.

**CWP No. 3879 of 2012**

Federal Mogul Bearing India Ltd. ....Petitioner.
Versus
Prit Pal .....Respondent.

**CWP No. 3442 of 2012**

Krishan Chand ....Petitioner.
Versus
M/s Federal Mogal Bearing India Ltd. .....Respondent.

**CWP No. 3878 of 2012**

Federal Mogul Bearing India Ltd. ....Petitioner.
Versus
Krishan Chand .....Respondent.

**CWP No. 3443 of 2012**

Mehar Chand ....Petitioner.
Versus
M/s Federal Mogal Bearing India Ltd. .....Respondent.

**CWP No. 3883 of 2012**

Federal Mogul Bearing India Ltd. ....Petitioner.
Versus
Mehar Chand .....Respondent.

**CWP No. 3444 of 2012**

Dilbara Singh ....Petitioner.
Versus
M/s Federal Mogal Bearing India Ltd. .....Respondent.

**CWP No. 3884 of 2012**

Federal Mogul Bearing India Ltd. ....Petitioner.
Versus
Dilbara Singh .....Respondent.

**CWP No. 3881 of 2012**

Federal Mogul Bearing India Ltd. ....Petitioner.

Versus

Ram Chander .....Respondent.

CWP No. 3441 of 2012 a/w CWP Nos.3442, 3443, 3444, 3878, 3879, 3881 3883 and 3884 of 2012
Reserved on: 12.07.2018
Date of Decision: 12.10.2018

**Industrial Disputes Act, 1947 –**Sections 9A and 33(2) – Whether employee can be dismissed during pendency of conciliatory proceedings pending before Labour – Cum - Conciliatory Officer without his express permission ? - Held, no – Employer dismissing employee on ground of misconduct after holding enquiry and then filing application for approval before Labour Court – Labour Court dismissing application on ground of maintainability – Petition against – Employee contending that conciliatory proceedings with regard to disputed matter were pending before Conciliatory Officer on date dismissal order was passed – And no express permission was obtained, being so order is bad – Held, Statutory provisions contained in section 33 of Act, demonstrate that during pendency of conciliation proceeding before Competent Authority/ Tribunal /Court in respect of Industrial Dispute, employer cannot discharge or terminate employee without express permission of said Authority/ Court – No conciliatory proceeding pending before Labour Court – There was no question of obtaining such express permission/ approval from Labour Court – No application for express permission to dismiss employee filed by employer before Labour-Cum- Conciliatory Officer – Further held, there is no infirmity with findings of Labour Court – Petitions dismissed. (Paras14, 17 19 & 20).

**Industrial Disputes Act, 1947 –**Section 33 (2) (b)- Nature of powers- Held - Order of dismissal or discharge passed by employer by invoking Section 33 (2) (b) of Act, remains incomplete and inchoate as it is subject to approval of Authority – If approval not granted by Competent Authority relationship of Employer – Employee deemed to be continuing entitling employee to all service benefits. (Paras 22 & 23).

***Cases referred:***

Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and others (2002) 2 SCC 244

For the petitioner(s): Mr. V. D. Khidtta, Advocate, for the petitioners in CWP Nos. 3441,3442, 3443 & 3444 of 2012
and Mr. Rahul Mahajan, Advocate, for the petitioners in CWP Nos. 3878, 3879, 3883 & 3884 of 2012.

For the respondent(s): Mr. Rahul Mahajan, Advocate, for the respondents in CWP No. 3441, 3442, 3443, 3444 of 2012
and Mr. V. D. Khidtta, Advocate, for the respondents in CWP Nos. 3878, 3879, 3881, 3883 & 3884 of 2012.

The following judgment of the Court was delivered:

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**Ajay Mohan Goel, Judge:**

As similar facts and common issues of law are involved in these writ petitions, the same are being disposed of by a common judgment.

2. The moot issue involved in all these writ petitions is as to whether the order passed by the learned Labour Court whereby it has dismissed the application filed by the employer under Section 33(2) of the Industrial Disputes Act, 1947 read with Rule 64(2) of the Himachal Pradesh Industrial Disputes Rules, 1974, is sustainable in law and if yes, whether those writ petitioners (workmen), who have by way of independent writ petitions prayed for modification of the order passed by the learned Labour Court for grant of full back wages alongwith interest, are entitled for the same or not?

3. For the purpose of adjudication of these petitions, in detail, facts from CWP No. 3441 of 2012, titled as *Pritpal Vs. M/s Federal Mogal Bearing India Ltd.* and CWP No. 3879 of 2012, titled as *Federal Mogul Bearing India Ltd. Vs. Prit Pal* have been taken, as arguments were addressed by the learned counsel for the parties on the facts of the present two writ petitions.

4. Brief facts necessary for the adjudication of these petitions are that an application under Section 33(2) of the Industrial Disputes Act read with Rule 64(2) of the Himachal Pradesh Industrial Disputes Rules, 1974 was filed by the employer, i.e., M/s Federal Mogul Bearing India Ltd. (for convenience referred to as 'the employer') for approval of dismissal of respondent, namely, Prit Pal. As per the employer, it was in the business of engine bearing manufacturing at Parwanoo. Respondent-Prit Pal (for convenience referred to as 'the workman') was employed as an Operator, who was sitting idle after 07.07.2008 due to paucity of orders and recession. Employer decided to provide alternate work and workman was accordingly directed vide order, dated 17.04.2009 to attend the job of Rejection, Rework, Material and Chip Handling by reporting to Shri Deep Ram, Assistant Manager, Plant-1. The workman under protest refused to perform the alternate work. On complaints made by Line Incharge dated 21.04.2009, 25.04.2009 and 01.05.2009, the workman was issued a chargesheet, dated 12.05.2009 for negligence of duty and for disobedience of orders/instructions of the superiors under Sub-clause I, X and XVI of Clause 26(b) of the Certified Standing Orders. An inquiry was held, in which the misconduct of the workman stood proved. This led to the dismissal from service of the workman. A reference regarding dismissal of three workers for claiming false medical claims and about strike/lockout was stated to be pending before the learned Labour Court, therefore, an application was filed for approving the dismissal from service of the workman.

5. This application was contested by the workman on the ground that the same was not maintainable being in violation of the provisions of Section 33 and 9-A of the Industrial Disputes Act. On merits, the stand of the workman was that there was no paucity of orders and in fact work was available and the employer had engaged hundreds of workers from outside the State for performing the said work. According to the workman, the employer had not complied with the mandatory provisions of the Industrial Disputes Act before the issuance of letter of alternative employment. As per the workman, he was a highly skilled worker and the alternative work was that of an unskilled worker. Further, as per the workman, the entire action was initiated by the employer with an intent to terminate the services of the workman illegally. As per him, he had not violated the provisions of Standing Orders. According to him, domestic inquiry was not conducted by following the principles of natural justice. Inquiry report was submitted by the Officer as per the wishes of the employer. Conciliation proceedings between the parties with regard to the matter in dispute at the time of dismissal were still pending before the Conciliation Officer, Solan and approval thus, could not be granted in view of the provisions of Section 33 of the Industrial Disputes Act, 1947.

6. On the basis of pleadings of the parties, learned Tribunal framed the following issues:

> *"1. Whether the applicant is entitled to be given approval qua action taken against the respondent as alleged? OPP*
>
> *2. Whether this application is not maintainable? OPR*
>
> *3. Final Order.*

7. On the basis of evidence produced on record in respect of their respective contentions, the issues so framed, were answered by the learned Tribunal in the following terms:

> "Issue No. 1: No.
>
> Issue No. 2: Yes.
>
> Final Order: Application dismissed.

8. Learned Tribunal held that the termination order was passed by the employer on 31.08.2009 and record demonstrated that Union had raised a Demand Notice in respect of alternative work given to the workman on 08.06.2009 by way of a letter addressed both to the employer as also Labour-cum-Conciliation Officer. Learned Tribunal further held that said Officer, pursuant to the receipt of the Demand Notice, had issued communication, dated 19.06.2009 to the employer-company to attend conciliation meeting on 04.07.2009, however, record was silent as to whether any Conciliation meeting took place on the said date or not. Learned Tribunal further held that yet it was apparent from the reply of the employer, dated 25th July, 2009 to the said Demand Notice that there was no change in service conditions during pendency of reference. Learned Tribunal further held that said Demand Notice culminated into a Reference as to whether the dispute raised vide Demand Notice, dated 08.06.2009, to give alternative employment to workmen, including Prit Pal and their subsequent suspension and initiation of disciplinary action against them was legally justified or not in March, 2010. Learned Tribunal thus held that till March, 2010, the conciliation proceedings, as contemplated in Section 10 of the Industrial Disputes Act, 1947 were pending before the Labour-cum-Conciliation Officer, Solan. It further held that as on the date when the order of dismissal of the services of the workman was passed, i.e. on 27.07.2009, conciliation proceedings were pending with the Labour-cum-Conciliation Officer and no permission of the said Officer to dismiss the services of the workman was obtained by the employer-company as per the provisions of Section 33 of the Act. It further held that there was neither any Reference nor any other application pending before the learned Tribunal and thus, it was not open for the applicant to have had filed an application with the prayer as was made in the same before the learned Tribunal.

9. Learned Tribunal held that termination of the services of the workman was without the permission of the Labour-cum-Conciliation Officer and the same was, therefore, void and the workman was entitled for reinstatement in service. Learned Tribunal held the termination to be in violation of Section 33 of the Industrial Disputes Act. It further held that the workman was entitled for back wages @25%. This order passed by the learned Industrial Tribunal stands assailed both by the employer-company as also the workman.

10. The contention of learned counsel for the employer-company is that the order passed by the learned Tribunal is perverse and not sustainable in the eyes of law, as the findings returned by the learned Tribunal that the order of dismissal of service was in violation of Section 33 of the Industrial Disputes Act are bad and not sustainable in law.

11. On the other hand, the prayer of the workman is that in addition to the reliefs, which stand granted by the learned Tribunal, he is entitled to be paid full back wages alongwith interest @ 9% and the order passed by the learned Tribunal calls for modification to this effect.

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

13. Before proceeding with the factual matrix involved in the case, it is necessary to refer the relevant provisions of the Industrial Disputes Act.

Section 33 of the Industrial Disputes Act reads as under:

> *"33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-(1) During the pendency of any conciliation proceedings before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-*
>
> *(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or*
>
> *(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute,*
>
> *save with the express permission in writing of the authority before which the proceeding is pending.*
>
> *(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman-*
>
> *(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or*
>
> *(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:*
>
> *Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.*
>
> *(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute-*
>
> *(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceeding; or*

*(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman,*

*save with the express permission in writing of the authority before which the proceeding is pending.*

*Explanation.- For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being a member of the executive or other office bearer of a registered trade union connected with the establishment, is recognized as such in accordance with rules made in this behalf.*

*(4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.*

*(5) Where an employer makes an application to a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal under the provisoto sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, within a period of three months from the date of receipt of such application, such order in relation thereto as it deems fit:*

*Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:*

*Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed."*

14. A bare perusal of the statutory provision demonstrates that this Section provides that *inter alia* during the pendency of any conciliation proceeding before a Conciliation Officer or a Board or an Arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an Industrial Dispute, no employer shall in regard to any matter connected with the dispute, alter to the prejudice of the workmen concerned in the dispute, the conditions of service applicable to the workmen immediately before the commencement of the proceedings. Clause (b) of Sub-section (1) of Section 33 clearly provides that during the pendency of Conciliation proceeding before a Conciliation Officer etc., no workman shall be discharged or punished whether by dismissal or otherwise, save with the express permission in writing of the authority before which the proceeding is pending.

15. In the case in hand, it is the employer who filed an application under Section 33(2) of the Industrial Disputes Act seeking approval of the order of dismissal it had passed against its workman, namely, Prit Pal before the learned Labour Court.

16. Before proceeding further, it is pertinent to mention that Sub-section (2) of Section 33 under which the application was purportedly filed by the employer-company before the learned Industrial Tribunal-cum-Labour Court, does not envisages filing of any such application. This is for the reason that Sub-section (2) of Section 33 comes into play in a situation where though proceedings as contemplated in Sub-section (1) of Section 33 are pending before either the Conciliation Officer or a Board or Arbitrator or a Labour Court/Tribunal etc., but the employer intends to alter the conditions of service or discharge or punish the workman **with regard to any matter not connected with the dispute which is pending under Sub-section(1) of Section 33 of the Act.**

17. Be that as it may, leaving aside technicalities, this Court proceeds under the presumption that the application so filed by the employer was one as envisaged under Sub-section (1) of Section 33 (*supra*). The application filed by the employer-company before the learned Court below is dated 31st August, 2009. It is verified by one Shri Neeraj Gupta, son of Shri M.C. Gupta, General Manager, Manufacturing-cum-Factory Manager of the employer-company. As per the averments made in the application, Shri Prit Pal was employed as Operator with Gabriel India Limited on 08.04.1988 and thereafter with Anand Engine Components Limited followed with employer-company. Management issued a letter, dated 17.04.2009 to the workman mentioning therein that due to paucity of orders and slow market demand, the workman could not be provided work which he was performing before 07.07.2008 and that as he was sitting idle for several months and was being paid salary without work, it was decided that he should be provided with alternative work and was accordingly directed to attend the job of "Rejection, Rework, Material, and Chip Handling" w.e.f. 17.04.2009. This letter was received by the workman under protest on 18.04.2009. However, he failed to join the alternative job. Management chargesheeted him on 12.05.2009 for not doing alternative job/work after following the requisite procedure. Reply filed against the chargesheet by the workman was not found satisfactory by the Management, who took a decision to conduct a domestic inquiry vide letter dated 02.06.2009. One Shri A.K. Bakshi was appointed as an Inquiry Officer. Said Inquiry Officer after conducting the inquiry, furnished his report holding that chargesheet dated 12.05.2009 stood duly proved. It further stood mentioned in the application that the inquiry was conducted by the Inquiry Officer by following the principles of natural justice as also the Certified Standing Orders, and as charges stood proved against the workman, therefore, Management took the decision to dismiss him from service and the same was communicated to him vide letter, dated 31.08.2009. In this background, the application was filed.

18. Now incidentally, there is not even a whisper in this application as to why the same was filed by the employer-company before the learned Labour Court. There is no mention of any proceedings pending before the learned Labour Court as envisaged under Section 33(1) of the Industrial Disputes Act warranting filing of any such application before it. During the course of arguments, when learned counsel for the employer-company was confronted with the contents of the said application, his contention was that may be it is not mentioned in the application itself as to what was the actual proceeding pending before the learned Labour Court, but the same as per him, had to be deciphered from the documents appended with the application. Learned counsel was called upon by this Court to state and demonstrate from record that which Reference was pending before the learned Labour Court as on the date when the application was filed by it before the said Court pertaining to the dispute in issue which led to the dismissal of the workman, however, learned counsel could not point out to any such material on record. In other words, on behalf of the employer-company it could not be pointed out that any Reference was pending before the learned Labour Court pertaining to the dispute which led to the dismissal of the workman in issue, i.e., his non-joining of alternative job offered to him by the employer.

19. It is a matter of record that grievance qua this issue stood raised by the Union on behalf of the workman before the Labour-cum-Conciliation Officer and as on the date when the application was filed by the employer-company, these proceedings were pending before the Conciliation Officer. The contention of the learned counsel for the employer-company that the company was not aware of any such proceedings or simply because an application stood filed before the authority concerned, the same would not itself amount to an Industrial Dispute, also has no force because it is a matter of record that the employer-company had filed its response to the said application before the Labour-cum-Conciliation Officer. This is duly borne out from the record of the case. It is also a matter of record that no application as envisaged under Sub-section(1) of Section 33 *(supra)* was filed by the employer-company before the learned Labour-cum-Conciliation Officer before whom the application of the workman was pending.

20. Yet, another issue which is relevant to be stated at this point is that Sub-section (1) of Section 33 does not envisages a situation wherein the Management can first terminate the services of the employee and thereafter seek ratification of such order from the authority/Court of law envisaged in the said Sub-section. The import of the statutory provisions thereof is that before such action is actually taken by the Management of the employee, permission in this regard has to be obtained from the concerned officer or Board or arbitrator or Court where the proceedings/industrial dispute is pending. This, admittedly, has not been done in the present case. In this view of the matter, in my considered view, there is no infirmity with the findings returned by the learned Labour Court, wherein it has been held that the application so filed by the employer-company under Section 33 (2) of the Industrial Disputes Act was not maintainable, as on the date in issue, there was no Reference pending before the learned Labour Court pertaining to the dispute which led to the dismissal of the workman, confirmation of which was being sought by the employer from the learned Labour Court.

21. Now coming to the grievance raised by the workman that learned Labour Court ought to have had granted full back wages to him, pursuant to the order of reinstatement having been passed in his favour, in my considered view, said contention of the learned counsel for the workman has merit.

22. A five Judge Bench of Hon'ble Supreme Court in ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.*** Vs. ***Ram Gopal Sharma and others*** (2002) 2 Supreme Court Cases 244 while dealing with the order of dismissal or discharge passed by invoking the provisions of Section 33 of the Industrial Disputes Act has held that when an application under the provisions of Section 33(2)(b) of the Act is made before the authority with which the proceeding is pending for approval of the action taken by the employer, the authority has to examine whether the order of dismissal or discharge is bonafide or whether it was by way of victimization or unfair labour practice. Hon'ble Supreme Court has further held that the authority has also to see whether the conditions contained in the proviso were complied with or not, etc. As per Hon'ble Supreme Court, if the authority refuses to grant approval, obviously it follows that the employee continues to be in service as if the order of discharge or dismissal had never been passed. It has been further held that an order of dismissal or discharge passed by invoking the provisions of Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of the dismissal or discharge, but that order remains incomplete and inchoate, as it is subject to approval of the authority under the said provisions.

23. In my considered view, as per the law laid down by Hon'ble Supreme Court, once approval, as envisaged under Section 33 (supra) has not been granted by the authority concerned, then it is deemed that the order of dismissal or discharge has not been passed

and the relationship between the employer and the employee has not come to an end. Nothing more is required to be done by him, as the employee is deemed to be in continuous service entitling him for the benefits available. Taking into consideration the said law of Hon'ble Supreme Court, there is merit in the contention of learned counsel for the workman that the order passed by the employer is required to be modified to the extent that the employer has to be directed to pay the workman full back wages (but without interest) which were available to him in his capacity as an employee, as the relationship of employer and employee has not been severed at all. Ordered accordingly.

With the aforesaid observations/directions, the petitions stand disposed of, so also miscellaneous application(s), if any.

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

Subhash Chand ..... Petitioner
Versus
State of Himachal Pradesh .....Respondent

Cr.MP(M) No. 1302 of 2018
Date of Decision No. 14.11.2018

**Code of Criminal Procedure, 1973**- Section 439 - **Narcotic Drugs and Psychotropic Substances Act, 1985** – Section 37 – Bail – Grant of – Applicability of rigors – Police recovering huge quantity of banned drugs from Chemist shop of accused – Accused not having licence to posses them - Accused seeking bail and same resisted by prosecution on ground that rigors of section 37 of Act do not permit same – On facts, accused old and behind bars since long – Also remained hospitalized at IGMC, Shimla and PGI, Chandigarh, where he was operated upon – Fluctuating high blood sugar of accused requiring continuous monitoring – Medical facilities not available in Judicial lockup to deal emergent situations – Almost bed ridden conditions making it unlikely that he would indulge in illicit trade of drugs if released on bail – Conditional bail granted but purely on medical grounds. (Paras 8, 9 13 & 15)**.**

***Cases referred:***

Dataram Singh vs. State of Uttar Pradesh & Anr, Criminal Appeal No. 227/2018, decided on 6.2.2018

Dipak Shubhashchandra Mehta versus Central Bureau of Investigation and another, (2012) 4 SCC 134

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

Sanjay Chandra Vs.CBI, (2012)1 SCC 40

For the petitioner**:** Mr. Ashok Saini & Mr. Divya Raj Singh, Advocates.

For the respondent**:** M/s S.C.Sharma, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals, with Mr. Amit Kumar Dhumal, Deputy Advocate General.

The following judgment of the Court was delivered:

**Sandeep Sharma, Judge** (oral):

Bail petitioner namely, Subhash Chand, who is behind the bars since 30.1.2018, has approached this Court in the instant proceedings filed under Section 439 of the Code of Criminal Procedure, praying therein for grant of regular bail in case FIR No. 33 of 2018, dated 30.01.2018, under Sections 21-61-85 of the Narcotics Drugs & Psychotropic Substances Act ***( for short "ND&PS Act")*** and Section 18-A of the Drugs & Cosmetic Act, registered at police Station, Nalagarh, District Solan, H.P.

2. Sequel to order dated 23.10.2018, ASI Yog Raj, Police Station, Nalagarh and Mr Deepak Shandil, Assistant Superintendent Jail, Solan H.P., have come present alongwith record. Mr. Sanjeev Sood, learned Additional Advocate General, has also placed on record status report prepared on the basis of the investigation carried out by the Investigating Agency. Record perused and returned.

3. Careful perusal of the record/status report reveals that on 30.01.2018, police party on the basis of prior information, raided the Verma Medical Store owned by the bail petitioner Subhash Chand son of Sh. Yog Raj, R/o village Dattowal, Post Office & Tehsil Nalagarh, District Solan, H.P. During search, police recovered prohibited drugs/psychotropic substance. Since bail petitioner and co-accused Manisha Verma, who happened to be daughter-in-law of present bail petitioner, failed to produce any valid permit/licence, if any, to possess prohibited drugs/ psychotropic substance allegedly recovered from the aforesaid shop, they were taken into custody and FIR, detailed hereinabove, came to be registered against them. Subsequently, co-accused namely, Manisha Verma came to be enlarged on bail vide order dated 13.4.2018, passed by this Court in Cr.MP(M) No.388 of 2018, whereas bail petition(Cr.MP(M) No.582 of 2018) having been filed by the present bail petitioner was dismissed as withdrawn reserving liberty to the bail petitioner to file afresh at appropriate stage, in accordance with law, if so required and desired.

4. Present bail petition has been filed mainly on the medical grounds. On 23.10.2018, learned counsel representing the petitioner, while inviting attention of this Court to the medical record attached with the petition, strenuously argued that medical condition of the bail petitioner is not healthy and it would not be safe to keep him behind the bars for indefinite period. This Court having perused the material available on record, called for the report of Jail Superintendent, concerned regarding medical condition of the bail petitioner.

5. Today, during the proceedings of the case, Mr. Sanjeev Sood, learned Additional Advocate General placed on record affidavit of Shri Rajnesh Kumar, Superintendent, District Jail-cum-Assistant Commissioner to Deputy Commissioner, Solan, which is taken on record. Perusal of aforesaid affidavit, suggests that bail petitioner is/was under treatment for Heart Disease and Diabetes at the time of his admission at District Jail,Solan, whereafter he was taken to Regional Hospital, Solan on 20.2.2018 from where he was referred by the concerned Doctor to P.G.I.,Chandigarh. On 2.3.2018, bail petitioner was taken to PGI Chandigarh, where he remained admitted till 4.3.2018. The discharge slip and follow up card is Annexure P-3. Record also reveals that bail petitioner remained admitted at Regional Hospital, Solan on 6.4.2018 from where he was referred to IGMC, Shimla for Cardiology consultation and where he remained admitted w.e.f. 6.4.2018 to 12.4.2018. During this period, he was operated upon and discharged on 12.4.2018. Discharge slip of Regional Hospital, Solan and discharge/ follow up card of IGMC, Shimla are placed with the affidavit having been filed by the Jail Superintendent, Solan as

Annexures R-4 & R-5. Affidavit of Jail Superintendent, clearly suggests that bail petitioner is frequently taken to IGMC, Shimla for follow up and lastly he was sent for follow up and to obtain health status report on 5.11.2018, 9.11.2018 and 12.11.2018. Jail Superintendent has also placed on record copy of status report issued by Assistant Professor Department of Cardiology Indira Gandhi Medical College (IGMC), Shimla as Annexure R-6, perusal whereof, suggests that bail petitioner is suffering from heart disease, but presently he is having uncontrolled blood sugar, for which he needs continuous medication and injections. Dr. has categorically advised that for control of blood sugar, he needs follow up in Department of medicine. Though, Dr. has stated that presently patient is able to climb stairs of three stories and there is no functional limitation of activity, but blood investigation of patient done on 12.11.2018 reveals uncontrolled blood sugar. Otherwise also, Mr. Deepak Shandil, Assistant Superintendent Jail, Solan, who is present in Court, states that keeping in view the health condition of the bail petitioner, he is required to be taken to hospital frequently because there is no adequate facility available in jail as far as infrastructure required for present bail petitioner, is concerned.

6 Mr. Ashok Saini, Advocate, duly assisted by Mr. Divya Raj Singh, Advocate, representing the petitioner, contended that keeping in view the medical condition of bail petitioner, it is not safe to keep him in jail, rather he deserves to be enlarged on bail, so that he is provided good medical facility by his family members. While referring to the medical report placed on record by Jail Superintendent, Solan, learned counsel representing the bail petitioner made serious attempt to persuade this Court to agree with his contention that bail petitioner is totally confined to bed and no fruitful purpose would be served in case bail petitioner is allowed to incarcerate in jail for indefinite period during the pendency of the trial, especially when his health is not good. Mr. Saini further contended that challan stands filed in the competent court of law and nothing is required to be recovered from the bail petitioner and as such, there is no impediment, if any, in accepting the prayer having been made by the bail petitioner for grant of bail. Mr. Saini, further contended that keeping in view the physical condition of bail petitioner, there is no likelihood of his fleeing from justice and he can be enlarged on bail by putting him to stringent conditions.

7. Mr. Sanjeev Sood, learned Additional Advocate General, while fairly acknowledging the factum with regard to serious illness of bail petitioner, contended that as per the affidavit filed by the Jail Superintendent, Solan, bail petitioner is required to be taken to IGMC frequently for follow up. He further contended that there is no adequate facility available in jail at Solan to meet the emergent situation, if any, arises in the case of the bail petitioner, who admittedly is suffering from heart disease as well as blood sugar. Mr. Sood, learned Additional Advocate General further contended that though huge contraband came to be recovered from the shop of bail petitioner and he is found to be involved in heinous/serious crime, but keeping in view his present health condition, prayer having been made by the bail petitioner for grant of bail may be considered subject to putting him to stringent conditions.

8. Having heard learned counsel for the parties and perused the material available on record, especially medical record made available to this Court during the proceeding of the case, this Court finds that bail petitioner, who is behind the bars since 30.1.2018 is not fit to be kept in jail for indefinite period, it is quite apparent from the opinion rendered by the Department of Cardiology IGMC, Shimla that bail petitioner is suffering from heart disease and his blood sugar is uncontrolled and he is required to visit medicine department frequently. Otherwise also, record reveals that for the last few months bail petitioner remained admitted in the hospital and during this period he was also operated and as such, it is not safe to keep the bail petitioner in jail, where admittedly no

adequate facilities are available to meet the emergent situation, as has been fairly admitted by the Jail Superintend, Solan. Though, as is evident from the material available on record that jail authorities are trying its best to provide best medical help to the bail petitioner, but, there is no permanent medical help available at Jail and as such, it would be in the interest of bail petitioner to enlarge him on bail, so that he is taken care of by his family members.

9. There is no doubt that offence alleged to have been committed by the bail petitioner is heinous and rigour of Section 37 of ND& PS Act, are attracted in the present case but in the given facts and circumstances of the case, it would be inhumane to keep the bail petitioner behind the bars, especially, till the time, he fully recovers from the disease/ailment allegedly suffered by him. No doubt, petitioner is alleged to have been involved in serious crime, but guilt, if any, of him is yet to be proved, in accordance with law. Taking note of the health condition of the bail petitioner, this Court has reasons to presume that there is no likelihood of petitioner's indulging in illegal trade of narcotics during the pendency of the trial, which is one of the factor to be borne in mind, while considering the prayer for grant of bail during the pendency of the trial.

10. Hon'ble Apex Court in case titled ***Dipak Shubhashchandra Mehta versus Central Bureau of Investigation and another;*** (2012) 4 Supreme Court Cases 134, while considering the health condition as supported by the documents including the certificate of the Medical Officer, Central Jail Dispensary, granted bail pending trial on stringent conditions. In the case before the Hon'ble Apex Court, appellant while in custody had contracted/obstructive jaundice requiring long intensive treatment. As a result of such obstructive jaundice, the appellant was unable to undergo other required surgeries. It would be profitable to reproduce para Nos. 34 and 35 of the judgment herein:-

> " 34. As posed in ***Sanjay Chandra Vs.CBI,(2012)1 SCC 40***, we are also asking the same question i.e. whether the speedy trial is possible in the present case for the reasons mentioned above.
>
> 35. As observed earlier, we are conscious of the fact that the present appellant alongwith others is charged with economic offences of huge magnitude. At the same time, we cannot lose sight of the fact that though the investigating agency has completed the investigation and submitted the charge sheet including additional charge-sheet, the fact remains that the necessary charges have not been framed, therefore, the presence of the appellant in custody may not be necessary for further investigation. In view of the same, considering the health condition as supported by the documents including the certificate of the Medical Officer, Central Jail Dispensary, we are of the view that the appellant is entitled to an order of bail pending trial on stringent conditions in order to safeguard the interest of CBI."

11. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual cannot be curtailed for indefinite period, especially when his guilt has not been proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:-

> *2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to*

> *some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.*

12. 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; wherein it 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."*

13. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

14. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

- whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
- nature and gravity of the accusation;
- severity of the punishment in the event of conviction;
- danger of the accused absconding or fleeing, if released on bail;
- character, behaviour, means, position and standing of the accused;
- likelihood of the offence being repeated;
- reasonable apprehension of the witnesses being influenced; and
- danger, of course, of justice being thwarted by grant of bail.

15. Consequently, in view of the above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing bail bonds in the sum of Rs. 5,00,000 ( Rs. Five lakh) with one local surety in the like amount, to the satisfaction of learned trial Court, besides following conditions:

- *He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;*
- *He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;*
- *He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or the Police Officer; and*
- *He shall not leave the territory of India without the prior permission of the Court.*
- *He shall surrender passport, if any, held by him.*

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 his 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 the petition alone.

The bail petition stands disposed of accordingly.

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

Sarwan Singh & others ...Petitioners.
Versus
Mohar Singh ...Respondent.

Civil Revision No. : 168 of 2016
Reserved on : 04.10.2018
Date of Decision: November 5, 2018

**Constitution of India, 1950,-** Article 227 – Supervisory powers – **Code of Civil Procedure, 1908** - Sections 102 & 115 – Revision- Maintainability, when second appeal against decree is barred – In view of conflicting judgments on point whether aggrieved party can avail supervisory powers of High Court under Article 227 of Constitution or in alternative, can seek revision against decree when regular second appeal against it specifically barred under section 102 of Code, Hon'ble Single Bench referring matter to Larger Bench – Held, finality sought to be attained to decree by virtue of section 102 of Code cannot be permitted to be taken away by allowing party to agitate it by way of revision under section of 115 of Code – This provision can also not be permitted to be circumvented in guise of invoking supervisory jurisdiction under article 227 of Constitution except under exceptional circumstances where there is perversity on face of impugned judgment for which there is no need to reappreciate evidence on record. (Paras 20, 21 & 38).

**Constitution of India, 1950,-** Article 227 **–** Supervisory powers- Scope – Held, power of superintendence to be exercised more sparingly and with circumspection in order to keep subordinates courts within bounds of their authority and not for correcting mere errors. (Paras 23 & 34).

**Code of Civil Procedure, 1908 - Sections 102**- Second appeal – Maintainability – Held, no second appeal shall lie from decree when subject matter of original suit for recovery of money is not exceeding Rupees Twenty Five Thousand. (Para 9).

**Code of Civil Procedure, 1908 -** Sections 102- Purpose – Held, purpose behind enactment is to reduce quantum of litigation so that courts are not to waste their time when stakes are meager and not of much significance. (Para 10).

***Cases referred:***

Ajaib Singh Vs. Sirhind Co-operative Marketing cum Processing Service Society Ltd., (1999) 6 SCC 82
Baby v Travancore Devaswom Board and others**,** (1998) 8 SCC 310
Chandrasekhar Singh and others Vs. Siya Ram Singh and others, (1979) 3 SCC 118
Hari Vishnu Kamath v. Ahmad Ishaque & others, AIR 1955 SC 233
Kartar Singh v. State of Punjab, (1994) 3 SCC 569
Keshardeo Chamria v. Radha Kissen Chamria and others, AIR 1953 SC 23
M.L. Sethi v. R.P. Kapur, (1972) 2 SCC 427
Madras Bar Association v. Union of India & another, (2014) 10 SCC 1
Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee & others, AIR 1964 SC 1336
Mohd. Yunus Vs. Mohd. Mustaquim and others, (1983) 4 SCC 566
Nagar Palika Thakurdwara v. Khalil Ahmed & others, (2016) 9 SCC 397
Pandurang Dhondi Chougule & others v. Maruti Hari Jadhav & others, AIR 1966 SC 153
Radhey Shyam and another Vs. Chhabi Nath and others, (2015) 5 SCC 423
Ram Kishan Fauji v. State of Haryana & others, (2017) 5 SCC 533
Rena Drego Vs. Lalchand Soni and others, (1998) 3 SCC 341
Rishabh Chand Jain & another v. Ginesh Chandra Jain, (2016) 6 SCC 675
Shalini Shyam Shetty & another v. Rajendra Shankar Patil, (2010) 8 SCC 329
Surya Dev Rai Vs. Ram Chander Rai, (2003) 6 SCC 675

Waryam Singh and another Vs. Amarnath and another, AIR 1954 SC 215

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| For the Petitioners | : | Mr.Dinesh Kumar Sharma and Mr.Y. Paul, Advocates, for the petitioners. |
| For the Respondents | : | Mr.N.S. Chandel, Advocate, for the respondent. |

The following judgment of the Court was delivered:

**Sanjay Karol, Judge**

As to whether an order against which no appeal lies, by virtue of Section 102 of the Code of Civil Procedure (hereinafter referred to as the Code), can be assailed in a petition filed under Section 115 of the Code or Article 227 of the Constitution of India or not, is the issue which this Court is called upon to answer.

2. While passing judgment dated 24th November, 2016 in Civil Revision No. 168 of 2016, titled as *Sarwan Singh and others* Vs. *Mohar Singh,* the learned Single Judge has referred the matter to a larger Bench on the question of maintainability of a petition under Article 227 of the Constitution of India in cases where second appeal against the judgment and decree is specifically barred under Section 102 of the Code and the necessity being conflicting views taken by the two learned Single Judges of this Court in passing judgments in Civil Revision No. 58 of 2009, titled as *Managing Director, H.P. State Cooperative Marketing & Consumer Federation Ltd. (Him Fed), District Shimla Vs. Sh. Rajinder Singh*; Civil Revision No. 59 of 2009, titled as *Managing Director, H.P. State Cooperative Marketing & Consumer Federation Ltd. (Him Fed), District Shimla* Vs. *Sh. Sita Ram*, decided on 30.03.2016; and CMPMO No. 439 of 2010, titled as *Subhadra Devi Vs. Kishori Lal*, decided on 14.12.2010.

3. In CMPMO No. 439 of 2010, titled as *Subhadra Devi Vs. Kishori Lal,* decided on 14.12.2010, learned Single Judge held that provisions of Sections 100 and 102 of the Code cannot be circumvented by filing a petition under Article 227 of the Constitution of India. Para-3 thereof reads as under:

> "3. Under Section 100, CPC, a second appeal lies to the High Court only on a substantial question of law. Section 102, Code of Civil Procedure specifically provides that no second appeal is maintainable in a suit, value whereof is less than Rs.25,000/-. The provisions of Section 100 and 102, Code of Civil Procedure cannot be circumvented by filing a petition under Article 227 of the Constitution of India. An appeal is the creation of a statute and the legislature in its wisdom has decided that a second appeal will not lie in a suit valuation of which is less than 25,000/- There is no occasion to entertain a CMPMO unless it is shown that there is some illegality involved or there is some perversity in the finding of the learned Trial Court. In the present case, I have gone through the judgments of both the Courts below. I find that both the judgments are based on appreciation of evidence and, therefore do not call for any interference in this petition." (Emphasis supplied)

4. The very same learned Judge restricted the parties in CMPMO NO. 235 of 2006, titled as *Mohan Lal Vs. Bahader Singh,* decided on 16.12.2010, in the following terms:

> "2. Under Section 100, CPC, a second appeal lies to the High Court only on a substantial question of law. Section 102, Code of Civil Procedure specifically provides that no second appeal is maintainable in a suit,

valuation of which is Rs.25,000/- or less. This Court has repeatedly held that the provisions of Article 227 of the Constitution of India cannot be used as a means to circumvent the bar to filing of an appeal. An appeal is only a creation of the statute and if the statute prohibits the filing of an appeal, the provisions of Article 227 of the Constitution of India cannot be invoked in normal course.

3. Having held so, this Court would be failing in its duty if it does not exercise its supervisory jurisdiction under Article 227 of the Constitution of India, where the judgment or order challenged is totally illegal or perverse."

5. When similar issue came up for consideration before another learned Judge in Civil Revision No. 58 of 2009 and Civil Revision No. 59 of 2009 [Him Fed (supra)], the Court held that this Court in exercise of its revisional jurisdiction can look into the correctness, legality or propriety of any decision or order impugned, relevant portion of the judgment is quoted hereinbelow:

"16. In the exercise of revisional jurisdiction, this Court can look into the question as to the correctness, legality or propriety of any decision or order impugned."

6. It is in this background that now while deciding Civil Revision No. 168 of 2016, the third learned Single Judge has referred the matter for consideration before a Larger Bench, in the following terms:

33. Accordingly, with all humility at my command, I regret my inability to concur with the view expressed by a Co-ordinate Bench of this Court in *Managing Director's case (supra)*. In view of this difference, it is necessary for me to refer the matter to a larger Bench. Even otherwise, the issue is of great importance and the views expressed by the different High Courts on the question are otherwise not consistent and it is desirable that an authoritative pronouncement be made by a larger Bench.

34. At this stage, I may observe that though I have concurred with the exposition of law as propounded by a Co-ordinate Bench of this Court in Subhadra Devi, *Mohan Lal's cases (supra)*, however, since the matter is being referred to a larger Bench, it may also consider the desirability of going into the question of maintainability of the petition under Article 227 of the Constitution in cases where the second appeal against the judgment and decree is specifically barred under Section 102 of the Code."

7. We have heard the learned counsel for the parties and have also perused the records of the cases decided by the learned Single Judge, i.e., *Subhadra Devi (supra)*, *Mohan Lal (supra)*, as also *Rajinder Singh (supra)* and *Sita Ram (supra)*.

8. Relevant provisions of law are reproduced as under:

**Sections 100, 102, 115 of the Code of Civil Procedure**

"**100. Second appeal**— (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

"**102. No second appeal in certain cases**.-No second appeal shall lie from any decree, when the subject matter of the original suit is for recovery of money not exceeding twenty-five thousand rupees."

"**115. Revision** — (1) The High Court may call for the record of an case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceedings before the Court except where such suit or other proceedings is stayed by the High Court."

**Article 227 of the Constitution of India:**

"227. Power of superintendence over all courts by the High Court :- 196[(1) Every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction.] (2) Without prejudice to the generality of the foregoing provision, the High Court may- (a) call for returns from such Courts: (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts; and (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts. (3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such Courts and to attorneys, advocates and pleaders practising therein : Provided that any rules made, forms prescribed or tables settled under Cl. (2) or Cl. (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor. (4) Nothing in

> this article shall be deemed to confer on a High Court powers of superintendence over any Court or Tribunal constituted by or under any law relating to the Armed Forces. 197 [ * * * * *] Clause (1) has been successively subs. by the Constitution (Forty-second Amendment) Act 1976, Sec. 40 (w.e.f. 1st February. 1977) and the Constitution (Forty-fourth Amendment Act, 1978, Sec. 31 to read as above (w.e.f. 20th June, 1979). Clause (5) was ins. by the Constitution (Forty-second Amendment) Act, 1976, Sec. 40 (w.e.f 1st February, 1977) and omitted by the Constitution (Forty-fourth Amendment) Act, 1978 Sec. 31 (w.e.f. 20th June, 1979)."

9. In our considered view, provisions of Section 102 of the Code are unambiguously clear. No second appeal shall lie from a decree when the subject matter of the original suit for recovery of money is not exceeding rupees twenty five thousand.

10. The issue stands settled, with the Apex court delivering its judgment in *Nagar Palika Thakurdwara v. Khalil Ahmed & others,* (2016) 9 SCC 397 (2-Judges), holding that the purpose behind the enactment of the said Section is to reduce the quantum of litigation, so that the Courts are not to waste their time, where the stakes are meager and are not of much significance.

11. It is a settled principle of law that right to appeal is a statutory right and second appeal, by virtue of Section 100 of the Code, lies to the High Court against the judgment and decree, passed in an appeal by the Subordinate Court, involving a substantial question of law. However, such right is restricted by virtue of Section 102 of the Code, which provides that no second appeal shall lie from any decree, when the subject matter of the original suit is for recovery of money not exceeding twenty five thousand rupees.

12. In the absence of any statutory right of appeal, what needs to be examined is as to whether the order, which cannot be assailed by virtue of appeal, can be assailed by virtue of Section 115 of the Code or Article 227 of the Constitution.

13. Let us examine the scope of Section 115 of the Code.

14. The Apex Court in *Keshardeo Chamria v. Radha Kissen Chamria and others,* AIR 1953 SC 23, observed as under:

> "17. .. ... ... It seems to us that in this matter really the High Court entertained an appeal in the guise of a revision. The revisional jurisdiction of the High Court is set out in s. 115 Civil P. C. in these terms:
>
> > "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears –
> >
> > (a) to have exercised a jurisdiction not vested in it by law, or
> >
> > (b) to have failed to exercise a jurisdiction so vested, or
> >
> > (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."
>
> A large number of cases have been collected in Edn. 4 of Chitaley and Rao's Code of Civil procedure (vol. I), which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section. In Mohunt Bhagwan Ramanuj Das v. Khetter Moni Dassi, 1 Cal. W. N. 617, the High Court of Calcutta expressed the opinion

that sub-cl. (c) of s. 115, Civil P. C., was intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate Courts, so as to prevent grave injustice in non, appealable cases. This decision was, however, dissented from by the same High Court in Enat Mondul v. Baloram Dey, 3 Cal. W. N. 581, but was cited with approval by Lord-Williams J. in Gulabchand Bangur v. Kabiruddin Ahmed, 58 Cal. -111. In these circumstances, it is worth-while recalling again to mind the decisions of the Privy Council on this subject and the limits stated therein for the exercise of jurisdiction conferred by this section on the High Courts."

18. As long ago as 1894, in Rajah Amir Hassan Khan v. Sheo Baksh Singh, 11 Ind. App. 237, the Privy Council made the following observations on s. 622 of the former Code of Civil Procedure, which was replaced by s.115 of the Code of 1908:

> "The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

In 1917 again in *Balakrishna Udayar v. Vasudeva Aiyar*, 44 Ind. App. 261, the Board observed:

> "It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In 1949, in Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras, 76 Ind. App. 67, the Privy Council again examined the scope of s. 115 and observed that they could see no justification for the view that the section was intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate Courts so as to prevent grave injustice in non-appealable cases and that it would be difficult to formulate any standard by which the degree of error of subordinate Courts could be measured. It was said:

> "Section 115 applies only to cases in which no appeal lies, and, where the Legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate Court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction: and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing same error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied on those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate Court on questions of fact or law.""

"20. Reference may also be made to the observations of Bose J. in his order of reference in Narayan Sonaji v. Sheshrao Vithoba, A. I. R. 1948 Nag. 258 wherein it was said that the words "illegally" and "material irregularity"

> do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with."
>
> (Emphasis supplied)

The view stands reiterated by the Apex Court in *Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee & others,* AIR 1964 SC 1336 (3-Judges).

15. Subsequently, a Constitution Bench of the Apex Court in *Pandurang Dhondi Chougule & others v. Maruti Hari Jadhav & others,* AIR 1966 SC 153 (5-Judges), observed:

> "11. The history of recent legislation in India shows that when Legislatures pass Acts dealing with socio-economic matters, or make provisions for the levy of sales-tax, it is realized that the operative provisions of such legislation present difficult problems of construction; and so, sometimes, the Act in question provides for a revisional application to the High Court in respect of such matters or authorises a reference to be made to it. In such cases, the High Court will undoubtedly deal with the problems raised by the construction of the relevant provisions in accordance with the extent of the jurisdiction conferred on it by the material provisions contained in the statute itself. Sometimes however, no such specific provision is made, and the questions raised in regard to the construction of the provisions of such a statute reach the High Court under its general revisional jurisdiction under S. 115of the Code. In this class of cases the revisional jurisdiction of the High Court has to be exercised in accordance with the limits prescribed by the said section. It is true that in order to afford guidance to subordinate Courts and to avoid confusion in the administration of the specific law in question, important questions relating to the construction of the operative provisions contained in such an Act must be finally determined by the High Court but in doing so the High Court must enquire whether a complaint made against the decision of the subordinate Court on the ground that it has misconstrued the relevant provisions of the statute, attracts the provisions of S. 115. Does the alleged misconstruction of the statutory provision have relation to the erroneous assumption of jurisdiction, or the erroneous failure to exercise jurisdiction, or the exercise of jurisdiction illegally or with material irregularity by the subordinate Court? These are the tests laid down by S. 115 of the Code and they have to be borne in mind before the High Court decides to exercise its revisional jurisdiction under it.
>
> 12. The question has been recently considered by this Court in *Manindra Land and Building Corporation Ltd. Bhutnath Banerjee,* AIR 1964 SC 1336 and *Abbasbhai Alimahomed v. Gulamnabi*, AIR 1964 SC 1341. The effect of these two decisions clearly is that a distinction must be drawn between the errors committed by subordinate Courts in deciding questions of law which have relation to, or are concerned with, questions of jurisdiction of the said Court, and errors of law which have no such relation or connection. It is, we think, undesirable and inexpedient to lay down any general rule in regard to this position. An attempt to define this position with precision or to deal with it exhaustively may create unnecessary difficulties. It is clear that in actual practice, it would not be difficult to distinguish between cases where errors of law affect, or have relation to, the jurisdiction of the Court concerned, and where they do not have such a relation.

> 13. Considering the point raised by Mr. Sinha in the light of this position, it seems to us that the High Court was in error in assuming jurisdiction to correct what it thought to be the misconstruction of the decree passed in civil suit No. 102 of 1932-33. As we have already seen, in the present debt adjustment proceedings, one of the points which arose for decision was whether the mortgage debt was subsisting at the time when the respondents made their application, and the District Court had found that the respondents' equity of redemption had been extinguished. This finding was based on the construction of the said decree. It is difficult to see how the High Court was justified in reversing this finding under S. 115 of the Code. The construction of a decree like the construction of a document of title is no doubt a point of law. Even so, it cannot be held to justify the exercise of the High Court's revisional jurisdiction under S. 115 of the Code because it has no relation to the jurisdiction of the Court. Like other matters which are relevant and material in determining the question of the adjustment of debts, the question about the existence of the debt has been left to the determination of the Courts which are authorised to administer the provisions of the Act; and even if in dealing with such questions, the trial Court or the District Court commits an error of law, it cannot be said that such an error of law would necessarily involve the question of the said Courts' jurisdiction within the meaning of S. 115 of the Code. We are, therefore, satisfied that on the facts of this case, the High Court exceeded its jurisdiction in interfering with the conclusion of the District Court that the decree in question had extinguished the respondents' equity of redemption."

16. Recently, in *Rishabh Chand Jain & another v. Ginesh Chandra Jain,* (2016) 6 SCC 675 (2-Judges), the Apex Court observed as under:

> "14. The impugned order dismissing the suit on the ground of *Res Judicata* does not cease to be a decree on account of a procedural irregularity of non-framing an issue. The court ought to treat the decree as if the same has been passed after framing the issue and on adjudication thereof, in such circumstances. What is to be seen is the effect and not the process. Even if there is a procedural irregularity in the process of passing such order, if the order passed is a decree under law, no revision lies under Section 115 of the Code in view of the specific bar under sub-Section (2) thereof. It is only appealable under Section 96 read with Order XLI of the Code."

17. In *M.L. Sethi v. R.P. Kapur,* (1972) 2 SCC 427, the Apex Court observed:

> "12. ..... The word "jurisdiction" is a verbal cast of many colours. Jurisdiction originally seems to have had the meaning which Lord Baid ascribed to it in *Anisminic Ltd. v. Foreign Compensation Commission*, (1969) 2 AC 147, namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an inquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Denman in R. v. Bolton (1841) 1 QB 66. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In Anisminde Ltd., (1969) 2 AC 147 Lord Reid said:

> "But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive".

In the same case, Lord Pearce said:

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fall to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity."

The dicta of the majority of the House of Lords, in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. They comes perilously close to saying that there is a jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or "addressing themselves to a wrong question". The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only construing the empowering statute which will give little guidance. It is really a question of how much latitude the Court is prepared to allow in the end it can only be a value judgment (See H.W.R. Wade, "Constitutional and Administrative Aspects of the Anismenic case", Law Quarterly Review, Vol. 85, 1969, P.198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error an liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can

only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court."

18. The Reference Court, on the issue, has observed as under:

"27. A Second Appeal is maintainable only on a substantial question of law as provided under Section 100 of the Code of Civil Procedure. A Revision under Section 115 of the Code of Civil Procedure lies where the subordinate court appears to have exercised jurisdiction not vested in it by law; or to have failed to exercise jurisdiction so vested; or to have acted in the exercise of its jurisdiction illegally or with material irregularity. The question is whether the High Court would be entitled to entertain a Civil Revision Petition, in a case where a Second Appeal is barred under section 102 of the Code of Civil Procedure, on any ground which is less rigorous than that provided in Section 100 of the Code of Civil Procedure.

28. Even in matters where the valuation exceed `25,000/-, a second appeal could be entertained only on a substantial question of law. When Section 102 provides that no second appeal would lie in respect of a suit where the subject matter is for recovery of money not exceeding `25,000/-, it cannot be assumed the Parliament thought it fit to take such category of cases out of the rigour of Section 100 and to provide a less rigorous remedy in such cases. If so, it is to be taken that a revision under Section 115 cannot be entertained on a ground which is less rigorous than that provided in Section 100 of the Code of Civil Procedure.

29. The purpose of substituting Section 102 C.P.C. was to restrict entertaining Second Appeals in cases where the subject matter of the suit is for recovery of money not exceeding `25,000/-. The purpose sought to be achieved cannot be defeated by entertaining a revision under section 115 of the Code of Civil Procedure on a less rigorous test than that provided in Section 100 C.P.C."

"31. In addition to the aforesaid, it would be noticed that Section 115 of the Code does not refer to a decree and further provides that revision can be invoked where no appeal lies against the impugned order/judgment. There is a marked difference as regards an order or judgment against which no appeal lies and the judgment or order against which an appeal is prohibited or restricted by the Code.

32. Under Section 115 CPC, the legality and propriety as well as perversity can be seen, so also, while exercising jurisdiction of second appeal, appeal can be admitted only on substantial questions of law. The scope of both these provisions is quite similar and, therefore, the petitioners cannot invoke jurisdiction of this Court under Section 115 CPC because such invocation of revisional jurisdiction will render the specific provision of Section 102 of the Code to be otiose which is not permissible."

19. Keeping in view the principles enunciated by the Hon'ble Supreme Court of India, noticed supra, on the ambit, scope and power and exercise of revisional jurisdiction by the High Court, we are in agreement with the aforesaid observations.

20. We may also add that so far as assailing such an order under Section 115 of the Code is concerned, in our considered view, the intent behind incorporation of Section 102 in the Code is that finality has to be put to such like litigation, wherein in an original

suit for recovery, the subject matter does not exceed `25,000/-. That being so, this finality cannot be permitted to be taken away by allowing a party to agitate the judgment passed by the first Appellate Authority under Section 115 of the Code. Section 102 of the Code precedes Section 115 thereof and in our considered view, something which is prohibited under Section 102 of the Code, cannot be permitted to be done by filing an application under Section 115 of the Code.

21. In view of a categorical statutory bar envisaged in the Code, prohibiting second appeal against a decree when the subject matter of the original suit is for recovery of money not exceeding rupees twenty five thousand, in our considered view, this statutory provision cannot be permitted to be circumvented in the guise of invoking supervisory jurisdiction of this Court under Article 227 of the Constitution of India, except under exceptional circumstances.

22. By virtue of Article 227 of the Constitution of India, this Court exercises supervisory jurisdiction over the Courts within its jurisdiction. The scope and ambit of the exercise of supervisory jurisdiction under the said Article clearly stands spelled out in various judicial pronouncements rendered by Hon'ble the Supreme Court of India.

23. It is settled law that power of superintendence conferred upon the High Court under Article 227 of the Constitution of India has to be exercised most sparingly and with circumspection, that too, in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority. In other words, such power of superintendence is not conferred for correcting mere errors.

24. In *Waryam Singh and another* Vs. *Amarnath and another,* AIR 1954 SC 215, a Constitution Bench of the Hon'ble Supreme Court, after examining the scope of Article 227 of the Constitution, observed as under:-

> "This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J. in Dalmia Jain Airways Ltd. V. Sukumar Mukherjee, 1951 AIR (Cal) 193 to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors."

25. In *Hari Vishnu Kamath v. Ahmad Ishaque & others,* AIR 1955 SC 233, the Apex Court, in the context of the scope, power and jurisdiction exercised by the High Court, under Articles 226 & 227 of the Constitution of India, observed as under:

> "20. We are also of opinion that the Election Tribunals are subject to the superintendence of the High Courts under Article 227 of the Constitution, and that that superintendence is both judicial and administrative. That was held by this Court in 'Waryam Singh v. Amarnath', AIR 1954 SC 215 (K), where it was observed that in this respect Article 227 went further than section 224 of the Government of India Act, 1935, under which the superintendence was purely administrative, and that it restored the position under section 107 of the Government of India Act, 1915. It may also be noted that while in a 'certiorari' under Article 226 the High Court can only annul the decision of the Tribunal, it can, under Article 227, do that, and also issue further directions in the matter. We must accordingly hold that the application of the appellant for a writ of 'certiorari' and for other reliefs was maintainable under Articles 226 and 227 of the Constitution.

> 21. Then the question is whether there are proper grounds for the issue of 'certiorari' in the present case. There was considerable argument before us as to the character and scope of the writ of 'certiorari' and the conditions under which it could be issued. The question has been considered by this Court in 'Parry and Co. v. Commercial Employees' Association, Madras', AIR 1952 SC 179 (L): -'Veerappa Pillai v. Raman and Raman Ltd.'. AIR 1952 SC 192 (M); - 'Ebrahim Aboobaker v. Custodian General of Evacuee Property New Delhi', AIR 1952 SC 319 (N), and quite recently in AIR 1954 SC 440(C). On these authorities, the following propositions may be taken as established: (1) 'Certiorari' will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it. (2) 'Certiorari' will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice. (3) The Court issuing a writ of 'certiorari' acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings or fact reached by the inferior Court or Tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the Legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy if a superior Court were to re-hear the case on the evidence, and substitute its own findings in 'certiorari." These propositions are well settled and are not in dispute."

26. The Apex Court in *Madras Bar Association v. Union of India & another,* (2014) 10 SCC 1, while dealing with the constitutional validity of the National Tax Tribunal Act, 2005, held Judicial Review, under Articles 226 & 227 of the Constitution of India, to be part of the Basic Structure of the Constitution. Even earlier, in *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569, the Court had observed as such.

27. After elaborately discussing its earlier decisions on the scope of power under Articles 226 & 227 of the Constitution of India, the Apex Court in *Shalini Shyam Shetty & another v. Rajendra Shankar Patil,* (2010) 8 SCC 329, culled out the following principles:

> "(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.
>
> (b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.
>
> (c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, 'within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar vs. Union of India & others, 1997 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for

promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

(Emphasis supplied)

The aforesaid principles stand reiterated by the Apex Court in *Ram Kishan Fauji v. State of Haryana & others*, (2017) 5 SCC 533.

28. Earlier in *Radhey Shyam and another* Vs. *Chhabi Nath and others*, (2015) 5 SCC 423 while holding that orders of Civil Courts are not amenable to writ jurisdiction under Article 226 of the Constitution of India, it further held that jurisdiction under Article 227 of the Constitution of India was distinct from the jurisdiction under Article 226 of the Constitution of India. To this extent, it also overruled its contrary view in *Surya Dev Rai* Vs. *Ram Chander Rai*, (2003) 6 SCC 675. In para 28 of the judgment in *Radhey Shyam's* case, Hon'ble Supreme Court observed that:

"28. We may also deal with the submission made on behalf of the respondent that the view in Surya Dev Rai stands approved by larger Benches in Shail, Mahendra Saree Emporium and Salem Advocate Bar Assn and on that ground correctness of the said view cannot be gone into by this Bench. In Shail, though reference has been made to Surya Dev Rai, the same is only for the purpose of scope of power under Article 227 as is clear from para 3 of the said judgment. There is no discussion on the issue of maintainability of a petition under Article 226. In Mahendra Saree Emporium, reference to Surya Dev Rai is made in para 9 of the judgment only for the proposition that no subordinate legislation can whittle down the jurisdiction conferred by the Constitution. Similarly, in Salem Bar Assn. in para 40, reference to Surya Dev Rai is for the same purpose. We are, thus, unable to accept the submission of learned counsel for the respondent."

29. In *Mohd. Yunus Vs. Mohd. Mustaquim and others*, (1983) 4 SCC 566, Hon'ble Supreme Court held that High Court has very limited scope under Article 227 of the Constitution and even errors of law cannot be corrected in exercise of power of judicial review while exercising such power. The powers can be used sparingly only when High Court comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction. It further held that the High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principles of law or where order of Tribunal etc. has resulted in grave injustice.

30 In *Chandrasekhar Singh and others Vs. Siya Ram Singh and others,* (1979) 3 SCC 118, Hon'ble Supreme Court observed that:

"11. The only other question that remains to be considered is whether an order under Section 146 (1B) can be interfered with by the High Court in the exercise of its powers under Article 227 of the Constitution. It is admitted that the powers conferred on the High Court under Art. 227 of the Constitution cannot in any way be curtailed by the provisions of the Criminal Procedure Code. Therefore, the powers of the High Court under Art. 227 of

> the Constitution can be invoked in spite of the restrictions placed under Section 146(1D) of the Criminal Procedure Code. But the scope of interference by the High Court under Art. 227 is restricted. This Court has repeatedly held that "the power of superintendence conferred by Article 227 is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors vide 1954 S.C.R. 565 (Waryam Singh v. Amar Nath). In a later decision, (Nagendra Nath Bora and another v. The Commissioner of Hills Division, and Appeals, Assam and Others(1), the view was reiterated and it was held that the power of judicial interference under Article 227 of the Constitution are not greater than the power under Article 226 of the Constitution, and that under Art. 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority. In a recent decision, (Babhutmal Raichand Oswal v. Laxmibai R. Tarts(2) this Court reiterated the view stated in the earlier decisions referred to and held that the power of superintendence under Article 227 of the Constitution cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as the Court of appeal and that the High Court cannot in exercise of its jurisdiction under Art. 227 convert itself into a court of appeal."
>
> (Emphasis supplied)

31. In *Rena Drego Vs. Lalchand Soni and others*, (1998) 3 SCC 341, the Hon'ble Supreme Court has categorically held that the power under Article 227 of the Constitution is of the judicial superintendence which cannot be used to up-set the conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could have ever reached them.

32. In *Baby v Travancore Devaswom Board and others***,** (1998) 8 SCC 310, the Hon'ble Supreme Court has held that even if revisional jurisdiction was not available to the High Court, it still have powers under Article 227 of the Constitution of India to set aside the orders so passed by the Tribunal if the finding of fact arrived at was perverse.

33. In *Ajaib Singh* Vs. *Sirhind Co-operative Marketing cum Processing Service Society Ltd.*, (1999) 6 SCC 82, the Hon'ble Supreme Court held that High Court is not to substitute its view for the opinion of Authorities/ Courts below as the same is not permissible in proceedings under Articles 226/227 of the Constitution.

34. Thus, it can conveniently be held that the supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the Subordinate Courts within the bound of the jurisdiction, when such Court has assumed jurisdiction which it does not has or has failed to exercise jurisdiction which it does has or jurisdiction though available is exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby the High Court may step-in to exercise its supervisory jurisdiction. The supervisory jurisdiction is not available to correct mere errors of fact or law unless the following requirement is satisfied:-

> (i) The error is manifest and apparent on the face of the proceedings such as when it is based on ignorance or utter disregard to the provisions of law, and to grave injustice or gross failure of justice has occasioned thereby.

(ii) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscious of the High Court dictates which too act lest gross failure of justice or grave injustice has occasioned.

35. Having set out the legal parameters for exercise of jurisdiction, it would be necessary to advert to the facts of the case.

36. As we have already held above, in view of the specific provisions so contained in Section 102 of the Code of Civil Procedure, the order passed by the first Appellate Authority cannot be ordinarily permitted to be assailed by invoking the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. This we say so for the reason that in our considered view, what cannot be done directly cannot be permitted to be done indirectly.

37. Coming to the scope of interference under Article 227 of the Constitution of India, in our considered view, taking into consideration the specific bar created under Section 102 of the Code, in routine, judgment passed by the learned first Appellate Court cannot be assailed under Article 227 of the Constitution of India on merit. We are not oblivious to the fact that whereas the right to file appeal, revision etc. is a statutory right, the right of supervision conferred upon this Court under Article 227 of the Constitution of India is constitutional right. However, in the guise of exercise of its right of supervision, this Court cannot be called upon to re-appreciate the evidence on record in matters in which second appeal is prohibited under Section 102 of the Code of Civil Procedure.

38. The limited scope of interference under Article 227 of the Constitution of India, in such like matters would be where there is perversity on the face of the impugned judgment, for which there is no need to re-appreciate the evidence on record and permitting which perversity to remain on record would result in travesty of justice.

We decide the Reference accordingly.

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

1. **Cr. Appeal No. 371 of 2012.**
Sheesh Pal
Versus
State of Himachal Pradesh.

2. **Cr. Appeal No. 383 of 2012.**
Bal Mukand
Versus
State of Himachal Pradesh.

3. **Cr. Appeal No. 395 of 2012.**
Bir Singh
Versus
State of Himachal Pradesh.

Cr. Appeal No. 371 of 2012 a/w Cr. Appeal Nos. 383 & 395 of 2012.
Reserved on: 14.11.2018.
Date of decision: 16.11.2018

**Prevention of Corruption Act, -**1988 - Sections 13 (1)(d) and 13(2) – Indian Penal Code, 1860 – Sections 120 B, 409, 420, 467, 468 and 471 – Cheating, forgery and misappropriation of Government money – Proof – Special Judge convicting and sentencing accused, Junior Engineer (JE), Block Development Officer (BDO) and Contractor (A3) of hatching conspiracy, forging documents and misappropriating Government money on basis forged documents – Appeal- Accused contending wrong appreciation of evidence by Special Judge – Facts revealing that Department had accepted tender of "R" for supply of construction material, but payment made to (A3) on his application instead of "R" – No explanation from Accused as how (A3) came into picture when he had not even submitted his quotation – Hand writing on application submitted for payment for said work tallied with handwriting of (A3) – This application processed by BDO and he sanctioned payment of Rupees One Lakh Thirty Three Thousand One Hundred Seventy Nine to (A3) – Cheque of said amount got encashed by (A3) - JE endorsing certain payments towards construction material purchased from "SU" and "ST" through whose trucks it was carried – No receipts of "SU and "ST" on record showing payment of money to them by JE – Accused not disclosing anything who were "SU" and "ST" – Held, amount was misappropriated under conspiracy by accused – Appeals dismissed – Conviction upheld. (Paras 18 to 21 and 27).

For the appellant(s): Mr. G.D.Verma, Mr. Satyen Vaidya, , Sr. Advocates with M/S. Romesh Verma, Vivek Sharma and D.P.Chauhan, Advocates.

For the respondent(s): Mr. Narender Guleria, Addl. AG with Mr. Kunal Thakur, Dy. AG.

The following judgment of the Court was delivered:

**Dharam Chand Chaudhary, J.**

This judgment shall dispose of all the three appeals having arisen from the judgment dated 21.8.2012, passed by learned Special Judge (Forests), Shimla, in Corruption case No. 7-S/7 of 2009. Learned trial Court vide impugned judgment has convicted the appellants (hereinafter referred to as "the accused") and also sentenced them for the commission of the offence they allegedly committed.

2. Accused-appellant Sheesh Pal in this appeal (Cr. Appeal No. 371 of 2012) and accused-appellant Bal Mukand in connected Cr. Appeal No. 383 of 2012 have been tried for the commission of the offence allegedly committed by them under Sections 120-B, 409/420, 409, 467, 468, 471 IPC and under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, being working as Jr. Engineer and Block Development Officer (BDO), Rohru, respectively, hence public servants. Their co-accused Bir Singh, appellant in connected Cr. Appeal No. 395 of 2012, being Contractor has been tried for the commission of offence punishable under Sections 120-B, 420, 467, 468, 471 IPC and under Section 13(1)(c) & 13(1)(d) of the Prevention of Corruption Act. Accused Bir Singh was convicted for the commission of offence punishable under Sections 120-B and 420 IPC. Accused Appellant Sheesh Pal has been acquitted of the charge under Section 409 IPC whereas

acused-appellant Bal Mukand under Sections 420, 467, 468 and 471 IPC. Accused Bir Singh was also acquitted under Sections 467, 468 and 471 IPC. They all were sentenced as under:

| | |
|---|---|
| **Accused Balmukand** | **U/S 120-B IPC-** to suffer imprisonment for one year and a fine of Rs. 10,000/- (ten thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |
| | **U/S 409 IPC-** to suffer imprisonment for three years and a fine of Rs. 10,000/- (ten thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |
| | **U/S 13(1) (c) read with Section 13(1)(d), PC Act-** to suffer imprisonment for one year and to pay a fine of Rs. 5,000/- (five thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |
| **Accused Sheesh Pal** | **U/S 120-B IPC-** to suffer imprisonment for one year and a fine of Rs. 10,000/- (ten thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |
| | **U/S 420 IPC-** to suffer imprisonment for one year and a fine of Rs. 5,000/- (five thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |
| | **U/S 467 IPC-** to suffer imprisonment for one year and a fine of Rs. 5,000/- (five thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |
| | **U/S 468 IPC-** to suffer imprisonment for one year and a fine of Rs. 5,000/- (five thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |
| | **U/S 471 IPC-** to suffer imprisonment for one year and a fine of Rs. 5,000/- (five thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |
| | **U/S 13(1) (c) read with Section 13(1) (d), PC Act-** to suffer imprisonment for one year and a fine of Rs. 5,000/- (five thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |
| **Accused Bir Singh** | **U/S 120-B IPC-** to suffer imprisonment for one year and a fine of Rs. 10,000/- (ten thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |
| | **U/S 420 IPC-** to suffer imprisonment for one year and a fine of Rs. 5,000/- (five thousand) and in default of payment of fine, to further suffer imprisonment for 6 months. |

3. Being aggrieved by the findings of their conviction and sentence recorded by learned trial Court, accused-appellant Sheesh Pal has assailed the same having been based on surmises and conjectures and without application of mind. The evidence available on record is stated to be not appreciated in its right perspective and the findings to the contrary holding him as guilty have been recorded mechanically without application of mind. The prosecution has miserably failed to prove its case against him, however, the findings to the contrary are the result of misreading, mis-appreciation and misconstruction of the evidence available on record. The essential ingredients of the offence he allegedly committed were not at all proved and as such no findings of conviction could have been recorded. He, however,

has been convicted without there being any legal evidence available on record and on the basis of the findings recorded in a slip shod and perfunctory manner. The findings that he cheated the Government by Rs. 8,000/- or used forged documents as genuine are not supported by any cogent and reliable evidence. The factum of this amount entrusted to him vide receipt Ext. PW-4/E is not at all appreciated and to the contrary undue weightage has been given to the answers in his statement recorded under Section 313 Cr.P.C. The documentary evidence Ext. PW-4/E, PW-4/H and A-13 being not proved legally could have not been used against him.

4. Now, if coming to the grounds of appeal preferred by accused-appellant Bal Mukand, he has also assailed the impugned judgment on more or less similar grounds. According to him, no case that he has cheated the State Government for Rs. 1,33,179/- was made out and as such, no findings of conviction could have been recorded against him. The application Ext. PW-3/M submitted by accused Bir Singh was processed by the ministerial staff and a sum of Rs. 1,33,179/- released to said Bir Singh on the recommendation of the Jr. Engineer concerned accused Sheesh Pal. The entries to this effect find mention in the cash-book have not been taken into consideration. Had there been any intention to misappropriate the said amount by him, no entry would have been made in the cash-book. The factum of the amount in question was received by Bir Singh had also been proved. He had also issued a receipt in this regard. Such evidence, however, has not been considered in its right perspective. As per the own case of the prosecution, a sum of Rs. 11,33,241/- was the expenditure incurred upon to construct the building i.e. residential accommodation for the school children studying in Govt. High School, Kuthari. Therefore, obviously, the construction material was required to undertake the construction work. The Contractor, no doubt, was Sh. Ram Lal Reshta (since dead) and he had engaged labourers as well as mules who made the payment either through said Sh. Ram Lal or directly also by him on the recommendation of accused Sheesh Pal, the Jr. Engineer/In charge of the site. The prosecution evidence is highly doubtful that a sum of Rs. 1,33,179/- was not spent on transportation/unloading the construction material at the site. Therefore, according to the appellant-accused, no findings of conviction under Section 409 IPC and Prevention of Corruption Act, could have been recorded against him.

5. The accused-appellant Bir Singh has assailed the impugned judgment on the grounds inter alia that he never made application Ext. PW-3/M nor claimed a sum of Rs. 1,33,179/- from the BDO accused Bal Mukand. The prosecution, allegedly failed to prove as to who was the scribe of this application. The department initially intended to award the work of transportation of construction material by him, however, later on intended to float the tenders. However, well before that he had transported some construction material to the spot. Interestingly enough, the column of amount in the application allegedly claimed by him is blank. In the receipt Ext. PW-3/A also, the space qua the amount was blank and later on filled in as Rs. 1,33,179/-. Therefore, on such inadmissible evidence, no findings of conviction could have been recorded against him. The order that a sum of Rs. 1,33,179/- sanctioned for being paid to him was produced by PW-3 Rajinder Chand. Application Ext. PW-3/M was never forwarded to accused Sheesh Pal, the Jr. Engineer concerned. The same is dealt with by P.A. of the BDO himself. There is again no evidence to show as to who got the cheque amount of Rs. 1,33,179/- in cash.

6. Now, if coming to the factual matrix the record reveals that Superintendent of Police (Vigilance) on receipt of information that financial irregularities have been committed and the funds mis-appropriated in the construction of Hostel at Government High School Kuthari under **Yashwant Gurukul Awas Yojna,** FIR No. 5 of 2005 Ext. PW-14/B came to be registered in Police Station Anti-corruption Zone, Shimla with the

allegation that Deputy commissioner, Shimla vide letter dated 6.7.1999 Ext. PW-3/J had sanctioned funds amounting to Rs. 10,00,000/- from the head "Backward Area Sub Plan" and estimate Ext. PW-3/C and PW-3/D to the tune of Rs. 31,38,700**/-** prepared by accused Sheesh Pal for construction of hostel in Government High School, Kuthari Development Block, Rohru, District Shimla. The sanctioned funds were placed at the disposal of Block Development Officer with the stipulation that the construction be carried out and the money spent on fulfillment of all codal formalities as is apparent from the letter Ext. PW-3/H. The department decided to raise the construction under its own supervision, however, the quotations were invited for supply of the construction material. Three government Contractors, namely, Hem Chand, Kailash Chand and Ram Lal Reshta have submitted their respective quotations. The same were opened and comparative statement was drawn vide Ext. PW-3/L. The rates for various items quoted by accused Ram Lal Reshta (since dead) being on minimum side were accepted, however, accused Bir Singh made the application Ext. PW-4/M expressing his desire to execute the construction work of the hostel (residential accommodation) in the School. It was also mentioned in Ext. PW-3/M that to do so, he had already supplied some construction material at the spot. This application was processed by PW-4 Kedar Nath, Sr. Assistant Office of BDO Rohru when marked to him by accused Bal Mukand, the then Block Development Officer. This application was not forwarded to accused Sheesh Pal, Junior Engineer. The application was considered and payment to the tune of Rs. 1,33,179/- was sanctioned by accused Bal Mukand. The same was released to accused Bir Singh through cheque Ext. PW-3/N. The entries in this regard were made in the cash-book Ext. B-5. The abstract thereof is Ext. PW-4/A. The accused Bir Singh has executed the receipt Ext. PW-3/A in token of the receipt of Rs. 1,33,179/- from accused BDO Bal Mukand. Not only this, but accused Bir Singh submitted hand written receipt Ext. PW-4/E in the sum of Rs. 8,000/- on account of freight charges for loading 200 bags of sand @ Rs. 40/- each through mules of one Suresh Kumar. The hand receipt was neither verified and attested by BDO nor Jr. Engineer. It is straightway passed for payment by accused Bal Mukand. This amount was received by accused JE Sheesh Pal. Nothing, however, has come on record that said accused passed on this amount to Suresh Kumar as no receipt to this effect is produced on record. The receipt Ext. PW-4/E available on record reveals that this amount was received by one Kehar Singh of Village Tutupani and not Suresh Kumar. One GR dated 16.6.2001 Ext. PW-4/F for Rs. 2200/- on account of carriage of sand to Tutupani in Truck No. HP-10-0229 booked by Truck Operator Union (regd.) Rohru was verified by accused JE Sheesh Pal and passed for payment by accused Bal Mukand.

7. During the course of investigation, the quotations Ext. PW-1/A and Ext. PW-2/A were taken into possession. PW-3 Rajinder Chand, the then J.E. in the office of BDO, Rohru has handed over letter Ext. PW-3/B, PW-3/C, estimate Ext. PW-3/D and leave chart Ext. PW-3/E which were taken into possession vide seizure memo Ext. PW-3/A. The MBs Ext. A-1 to A-12, Work Register A-13, MAs register Ext. A-14 were also handed over to PW-3 Rajinder Chand vide seizure memo Ext. PW-3/F. PW-4 Kedar Nath Sr. Assistant (Progress) in the office of BDO Rohru has also handed over the vouchers Ext. B-1 to B-4, cash book, the entries qua receipt of Rs. 10,00,000/- from the office of Deputy Commissioner, Shimla Ext. B-5 vide seizure memo Ext. PW-4/A. The entries qua receipt of further sum of Rs. 5,00,000/- Ext. PW-4/C were also proved by him. PW-8 L.D.Chaudhary and PW-9 Chaman Singh, both Assistant Engineers had inspected the site and as per the abstract of cost Ext. PW-8/B, detail of measurement Ext. PW-8/C, consumption of material Ext. PW-8/D and analysis of rates Ext. PW-8/E find that against Rs. 13,61,550/- allegedly spent for completion of the work executed on the spot, the cost of work executed was Rs. 11,33,241/-. The intimation to the Vigilance police in this regard was also given by Executive Engineer concerned vide letter Ext. PW-10/A. The documents Ext. PW-8/B to PW-8/E were taken in possession vide memo Ext. PW-8/A. The official record i.e. Ext. C-1 to C-4 containing

admitted hand writing of accused Sheesh Pal and Ext. C-5 to C-11 of accused Bal Mukand were handed over to the police by Rich Pal Molta, the then Clerk in the office of BDO Rohru which were taken in possession by the police vide recovery memo Ext. PW-7/A. The signatures, hand writing, initials of accused Bal Mukand Nihalta marked S-1 to S-13, were obtained by the police. Similarly, the signatures/hand writing/initials S-25 to S-30 of accused Ram Lal Reshta (since dead) were also obtained. Besides, the posting order of accused Bal Mukand Ext. PW-13/A, his further posting order at Rohru Ext. PW-13/B & Ext. PW-13/C, the posting order of accused JE Sheesh Pal Ext. PW-13/D, his appointment letter Ext. PW-13/E, posting order Ext. PW-13/F were also taken into possession. Letter granting permission to register the case against accused accorded by the Government is Ext. PW-14/A. The inventory prepared is Ext. PW-14/D and the seizure memo is Ext. PW-14/E. The letters according approval by the competent authority are Ext. PW-3/G and PW-3/H which were taken into possession vide recovery memo Ext. PW-14/F. The report qua comparison of the admitted signatures and hand writing of the accused persons with their specimen signatures and hand writing submitted by PW-12 Dr. Meenakshi Mahajan, Asstt. Director, Documents and Photo Division, SFSL Junga is Ext. PW-12/D.

8. It is on the completion of the investigation and according prosecution sanction under Section 19(1) (c) of the Prevention of Corruption Act, 1988, in respect of accused JE Sheesh Pal Ext. PW-9/A, the report under Section 173 Cr.P.C. was filed in the Court. Learned trial Judge, on appreciation of the report and the documents annexed therewith and on finding a prima-facie case made out against the accused persons framed charge against each of them as pointed out in this judgment at the very outset.

9. The accused persons, however, pleaded not guilty to the charge. Therefore, the prosecution has examined 14 witnesses in all and also placed reliance on documentary evidence as discussed hereinabove. The material prosecution witnesses are PW-1 Hem Chand, one of the Contractor having submitted the quotation for supplying the construction material such as sand, bricks etc. He has proved the quotation Ext. PW-1/A, he submitted and admitted in his cross-examination that the notice for inviting quotations was published. PW-2 Kailash Chand is another Contractor who had submitted the quotation Ext. PW-2/A. PW-3 Rajinder Chand Sharma was working as J.E. in the office of BDO Rohru at the relevant time and various documents referred to hereinabove were taken into possession from him during the course of investigation. He, when re-examined had also identified the signatures marked Q-26 being that of accused JE Sheesh Pal. He has also identified signatures marked Q-27 of accused JE Sheesh Pal. PW-4 Kedar Nath was working as Sr. Assistant (Progress) in the office of BDO Rohru at the relevant time. He has also handed over the documents referred hereinabove during the course of investigation. When re-examined, he has identified the signatures of accused Sheesh Pal on Ext. PW-4/G and that of accused Bal Mukand on Ext. PW-4/H, PW-4/J, PW-4/K and PW-4/L. PW-5 Gopal Das, Sr. Assistant has proved the cheque Ext. PW-3/N issued in favour of Bir Singh, a government contractor. The cheque is not crossed one. PW-6 Dr. Rajesh Kumar, Dy. Director, RFSL Mandi has given the report Ext. PW-6/A with respect to quality of sand, stone, cement and mortar used for raising construction and the ratio thereof Ext. PW-6/A. PW-7 Rich Pal Molta has produced the documents referred to hereinabove which were taken into possession by the police vide memo Ext. PW-7/A. PW-8 L.D.Chaudhary and PW-10 Chaman Singh had conducted spot inspection and submitted the reports as already discussed hereinabove. PW-9 Ramesh Chand Verma, the then Superintending Engineer, HP PWD Rohru has proved the order of sanction Ext. PW-9/A. PW-11 Kehar Singh though was examined to prove the receipt Ext. PW-4/C, however, he denied the signatures thereon and stated that there is another Kehar Singh in Village Totupani. It has come in his cross-examination that said Kehar Singh of Village Totupani had mules and used to carry sand

etc. According to him, the receipt Ext. PW-4/C may have been signed by him. When re-examined, it is stated by this witness that there was another Kehar Singh in Village Totupani. He never stated so, during the course of investigation. PW-12 Dr. Minakshi Mahajan is Asstt. Director who has proved report Ext. PW-12/D. The remaining prosecution witnesses are PW-13 Naresh Kumar Sharma, Dy. Superintendent of Police State Vigilance and ACB, Kullu who had partly investigated this case during his posting as DSP (SV & ACB) Police Station Shimla. Sh. Vinod Kumar PW-14 DSP has also investigated this case partly.

10. On the other hand, accused Sheesh Pal in his statement recorded under Section 313 Cr.P.C. has almost admitted the entire prosecution case. Similarly, accused Bal Mukand has also admitted the incriminating circumstances appearing against him in the prosecution case except for that a sum of Rs. 1,33,179/- was released by him to accused Bir Singh without he having executed any work and that the cost of the work executed on the spot was found by the Expert Committee only amounting to Rs. 11,33,241/-. Accused Contractor Bir Singh has, however, denied the incriminating circumstances put to him being wrong, however, admitted that the application Ext. PW-3/M bears his signatures but as per his further version, he did not receive the payment through cheque. According to him, the receipt Ext. PW-3/O also bears his signatures but the same is related to some other work.

11. The accused, however, opted for not producing any evidence in their respective defence.

12. Learned trial Judge on examination of the entire evidence and affording an opportunity of being heard to the prosecution as well as accused has concluded that accused Bal Mukand committed the offence punishable under Sections 120B, 409/420 , 409, 467, 468, 471 IPC and also under Section 13(i)(d) read with Section 13(2) of P.C. Act and accused JE Sheesh Pal under Sections 120B, 420, 409, 467, 468 & 471 IPC and under Section 13(2) of P.C.Act whereas accused Bir Singh under Sections 120B, 420, 467, 468 and 471 IPC and convicted all of them. The sentences imposed against each of them have already been discussed in this judgment at the very outset.

13. Mr. G.D.Verma, Sr. Advocate assisted by Mr. B.C.Verma, Advocate representing accused Contractor Bir Singh has pointed out from the record that in the application Ext. PW-3/M, the column pertaining to amount claimed is blank. Had accused Bir Singh claimed any amount, he would have mentioned the same in the application. The receipt Ext. PW-3/A is stated to be partly in Hindi and partly in English. Who had scribed it, according to Mr. Verma remained unexplained. As regards the cheque Ext. PW-3/N, according to learned counsel whether it was got encashed by accused Bir Singh, no evidence is forthcoming. Also that when the money was received by accused Bir Singh, vide receipt Ext. PW-3/O, why the cheque was issued qua the same payment. The report Ext. PW-12/D, according to learned counsel is not suggestive of that the documents Ext. PW-3/N and PW-3/O bears the signatures of accused Bir Singh.

14. Mr. Satyen Vaidya, Sr. Advocate assisted by Vivek Sharma, Advocate, has argued on behalf of accused Jr. Engineer Sheesh Pal that findings of conviction against the said accused could have not been recorded on the basis of the statement under Section 313 Cr.P.C. and rather learned trial Court should have recorded such findings on the basis of the prosecution evidence if available on record. The so called Suresh Kumar, mules operator was neither associated during the course of investigation nor was he produced in evidence to show that he received Rs. 8,000/- from accused JE Sheesh Pal. The less work executed on the spot is not at all proved. The receipt Ext. PW-4/E reveals that a sum of Rs. 8,000/- was received by Suresh Kumar.

15. Mr. D.P.Chauhan, Advocate representing accused BDO Bal Mukand has stated that in the application Ext. PW-3/M, the amount claimed has not been mentioned. Similarly in the receipt Ext PW-3/O, the amount received also do not find mention. The cheque is not a crossed cheque. The payment thereunder has not been received by accused Bir Singh. The work was executed on nomination and not on tender. The accounts allegedly were accurate. The bearer of the cheque accused Bir Singh was not identified in the bank by anyone as there is no evidence. Therefore, according to Mr. Chauhan, the payment has not been received by accused Bir Singh to whom the cheque was issued.

16. Learned Dy. Advocate General, while supporting the judgment passed by learned trial Court has pointed out that accused Bal Mukand has passed the bill for payment of false claim. The quality and quantity of work was not found as shown in the record. PW-1 Hem Chand and PW-2 Kailash Chand who had also submitted the quotations were not called when the same were opened. Accused Bir Singh did nothing, however, received the payment. Also that reply to the questions put to the accused in their statements under Section 313 Cr.P.C. reveals that they themselves have admitted the prosecution case. Learned trial Judge as such has rightly convicted and sentenced the accused.

17. The present is a case where accused Bal Mukand was Block Development Officer, accused Sheesh Pal Jr. Engineer and accused Ram Lal Reshta (since dead) as well as accused Bir Singh, Government Contractors. They allegedly hatched conspiracy to commit the offence of cheating, mis-appropriation of the government funds on the basis of forged and fictitious documents. Pursuant to such conspiracy, the cost of work executed on the spot was entered/shown in the documents as Rs. 13,61,550/- by way of forging and fabricating the same and thereby mis-appropriated the government funds.

18. The prosecution, in support of its case has relied upon the oral as well as documentary evidence. Admittedly, the approval for construction of residential accommodation in Government High School, Kuthari, Tehsil Rohru, Distt. Shimla under the scheme **Yashwant Gurukul Awas Yojna** was conveyed by the Deputy Commissioner Shimla to District Education Officer on 6.7.1999. The letter is Ext. PW-3/G. The funds were diverted from the head **"Backward Area Sub Plan"** and were required to be utilized on fulfillment of all codal formalities. The funds amounting to Rs. 10,00,000/- and Rs. 5,00,000/- were received by accused BDO Bal Mukand. The work was to be executed departmentally, however, the construction material was to be supplied by the government contractors. The quotations were received and comparative statement Ext. PW-3/L was prepared and the same reveals that the rates quoted by accused Ram Lal Reshta (since deceased) being lowest were accepted, meaning thereby that the construction material should have been supplied by said accused Ram Lal Reshta (since deceased). How accused Bir Singh came into picture because he even had not submitted the quotations also, the accused BDO Bal Mukand has failed to explain? On the other hand, the prosecution has satisfactorily pleaded and proved that though he did nothing, however, received a sum of Rs. 1,33,179/-. The arguments addressed that accused Bir Singh was executing other works and the money released to him was pertaining to the said works are without any substance for the reason that in the application Ext. PW-3/M, it is categorically submitted that the said accused was interested in getting the construction work of the hostel of Government High School Kothari executed and as tenders were to be invited for execution of the said work and as he had already supplied some construction material at the work site, therefore, claimed payment.

19. True it is that the amount has not been mentioned in this application and may be due to part of the conspiracy amongst the accused. According to PW-3, this

application was made by accused Bir Singh, the same as per the report Ext. PW-12/B of the Asstt. Scientist bears the signature of the said accused. Not only this, but this application was processed and the accused BDO Bal Mukand sanctioned a sum of Rs. 1,33,179/- for being paid to accused Bir Singh. No evidence is forthcoming as to the construction material in how much quantity was transported by the said accused to the spot and under whose authority because the rates of deceased contractor accused Ram Lal Reshta qua supply of such material were duly approved.

20. It is canvassed that the cheque Ext. PW-3/N is not crossed one and there is no proof of the identifier. The crossed cheque seems to be not issued deliberately and intentionally with a view to enable accused Bir Singh to receive the payment in cash. There is endorsement on the reverse of the cheque that it was got encashed by accused Bir Singh and the payment thereunder received by him. Though as per the report Ext. PW-12/D, it was not possible to express opinion on the disputed signatures Q-19 and Q-20 which are that of accused Bir Singh on the reverse of the cheque. The fact, however, remains that the payment under the cheque was drawn by cash. The reference in this behalf can be made to the statement of PW-3 Rajinder Chand. In his cross-examination, no suggestion was put that the payment under the cheque was not received in cash. On the other hand, accused Bal Mukand in reply to question No. 11 in his statement recorded under Section 313 Cr.P.C. has admitted that the application Ext. PW-3/M was made by accused Bir Singh and on that he has sanctioned a sum of Rs. 1,33,179/- for payment to the said accused through cheque Ext. PW-3/N. Similarly, in reply to question No. 12, accused Bal Mukand, has further admitted that on receipt of the amount in question, accused Bir Singh had executed the receipt Ext. PW-3/O. The payment pertains to advance towards construction of the hostel of Government High School Kothari. It has also been admitted that entries in the cash-book were also made in this regard while answering question No. 13. The prosecution evidence coupled with the own admission of accused Bal Mukand, lead to the only conclusion that a sum of Rs. 1,33,179/- was paid to accused Bir Singh on the basis of the forged and fictitious record because there was no other reason to have taken the services of said accused to supply the construction material particularly when the lowest rates quoted by deceased contractor Ram Lal Reshta were approved.

21. Not only this, but as per hand receipt Ext. PW-4/E, a sum of Rs. 8,000/- was sanctioned for being paid to one Suresh Kumar from whom allegedly construction material was purchased. The hand receipt bears signatures of accused Sheesh Pal. This amount even is received by accused Jr. Engineer Sheesh Pal. However, who was Suresh Kumar and what construction material was purchased from him, nothing could be made out from the record maintained by accused BDO Bal Mukand and accused Sheesh Pal. This amount was actually paid to Suresh Kumar, is also not proved because neither said Suresh Kumar has been examined as a witness during the course of trial nor the receipt if any issued by him in token of the receipt of this amount. This amount has therefore been embezzled by accused Sheesh Pal or may be by accused BDO Bal Mukand. A further sum of Rs. 2200/- has been shown to be paid by way of freight charges on account of carriage of construction material in truck No. HP 10-0229 which was got booked from Truck Operators' Union (Regd.), Rohru. This amount as per Ext. PW-4/F was to be paid to the driver of the truck. The same has been received by one Satish as is evident from the signature on the revenue stamp. However, who was that Satish, nothing to this effect surfaced during the course of investigation nor the accused could give any explanation in this regard. On the other hand, in the statement recorded under Section 313 Cr.P.C. of accused Bal Mukand, he has expressed his inability to tell that this amount was drawn and paid. As per the evidence having come on record by way of testimony of PW-4 Kedar Nath, Sr. Assistant, the payment of Rs. 2200/- was verified by Shesh Lal and thereafter passed for payment by the BDO

accused Bal Mukand. The signatures of the said accused (Q-4) stands proved from the report Ext. PW-12/D. Therefore, it is proved beyond all reasonable doubt that payments of Rs. 1,33,179/-, Rs. 8000/- and Rs. 2200/- was sanctioned for payment to accused Contractor Bir Singh, Suresh Kumar and driver of truck No. HP 10-0229, respectively. There is sufficient evidence available on record to show that the payment of Rs. 1,33,179/- to Bir Singh is duly proved. However, the justification of such payment to the said accused is not at all established. The accused respondent, however, failed to count for the payment of Rs. 8,000/- to Suresh Kumar and Rs. 2200/- to the driver of the truck. Therefore, under the part of the conspiracy, accused persons hatched, they forged the record and mis-appropriated this amount and thereby caused wrongful loss to the public exchequer whereas wrongful gain to themselves.

22. The poor workmanship and quality of the construction work find support from the report of FSL Ext. PW-6/A. As per this document, the ratio of cement, sand and stone was 1:4.7:10 by weight and in the ratio of 1:6.9 of cement and sand by weight. The report stands duly proved from the statement of Dr. Rajesh Kumar, Dy. Director, RFSL, Mandi. The ratio as per Ext. PW-8/B, however, should have been as prescribed in Ext. PW-8/B. It is, therefore, proved that the prescribed ratio of cement, sand and stone etc. has not been used and as such construction work executed on the spot was of inferior quality. The report of the Expert committee Ext. PW-8/B further reveals that the cost of construction on the spot comes to Rs. 11,33,241/- as against Rs. 13,61,550/- shown in the record by the accused persons. This report finds full support from the testimonies of PW-8 L.D.Chaudhary and PW-10 Chaman Singh, both Asstt. Engineers and Members of the Expert Committee who had conducted the spot inspection and prepared the report Ext. PW-8/B. This report is correct as nothing to the contrary has been suggested to both the witnesses in their cross-examination. Although, a plea in defence that cross-sections were not prepared and had it been prepared the exact estimation of the work conducted could have been made was raised, however, unsuccessfully because the same cannot be believed to be true without any material to the contrary available on record.

23. Another plea raised by accused Bir Singh that the payment was received by him in connection with some other work he executed is also false as no suggestion was given to PW-5 Gopal Dass and for that matter PW-3 Rajinder Chand Sharma in this regard who proved the cheque Ext. PW-3/N. On comparison of the admitted signatures with specimen signatures of all the accused in the SFSL, Junga by PW-12 Dr. Minakshi Mahajan, the signatures on various documents discussed hereinabove were proved to be that of accused BDO Bal Mukand and accused Sheesh Pal, Jr. Engineer. True it is that no opinion could be expressed by PW-12 Dr. Minakshi Mahajan qua the signatures marked Q-19 and Q-20 on the reverse of the cheque Ext. PW-3/N, however, the signatures Q-17 on the application Ext. PW-3/M and receipt Ext. PW-3/O are that of the said accused. It is again without any substance that in the receipt, the amount received by accused Bir Singh do not find mention because the same find mention with red pen not only in figures but words also.

24. The entrustment of Rs. 15,00,000/- the amount sanctioned by Deputy Commissioner is duly proved as it is stated so by PW-3 Rajinder Chand Sharma, Jr. Engineer and also PW-4 Kedar Nath. There is no denial thereto by accused Bal Mukand also as he has admitted this aspect of the matter while answering question Nos. 8 & 9 in his statement recorded under Section 313 Cr.P.C.

25. Interestingly enough, accused Jr. Engineer Sheesh Pal has only denied the commission of various offences under the Indian Penal Code and Prevention of Corruption Act while answering question No. 1 and as regards remaining incriminating circumstances put to him under questions Nos. 3 to 14 and 16 to 20, he has admitted the same to be true

and correct. He has only denied question No. 15 qua drawing the sample of cement concrete, cement mortar and stone used in masonry work as well as RCC slab and the ratio thereof found when analyzed in the laboratory. Similarly, accused Bal Mukand has also denied the second question i.e. qua he having committed different offences under the IPC and the Prevention of Corruption Act whereas admitted the rest of the prosecution case put to him under question Nos. 3 to 13 and 15 to 18 and 20. In reply to question No. 14 that he had sanctioned a sum of Rs. 2200/- for transportation of sand by GR Ext. PW-4/F, the reply was that he does not remember and denied the prosecution case that a Committee comprising Asstt. Engineers when conducted spot inspection, the cost of construction raised on the spot was valued at Rs. 11,33,241/- put to him under question No. 19. Similarly, accused Bir Singh has also denied the commission of various offences while answering question No. 2, however, in reply to question No. 3 admitted his signatures on the application Ext. PW-3/M. However, according to him, he did not receive any payment through cheque nor the receipt Ext. PW-3/O bears his signatures. The receipt according to him pertains to some other work which is not correct because no suggestion was given by him to PW-3 Rajinder Chand and PW-5 Gopal Dass who have proved the cheque and receipt that this amount was due and admissible to him with respect to execution of some other work.

26. True it is that the statement of the accused recorded under Section 313 Cr.P.C. cannot be made the sole basis for recording the findings of conviction against an accused, however, only in those cases where the prosecution has failed to produce cogent and reliable evidence. In the case in hand, the documentary evidence itself is sufficient to prove the entrustment of the funds and its misappropriation by accused BDO Bal Mukand, accused Jr. Engineer Sheesh Pal in connivance with their co-accused Bir Singh, the contractor. The prosecution, as such, has otherwise also proved its case beyond all reasonable doubt with the help of the oral as well as documentary evidence. The ratio of the judgment of the Hon'ble Apex Court in ***Balaji Gunthu Dhule vs. State of Maharashtra,*** (2012) 11 SC 685, is therefore, not attracted in the case in hand. On the other hand, learned trial Judge has not only appreciated the evidence available on record in its right perspective but also the law applicable to a case of this nature and rightly held all the accused guilty for commission of various offences under the IPC and also the Prevention of Corruption Act. The findings of conviction as recorded, therefore, call for no interference. In the matter of sentence also, learned trial Court has taken a reasonable view by sentencing all the accused to undergo imprisonment only for six months for the commission of each offence.

27. The defence of the accused that at the most the present is a case of lack of supervision and administrative failure and not misappropriation of the funds is also without any substance for the reason that a sum of Rs. 1,33,179/- has been paid to accused Bir Singh without there being any record to show that the construction material to this extent was supplied by him. So far as payment of Rs. 8,000/- to Suresh Kumar and Rs. 2200/- to the driver of truck No. HP 10-0229 is concerned, there is again no record maintained, therefore, it is not due to the supervisory control or its administrative failure and rather a move to misappropriate the funds with malafide intention to cause wrongful loss to the public exchequer and wrongful gains to them.

28. For all the reasons hereinabove, there is no merit in these appeals and the same are accordingly dismissed. Consequently, the impugned judgment is affirmed. The appellants-convicts to surrender in the trial Court to serve out the sentence passed against each of them.

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

Ram Tari & ors. ..... appellants.
Versus
Shri Rattan Chand & ors. .....Respondents.

RSA No. 167 of 2015.
Date of decision: October 11, 2018.

**Hindu Succession Act, 1956** – Section 22 – Expression "immovable property" – Meaning – Held, expression "immovable property" used in sections 22 of Act, covers all kinds of property including agricultural land – Therefore heirs have preferential rights to acquire property of other heirs in certain cases - Object of provisions being to prevent fragmentation and entry of strangers. (Paras 11 & 12).

**Hindu Succession Act, 1956 –** Sections 22 – Concluded sale transactions – Applicability – Held, already concluded sale transactions can also be opened on payment of sale consideration either as mutually agreed or at rates prevalent in market. (Para 13).

***Cases referred:***
Vaijanath & others vs. Guramma & another, (1999) 1 SCC 292

For the appellants : Mr. Amit Jamwal, Advocate, vice
Mr. Ajay Sharma, Advocate.
For the respondents : Mr. Shanti Swaroop, Advocate.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and decree dated 31.7.2013 passed by learned Additional District Judge (II), Una in Civil Appeal No. 19/2012, whereby the appeal has been dismissed and the judgment and decree dated 1.9.2007 passed by learned Civil Judge (Senior Division), Una, District Una in case No. 183 of 1996 is affirmed.

2. This appeal when listed for admission/hearing on 26.11.2015 , the following order came to be passed:

> "Learned Counsel, representing the appellants-plaintiffs, submits that a similar matter, *RSA No. 258 of 2012, Roshan Lal versus Pritam Singh,* involving the identical question of law referred to a Larger Bench by a Coordinate Bench of this Court is pending disposal before the Larger Bench. List after the question of law referred to the larger Bench is decided."

3. The Division Bench of this Court has now decided the question of law referred to in *Roshan Lal's* case supra vide judgment dated March 01, 2018.

4. Now if coming to the factual matrix, the appellant-plaintiff has filed suit for possession by way of preferential right under Section 22 of the Hindu Succession Act, 1956 of the suit land entered in the land measuring 6 Marlas being 1/6 share of land measuring

IK-19 Mls. In Khewat No. 806, Khatoni No. 1920 Khasra Nos. 23143, 2322, 2324, two rooms Kharposh standing over Khasra No. 2313, situated in village Khad, Tehsil and district Una (hereinafter referred to as the 'suit land') to the extent of half shares on payment of `15,000/-, the sale consideration to the defendants.

5. The plaintiff and defendant No. 2 on the death of their father Sarna had inherited the suit land in equal shares. The brother of the plaintiff, Pritam the defendant No. 2, has disposed of his share including the constructed abadi to defendant No. 1 vide sale deed No. 628 dated 28.5.1996 (wrongly mentioned as 28.5.1995 in the plaint). The plaintiff being joint owner and having agricultural interest in the suit land as well as preferential rights to this property coupled with the factum of willing to purchase the same on payment of the determined sale consideration aggrieved by the sale thereof in favour of defendant No. 1 has filed the suit for possession thereof on payment of the sale consideration, on the grounds, inter alia, that he is still in possession of the land and also the constructed abadi.

6. The suit was resisted and contested by defendant No.1 on the grounds, inter alia, that the same is not maintainable nor the plaintiff has locus standi and cause of action to file the same. Also that, the land in dispute was not joint and rather defendant No. 2 was having all rights to dispose of his share to them.

7. In view of the pleadings of the parties, learned trial Court has framed the following issues:

1. Whether the plaintiff has preferential right to acquire the suit property and to get possession as alleged? OPP
2. Whether suit is not maintainable in the present form ? OPD
3. Whether the plaintiff has no locus standi to file the present suit? OPD
4. Whether the plaintiff has no cause of action? OPD
5. Whether the plaintiff is estopped to file this suit by his act and conduct? OPD
6. Relief.

8. After holding full trial and affording opportunity of being heard to the parties on both sides, learned trial Court while answering Issue No. 1 has concluded that the plaintiff led no evidence to show that he offered to purchase the share of defendant No. 2 but the said defendant declined to sell the same to him. Issue No. 1, as such, was answered against the plaintiff, whereas the remaining issues against the defendants. The suit was ultimately dismissed. Learned lower Appellate Court has dismissed the appeal and affirmed the judgment and decree passed by learned trial Court.

9. The legality and validity of the impugned judgment and decree has been questioned on several grounds, however, mainly that the evidence available on record has not been appreciated in its right perspective when as per the document Ext.PW1/A the suit land was established to be joint Hindu co-parcenary property. Only a small portion thereof has been shown as Barani in this document, whereas the remaining was agricultural land, therefore, the provisions contained under Section 22 of Hindu Succession Act were fully attracted. The findings that the suit land being agricultural, hence the provisions contained under Section 22 of the Act were not applicable, are stated to be illegal and contrary to the factual position as the constructed abadi was also in-existence over the suit land. The findings that for want of copy of sale deed No. 628 normally declaration qua the same null and void and not binding upon the plaintiff could have not been granted because it was for

learned counsel representing the appellant-plaintiff to have produced the same in evidence. He cannot be made to suffer on account of the fault if attributed to learned counsel. The appellant-plaintiff being co-sharer in the suit land has preferential right to purchase the same. The findings that the plaintiff did not offer to purchase the land in the share of defendant No. 2 are also stated to be illegal and erroneous as according to the appellant-plaintiff there is no such legal requirement and even defendant No. 2 has also not disclosed that he intend to sell the suit land to defendant No. 1 or any one else. Had any such intention been disclosed by him, the plaintiff would have definitely offered himself to purchase the same.

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

1. Whether on account of misreading, misappreciation and misconstruction of the law and facts as well as the oral and documentary evidence available on record, the judgment and decree under challenge in the main appeal being perverse and vitiated is not legally sustainable?
2. Whether the findings that the provisions contained under Section 22 of the Hindu succession Act are legally and factually unsustainable?

11. At the outset, it is desirable to refer to the judgment of this Court in *Roshal Lal's* case cited supra. As per the ratio of this judgment, the expression 'property' under Section 22 of the Act cover all kinds of property including agricultural land. The view of the matter so taken by this Court is supported by the judgment of Apex Court in ***Vaijanath & others*** vs**. *Guramma & another, (1999) 1 SCC 292.*** The view of the matter taken by this Court in *Roshal Lal's* case supra is reproduced as follow:

> "We are in respectful agreement with the view of the matter taken by the learned Single Judge that the expression "property" would cover all kinds of properties, including agricultural land, which view finds support from the decision rendered by the Apex Court in *Vaijanath* (supra). Now, significantly the Apex Court was dealing with the provisions of the Hindu Women's Rights to Property Act, 1937 which did not define the word 'property' which in fact, is similar to the position with the statute with which we are dealing. Noticeably, laws relating to women came to be enacted not only to mitigate hardship but also to confer certain rights upon women and widows.
>
> The provisions contained under Section 22 of the Act have, therefore, to be construed and understood in the light of the above legal principles settled by the Supreme Court. Nothing is there in Section 22 of the Hindu Succession Act, 1956 to prohibit its applicability to "agricultural land" and for that matter even to any other kinds of land including "Banjar Kadim" and "Gair Mumkin", (the subject matter of dispute in the present lis). As a matter of fact, words "immovable property" in Section 22 of the Act covers all kinds of land including "agricultural land".

12. While explaining the scope and object sought to be achieved by the law maker by incorporating Section 22 in the Hindu succession Act in *Roshan Lal's* case supra, it is held further as under:

> "The intention behind to give preferential right to a heir(s) as envisaged under Section 22 of the Act, to acquire property of other

> heirs in certain cases, therefore, is with the sole object to prevent the fragmentation of the estate and introduction of strangers in the family business and estate. After the commencement of the Hindu Succession Act, 1956, if the interest in any immovable property or business carried by an intestate devolves upon two or more heirs specified in class I of the Schedule and if anyone of such heirs proposes to transfer his/ her interest in the property or the business, the other heirs shall have a preferential right to acquire such interest proposed to be transferred. The consideration for acquisition of that interest either may be mutually agreed upon between those two heirs and in the absence of any such agreement, the matter has to be decided by the Court on an application to be filed under Section 22 of the Act. If the applicability of Section 22 of the Act is excluded in the case of "agricultural land", the very purpose of such benevolent provisions therein shall be frustrated.
>
> As noticed by brother Justice Karol in para supra, there are two divergent views qua the applicability of Section 22 of the Act to "agricultural land". Section 22(1) of the Act refers to the immovable properties and business alone. In our considered opinion, the expression "immovable property" is quite wide to include agricultural land(s) and for that matter any other land including *"Banjar Kadim"* and *"Gair Mumkin",* the subject matter of dispute in the present lis.
>
> As already noticed, the object behind it is very noble i.e. to prevent the fragmentation of holdings, the entry of a stranger to the immovable property and business left behind by an intestate and on the top of it to give some solace to the intestate at his heavenly abode that after his/her death the successors do not allow any third person or stranger to enter upon the estate/business, he/she left behind."

13. In view of the ratio of the judgment in *Roshan Lal's* case supra, I am not in agreement that the findings recorded by both Courts below that the appellant-plaintiff did not offer himself to purchase the land to the extent of share of his brother defendant No. 2 for the reasons that it has been noticed in the judgment supra that a scrupulous co-sharer some time don't disclose his intention to other co-sharer to dispose of his/her share in the property in question. The legislative intent, therefore, is that it was for defendant No. 2 to have disclosed his intention to dispose of his share in the land in question to the plaintiff and called upon him to purchase the same, if interested. The plaintiff, as such, is absolutely justified in claiming that he had no knowledge of the intention of defendant No. 2 to sell the land in question to defendant No.1. True it is that defendant No. 2 has sold the land by way of sale deed dated 28.5.1996. The sale deed though has not been produced in evidence, however, there is no denial and rather defendant No. 1 has admitted the factum of he has purchased the land in question vide sale deed No. 628 dated 28.5.1996. Therefore, the findings to the contrary that without producing the sale deed in evidence its cancellation cannot be ordered are not legally sustainable. It is worth mentioning that the judgment of this Court in *Roshan Lal's* case supra take care of a situation when the land is already sold and the sale deed registered as it has been held that already concluded sale transaction can also be reopened, of course on payment of the sale consideration either as mutually agreed or at the rates of land prevalent in the market. Therefore, second substantial question of law, as arises for determination in this appeal, is answered accordingly and it is held that

both courts below have not considered the provisions contained under Section 22 of the Hindu Succession Act in its right perspective and thereby the findings as recorded are vitiated.

14. Now if coming to the first substantial question of law, on facts the controversy is not much because the plaintiff and defendant No. 2 have inherited the suit land from their forefathers. Both courts below have held the same to be the co-parcenary property. The plaintiff and defendant No. 2 have inherited the same on the death of their father Sarna. There is again no controversy qua this aspect of the matter. The averments in para-4 of the plaint that defendant No. 1 has purchased the suit land vide registered sale deed No. 628 dated 28.5.1996 for a sum of `15,000/- have not been specifically denied in para-4 of the written statement. The silence of defendant No. 1 in this regard, therefore, amounts to his admission meaning thereby that the suit land was purchased by him from defendant No. 2 in a sum of `15,000/-. In view of the own admission of defendant No. 1, both Courts below have erroneously concluded that the sale deed when on record cannot be cancelled for the reasons that there being no dispute qua execution of the same, the sale deed was not required to be produced in evidence. Otherwise also, it was for learned counsel to have produced the same in evidence. The plaintiff as such cannot be made to suffer for the fault, if any, of learned counsel representing him. The facts of the case and the evidence available on record have, therefore, also been mis-appreciated and misinterpreted by both Courts below and as a result thereof the findings as recorded are vitiated, hence not legally sustainable. The first substantial question of law is also answered accordingly.

15. For all the reasons hereinabove, the impugned judgment and decree is not legally and factually sustainable. The same, as such, is quashed and set aside. Consequently, the suit is decreed and the plaintiff held entitled to the possession of suit land by way of exercising his preferential right of course on payment of the sale consideration either as agreed upon or determined by the competent Court on an application to be filed under Section 22 of the Hindu Succession Act for the purpose. So far as registered sale deed No. 628 dated 28.5.1996 executed qua the suit land by defendant No. 2 in favour of defendant No. 1 and any other consequential action are held illegal, null and void, hence quashed. In the peculiar circumstances, the parties, however,to bear their own costs.

16. The appeal is accordingly allowed and stands disposed of, so also the pending application(s), if any.

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

Lalit Kumar Chopra .....Appellant.

Versus

Vijay Gupta & anr. .....Respondents.

RSA No.303 of 2018.
Decided on: 12.11.2018.

**Code of Civil Procedure,1908** – Order XL1 Rules 23 & 23A – Remand – Additional District Judge deciding appeal without disposing application filed before him for leading additional evidence – Regular Second Appeal - Held, plaintiff was prejudiced by omission on part of

first Appellate Court to decide application filed for adducing additional evidence – Appeal allowed- Matter remanded. (Para 3).

For the petitioner: Mr. Ramakant Sharma, Advocate.
For the respondents: Mr. Rajnish K. Lall, Advocate, for respondent No. 1.
Mr. Kunal Thakur, Dy. AG for respondent No. 2.

The following judgment of the Court was delivered:

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

In this appeal, judgment and decree dated 28.6.2017 passed by learned Addl. District Judge (III), Kangra at Dharamshala in Civil Appeal No. 90-D/XIII/2011 is under challenge. It is seen that learned Civil Judge (Sr. Divn.) Kangra at Dharamshala vide judgment dated 30.9.2011 has dismissed the suit filed by the appellant herein for the decree of specific performance of the contract. Learned lower appellate Court has dismissed the appeal and affirmed the judgment and decree passed by learned trial Court.

2. The plaintiff, appellant herein has assailed the impugned judgment and decree on several grounds, including that an application under Order 41 Rule 27 CPC filed in the lower appellate Court with a prayer to allow him to produce additional evidence irrespective of remained listed for consideration on different dates, ultimately omitted to be considered and decided resulting into miscarriage of justice to him. Though, the grounds of appeal discloses other substantial questions of law also, however, learned counsel representing the appellant-plaintiff has urged that omission on the part of learned lower appellate Court to decide the application under Order 41 Rule 27 CPC has vitiated the findings recorded and on reversal of the impugned judgment and decree, the case may be remanded to learned lower appellate Court for disposal afresh in accordance with law and after consideration and decision on the pending application.

3. This Court is in agreement with the submission so made because the omission on the part of learned lower appellate Court to decide the application has certainly resulted in miscarriage of justice to the appellant-plaintiff and the impugned judgment and decree is also not legally sustainable. Learned counsel representing the respondents-defendants have also not brought anything to the contrary to the notice of this Court and rightly so because the question of law and facts involved in the appeal could have not been adjudicated authoritatively without the application under Order 41 Rule 27 CPC considered and decided on merits.

4. In view of what has been said hereinabove, this appeal is allowed. Consequently, the impugned judgment and decree is quashed and set aside and the case is remanded to learned lower appellate Court for disposal afresh in accordance with law after taking into consideration the application filed under Order 41 Rule 27 CPC within three months from today. The parties, through learned counsel representing them, are directed to appear before learned lower appellate Court on 10.12.2018.

The appeal and the pending application(s), if any, shall also stand disposed of accordingly.

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

Tulsi Ram .....Appellant/Complainant.
Versus
Sh. Dhanu Ram and others ....Respondents/Accused.

Cr. Appeal No. 448 of 2010.
Reserved on: 12th November, 2018.
Date of Decision: 20th November, 2018.

**Indian Penal Code, 1860** - Sections 379, 447, 506 read with 149 – Trespass, theft and criminal intimidation – Proof – Complainant alleging trespass in his land, theft of wheat crop from there by accused – Trial Court acquitting accused – Appeal against – On facts, (i) Complainant found in settled possession of disputed land (ii) Possession also inferable from revenue record (iii) Accused forcibly harvested crop (iv) Accused also wielded sickles they were holding (v) Accused practically admitting occurrence in cross – examination of complainant and his witnesses – Held, evidence clearly proves commission of aforesaid offences by accused – Judgment of Trial Court suffers from misappreciation of evidence on record – Appeal allowed - Accused convicted of said offences. (Paras 8 to 13).

For the Appellant: Mr. G.R. Palsra, Advocate.
For the Respondents: Mr. H.S. Rangra, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge .**

The complainant/appellant herein, is aggrieved, by the judgement of acquittal pronounced by the learned Judicial Magistrate 1st Class, Court No. 4, Mandi, District Mandi, H. P, upon, Complaint No. 8-II/2007, on 12.07.2010, hence has instituted therefrom the instant appeal before this Court.

2. The facts relevant to decide the instant case, are, that the complainant is owner in possession of land comprised in Khasra No.817, situated in village Bataur, Illaqua Tungal, Sub-Tehsil Kotli, District Mandi, H.P. On 29.3.2007, at about 6.30 p.m., all accused formed an unlawful assembly and in prosecution of object of said assembly, accused first trespassed into the land of the complainant, and, thereafter cut and removed the wheat crop from the said land. When the complainant along with her daughter and son-in-law, attempted to resist them, accused started abusing the complainant and her family members by using filthy language, i.e. "Teri Maan Ka Khasam, Joo Hum Ko Rokne Wala Kaun Hota Hai, Yahan Se Chali Faao, Nahin to Tujhe Aur Tare Saare Khandan Ko Jaan Se Khatam Kar Dunga". When complainant cried for help, accused ran away from the spot with the wheat bundle. Accused persons had cut and removed the wheat crop from three fields costing Rs.1500/-. Thus, accused persons have committed offences punishable under Section 379, 427, 447, 504, 506 and read with Section 149 of the IPC. It is alleged in the complaint that the accused are habitual offenders. They have already committed same offences about 7-8 months back for which another complaint is pending before the Judicial Magistrate 1st Class, Court No.III, Mandi. Complainant is old man of 70 years but accused are having vicious nature and as such, there is every apprehension of committing any heinous offences, if they are not dealt with in accordance with law. Hence the complaint.

3. After presentation of the complaint, the complainant's preliminary evidence was recorded, and, upon, a prima facie case hence being found, against, the accused, they were hence summoned. On their appearance before the learned trial Court, they were charged for theirs committing offences punishable under Sections 379, 427, 447, 504, 506 read with Section 149 of the IPC. In proof of his case, the complainant examined three witnesses. On conclusion of recording, of, the complainant's evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication.

4. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

5. The complainant is aggrieved by the judgment of acquittal recorded in favour of the accused/respondent, by the learned trial Court. The learned counsel appearing for the complainant/appellant herein, has, concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court, standing, not based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it, of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

6. On the other hand, the learned counsel appearing for the accused/respondent herein, has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned trial Court, rather standing based on a mature and balanced appreciation by him, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

7. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

8. The entire crux of the reasoning assigned, by the learned trial court for rendering an order of acquittal, upon, the accused/respondent, is grooved, upon, (a) there existing a civil dispute inter se the complainant, and, the respondents/accused, vis-a-vis, the contentious parcel of land, whereon. the offences, borne in the complaint, were alleged to be committed, by the respondents/accused; (b) the verdict of acquittal also, is, anchored, upon, the factum of the complainant failing to adduce evidence, vis-a-vis, his holding settled ownership and possession, vis-a-vis, the contentious parcel of land.

9. However, for the reasons, to be ascribed hereinafter, the verdict of acquittal, rather suffers from, an, inherent fallacy; (i) given the complainant in his deposition comprised in his examination-in-chief, rendering a clear echoing qua, despite, his protesting against the misdemeanors of the respondents/accused, the latter meteing threatenings to him; (b) the respondent/accused wielding sickles in their hands, and, attempting to assault him. The afore rendered echoings occurring in the examination-in-chief, of the complainant, stood not concerted to be repulsed, by the defence counsel, (i)by the latter putting appropriate suggestions to him, during, the course of his holding him to cross-examination, (ii) rather affirmative, in tandem therewith hence suggestion(s) rather stood thereat put to him, suggestion whereof stood acquiesced by the defence, (iii) reiteratedly acquiescence whereof is evident, from, the learned defence counsel, while subjecting CW-1 Tulsi Ram, to cross-examination, his meteing a suggestion to him qua the accused wielding sickles, in their hands. The factum of an echoing occurring in the examination-in-chief, of, the complainant (v) qua ensual, of, loss to the complainant qua wheat crops sown, on, the contentious parcel of the land, sparked, by forcible harvesting thereof, by the

respondent/accused, also, likewise stood not concerted to be repulsed by the defence, by meteing(s), of, appropriate suggestion to the afore complainant, during, the course of his being subjected to cross-examination, (v) rather a suggestion stood thereat, put to him qua, from, amongst the contentious fields, the, accused hence harvesting the wheat crop, from, two fields, (vi) wherefrom, also, an inference stands sparked qua the defence acquiescing qua the accused/respondents, hence forcibly harvesting the crop of wheat, as, existing on the contentious parcel of land. Furthermore, with the complainant, during, the course of his examination-in-chief, placing, on record the jamabandi apposite to the suit land, jamabandi whereof is borne in Ex. CA, whereunder revelations exist, of his owning the contentious parcel of land, (i) and, with the respondents/accused not establishing qua theirs being owners of land, adjoining thereto, (ii) whereas, upon, theirs holding a valid demarcation, of the contentious parcel of land, purportedly adjoining their land contiguous thereto, and, the contentious parcel, of, land being therein, hence found, to, rather fall within their ownership, and, possession, may render them, to accomplish rather success, in, establishing qua theirs holding a right to harvest, the, wheat crop as sown, on, the contentious parcel of the land, or theirs being hence enabled to both exercise and espouse a valid defence, qua their acts being clothed with an exculpatory right of private defence, of, property, (iii) whereas, apparently, the afore best evidence, rather remained unadduced, thereupon, it is wholly insagacious for the learned trial Court, to conclude, that for want of evidence adduced by the complainant qua his settled ownership, and, possession of the contentious parcel of land, and, with civil litigation existing inter se the respondents/accused, and, the complainant, (iv) thereupon, the charges framed against the accused, for theirs, committing offences punishable under Sections 427, 447, 379, 504, 506, and, read with Section 149 of the IPC, rather standing not efficaciously proven.

10. Be that as it may, apt corroboration to the testification of CW-1 is also lent by the testification rendered by CW-2, (i) the latter in her examination-in-chief, rendered an echoing qua the ill-fated occurrence, wherewithin echoings hence in tandem therewith also occur. The learned defence counsel while putting suggestions to CW-2, while, holding her to cross-examination, meted a suggestion to her, qua, at the time of hers arriving, at the site of occurrence, the accused proceeding to harvest, the last field, existing on the contentious parcel of land, (ii)wherefrom, an inference is derivable qua the defence acquiescing, vis-a-vis, the respondents/ accused trespassing, upon, the contentious parcel of land. Furthermore, with the learned defence counsel also meteing a suggestion to CW-2 while holding her to cross-examination, vis-a-vis, the accused/respondents wielding sickles, hence, also sparks an inference, vis-a-vis, acquiescence, of, the defence, vis-a-vis, the incriminatory role, of, the accused.

11. With inter se corroborations, hence standing echoed respectively, in the uneroded testifications of CW-1, and, of CW-2, and, when for the aforestated reasons, the respondents/accused, are, unable to establish qua theirs holding any settled possession, and, ownership, vis-a-vis, the contentious parcel of land, (I) rather when hence for the aforestated reasons, contrarily, the complainant has established qua his holding evident settled ownership, and, possession of the contentious parcel of land, (ii) thereupon, the charge framed against the accused, for theirs committing the offences punishable under Sections 427, 447, 379, 504, 506, and, read with Section 149 of the IPC, hence stands cogently proven.

12. 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.

13. Consequently, the instant appeal is allowed and the impugned judgment is set aside. In sequel, the accused/respondents here are convicted for theirs committing offences punishable under Sections Sections 427, 447, 379, 504, 506 and read with Section 149 of the IPC. They be produced before this Court on 21st December, 2018 for hearing on quantum of sentence.

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

Pawan Dhiman .....Appellant/Complainant.
Versus
Messers Asian Towanvillen Farms Ltd. ...Respondent/Accused.

Cr. Appeal No. 539 of 2009.
Reserved on: 30.10.2018.
Date of Decision: 20th November, 2018.

**Negotiable Instruments Act, 1881 –** Sections 138 & 139 – Dishonour of Cheque – Complaint – Presumption of consideration – Complainant filing complaint by alleging dishonored cheque having been issued by accused towards outstanding sale price of land – Trial Court dismissing complaint – Sale deed executed in 2007 – Cheque also issued in 2007 – Subsequent agreement inter se parties indicating outstanding sale price stood paid to complainant – Cheque not proved to have been issued towards legally enforceable debt – Appeal dismissed – Acquittal upheld. (Paras 8 to 10).

For the Appellant: Mr. Dheeraj K. Vashishat, Advocate.
For the Respondent: Mr. Ajit Sharma, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge**

The instant appeal is directed by the complainant/appellant, against, the order of acquittal recorded by the learned Judicial Magistrate 1st Class (I), Palampur, District Kangra, H.P., upon, Crl. Complaint No.97-III/2008.

2. The facts relevant to decide the instant case, are that the complaint has been filed by the complainant through his Special Power of attorney. It is averred that accused entered into an agreement to purchase land from the complainant, situated in Mohan Chowki, Tehsil Palampur, and, the complainant executed, Sale deed of 22 Kanals and 10 Marlas of land being General Power of Attorney of owners and paid the sale consideration through cheque No. 230743 of 3.5.2007 drawn at Dena Bank, Lodhi Road, New Delhi, for a sum of Rs.15,80,000/-. It is further averred that when the aforesaid cheque was presented in the bank, i.e. Punjab National Bank, Palampur on 29.5.2007, for collection, the said cheque was sent by the aforesaid bank to the banker of the accused, but the accused intentionally stopped the payment, and, telephonically informed the complainant that he is

in short of money and requested the complainant not to present the cheque in the bank, but at that time, the cheque had already been presented in the bank and the same was returned with memo with the remarks “payment is stopped by the drawer”. It is further averred that after waiting for some time, when the accused did not pay the aforesaid amount, despite repeated requests, the complainant, again presented the aforesaid cheque in his bank, i.e. Punjab National Bank, on 16.8.2007, but again the said cheque was returned with memo by the banker of accused with remarks “payment stopped” by the drawer and the same was received by the complainant on 25.8.2007 from his banker. It is further averred that thereafter accused was requested through notice dated 17.9.2007, but he accused in connivance with the postal Department has refused to receive the registered A/D and ultimately the said notice was received unserved on 28.9.2007. It is further averred that despite repeated requests of the complainant, as the accused has not paid the cheque amount to the complainant, hence, the present complainant.

3. After presentation of the complaint, the complainant's preliminary evidence was recorded, and, upon, a prima facie case hence being found, against, the accused, he/it was hence summoned. On his/its appearance before the learned trial Court, a notice of accusation, was, put to the accused by the learned trial Court, for his/its committing an offence punishable under Section 138 of the Negotiable Instruments Act. In proof of his case, the complainant examined 1 witness. On conclusion of recording, of, the complainant's evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication, besides it examined one witness in its defence.

4. On an appraisal, of, the evidence on record, the learned trial Court, returned findings of acquittal qua the accused/respondent herein.

5. The complainant, stands, aggrieved by the judgment of acquittal recorded qua the accused/respondent. He, has concertedly, and, vigorously contended qua the findings of acquittal recorded by the learned trial Court, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, he contends qua the findings of acquittal, warranting reversal, by this Court in the exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

6. On the other hand, the learned counsel appearing for the accused/respondent herein, has with considerable force and vigour, also contended qua the findings of acquittal recorded by the learned trial Court rather standing based on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

7. 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. Cheque comprised in Ex. C-2, carrying therein a sum of Rs.15,80,000/-, stood issued by the accused, vis-a-vis, the complainant. However, the afore cheque, as, unraveled by Ex. C-3, stood dishonoured by the banker(s) concerned. Subsequent thereto, a statutory notice borne in Ex. C-5, hence stood served upon the accused. The complainant adduced evidence qua the dishonoured negotiable instrument, standing, issued in discharge, of, an apt contractual liability, arising, from it rather comprising the outstanding sum of sale consideration, payable, though, in contemporaneity, vis-a-vis, the execution, of, the apt sale deed inter se the complainant, and, the respondent/accused. The crucial document, for firmly establishing, qua the afore cheque hence carrying the afore sums of

money, and, it rather standing, issued by the accused, vis-a-vis, the complainant, towards a legally enforceable debt or liability, rather stands comprised in Ex.DW1/A. The valid and due execution of EX.DW1/A inter se the signatories thereof, has, remained undisputed. However, it is drawn on 16.7.2008, whereas, the sale deed towards liquidation, of, the purported remaining sale consideration, rather stood executed in the year 2007. Even, through, the execution of the sale deed, occurs a year prior, to, the drawing of Ex.DW1/A, however, the reference made in clause No.2 thereof, wherein a sum of Rs.15 lacs, stands, recited, to, stand tendered/liquidated by the accused, vis-a-vis, complainant, towards apt liquidation(s), of, the outstanding sale consideration, in respect, of, the apt sale deed, execution whereof, hence, occurred in the year 2007, would, yet be applicable, vis-a-vis, the dishonoured negotiable instrument, which stood issued, earlier thereto, on, 3.5.2007, only upon (a) the reference, occurring in clause (2), of, Ex.DW1/A, qua handing over of a sum of Rs.15 lacs, by the respondent/accused, vis-a-vis, the complainant, being readable, as an admission, and, specifically appertaining to the dishonoured negotiable instrument; (b) and, there also occurring a marked explicit echoing, that the afore tendered sum, of, Rs.15 lacs, hence, occurring through the mode of issuance, of, a negotiable instrument. However, a, reading of clause (2) borne in Ex.DW1/A, clause whereof stand extracted hereinafter:

> "2. That the party NO.2 has agreed to pay a sum of Rs.8,50,000/- as interest and to waive off the claim of party No.1 of 13% as mentioned in condition NO.15 of the agreement, as such the party No.2 will pay a sum of Rs.1,12,30,000/- to the party No.1 and out of which amount of Rs.15,00,000/- has been paid to the first party by the 2nd Party in the presence of witnesses."

(c) unravels rather a simplicitor narration qua a sum of Rs.15 lacs standing paid by the respondent/accused, to, the complainant/appellant, in, the presence of the witnesses; (d) obviously hence therefrom no inference, can be gatherable, that the afore transaction being made through, the mode of issuance, of, a cheque, conspicuously also when the drawing of Ex.DW1/A, occurs, much subsequent to the issuance, of, the dishonoured negotiable instrument, (e) thereupon, there cannot be any inference of any admission, being, rather mobilized therefrom qua the apt dishonoured negotiable instrument, evidently, issued prior to the drawing of Ex.DW1/A, rather appertaining, to, the dishonoured cheque. In aftermath, the reference in clause (2), of, Ex.DW1/A, cannot be capitalized in any manner, by the appellant/complainant.

9. Be that as it may, even if, there, is, a communication in clause (2) of Ex.DW1/A, qua, the remaining outstanding sums of sale consideration hence remaining unliquidated by the accused, vis-a-vis, complainant/appellant, (I) yet therefrom, also no inference, is, hence drawable qua rather the dishonoured negotiable instrument, falling within ambit thereof, unless (a) in part satisfaction thereof a specific narration, standing borne therein, and, qua, the, sum reflected, in, the dishonoured negotiable instrument, being specifically included in the sums, of, outstanding/unliquidated amounts, of, sale consideration, (b) especially when hence it was gatherable therefrom, that, on adding the sum, borne in the dishonoured negotiable instrument, the outstanding sums, as, stand reflected in clause (1) of Ex.DW1/A, being computable at Rs.1,03,80,000/-. However, there occurs no afore reference in clause (1), vis-a-vis, the extant dishonoured negotiable instrument, (c) thereupon, it is inevitable to conclude, that, at the stage of drawing of Ex.DW1/A, the accused/respondent, and the complainant/appellant, rather settling the contested unliquidated sums of sale consideration, and, corrolary thereof, is, qua hence the sum borne, in the dishonoured negotiable instrument rather standing hence excluded, from,

the apt enforceable contractual liability, as, re-agreed to be liquidated, in, the manner, as, enshrined in Ex.DW1/A.

10. The upshot of the afore discussion is that the conclusion as drawn by the learned trial Court that the issuance of the dishonoured negotiable instrument by the accused, vis-a-vis, the complainant, not being towards legally enforceable debt, hence, warrants validation.

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

12. Consequently, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the judgment impugned before this Court is maintained and affirmed. All pending application also stands disposed of. Records be sent back forthwith.

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

Sh. Vishal Sharma .....Appellant.
Versus
Shashi Sharma ....Respondent.

Cr. Appeal No. 566 of 2012.
Reserved on: 5th November, 2018.
Date of Decision: 20th November, 2018.

**Negotiable Instruments Act, 1881** - Sections 138 & 139- Dishonour of cheque – Presumption of consideration – Held, Presumption that cheque issued was for consideration is rebuttable – Complainant alleging cheque having been issued by accused to clear liability arising out of partnership business – Trial Court acquitting accused – Appeal – Evidence revealing disputed cheque issued in 2006 whereas, all other cheques of same book-let stood exhausted in 2004 – issuance of one cheque from same book-let in 2006 doubtful – Complainant not producing any document indicative of partnership business inter se parties – Complainant himself filling recitals of cheques – Further held, evidence does not prove that cheque was issued for consideration – Probability of misuse of cheque by Complainant cannot be ruled out – Appeal dismissed. (Paras 8 to 10).

For the Appellant: Mr. Munish Kumar Gupta, Advocate.
For the Respondent: Mr. Jyotirmay Bhatt, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge .**

The complainant/appellant herein, is aggrieved, by the judgement of acquittal pronounced by the learned Judicial Magistrate 1st Class, Bilaspur, H.P., upon,

Case No. 200/2 of 2006, on 31.07.2012, hence has instituted therefrom, the, instant appeal before this Court.

2. The facts relevant to decide the instant case, are that during the year 2003, accused Shashi Sharma, who was a registered contractor of P.W.D., and, his close friend entered into an oral agreement for sharing the profits of the business, on 50% basis and as such, the complainant financed the accused and used to deal with all works issued upon the name of the accused. The complainant has submitted that from the year 2003 to 2006, both of them worked jointly and the accused was under a liability of Rs.6,55,000/-, which was to be paid by the accused to him upto August 2006, but he paid only Rs.1 lac through cheque bearing No.072936 dated 25.8.2006, and, for the balance payment he issued another cheque No.789288 dated 30.8.2006 for Rs.5,25,000/- to discharge his legal liability. The said cheque was presented by the complainant with the banker for encashment, but it was dishonoured on the ground of insufficient funds. Therefore, the complainant issued a legal notice to the accused on 7.10.2006 to which the reply was also filed by the accused, but he did not make the payment of any amount. Hence the complaint.

3. The learned trial Court, on, finding sufficient material on record, to proceed against the accused, hence, issued notice to the accused. On his appearance before the learned trial Court, notice of accusation for his committing an offence punishable under Section 138 of the Negotiable Instruments Act, stood hence put to him. In proof of the case, the complainant examined two witnesses. On conclusion of recording of the complainant's evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded by the learned trial Court, wherein he claimed innocence and pleaded false implication. However, he has examined two witnesses in his defence.

4. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

5. The complainant is aggrieved by the judgment of acquittal recorded in favour of the accused/respondent, by the learned trial Court. The learned counsel appearing for the complainant/appellant herein, has, concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court, standing, not based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it, of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

6. On the other hand, the learned counsel appearing for the accused/respondent herein, has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned trial Court, rather standing based on a mature and balanced appreciation by him, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

7. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

8. Ex. CW1/B, embodies, the, dishonoured negotiable instrument. The mere factum of dishonour, of, the afore dishonoured negotiable instrument, does rear, a rebuttable presumption, qua, hence it standing issued towards, a, legally enforceable debt or liability, erupting inter se, the complainant and the accused. However, the afore presumption is rebuttable. The evidence to rebut the afore presumption is marshalable, from, Ex. D-2, (i) comprising the cheque book, unfolding qua two cheques respectively bearing No. 789287 and No. 789289 hence being issued therefrom, in the year 2004. (i) The

afore cheques book borne in Ex. D-2, stood, exhausted in the year 2004, and, hence the issuance, of, the disputed cheque, much belatedly therefrom, especially in the year 2006, hence, sparks a genuine and valid suspicion qua its issuance, being towards any legally enforceable debt, or, liability inter se the accused, and, the complainant (ii) AND the afore inference is strengthened by the factum, of, the complainant espousing qua the afore apt contractual legal liability, rather standing anchored, upon, a partnership business inter se the complainant and the accused, (iii) and obviously, hence he also espouses qua the outstanding liability arising, from, the afore partnership business, hence being embodied in the dishonoured negotiable instrument. However, neither the income tax returns appertaining to the partnership firm nor bank accounts held in the name, of, the partnership firm, were, adduced into evidence, (iv) thereupon, the vigour of the afore espousal rather wanes as well as subsides, and, the inevitable sequel thereof, is qua the issuance of the dishonoured negotiable instrument, being not towards any legally enforceable debt or liability inter se the accused and the complainant.

9. Furthermore, the scribings of the recitals in Ex.CW2/B, stand testified by the complainant while rendering his testification, borne in his cross-examination, to be rather filled by him, testification whereof, when stands coagulated, with, the factum, of, its issuance hence occurring in the year 2006, whereas, the cheque book, Ex. D-2, wherein, it stands held, rather standing exhausted in the year 2004, (i) hence garners an invincible conclusion, qua, the complainant misusing the afore dishonoured negotiable instrument, and, also his inventing the factum of its issuance, being towards a legally enforceable debt or liability inter se him and the accused.

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

11. Consequently, there is no merit in the instant appeal and it is dismissed. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Ritesh Kumar Goyal .....Appellant.
Versus
Smt. Sarvari Begum and others ....Respondents.

FAO No. 244 of 2010.
Reserved on : 1st November, 2018.
Decided on : 20th November, 2018.

**Workmen Compensation Act, 1923 -** Section 4-A **–** Motor Accident – Claim application – Compromise – Effect – Parties effecting compromise before Commissioner – Claimants receiving full and final payment under compromise – Commissioner however, further imposing penalty on employer – Challenge thereto – Held, employer bound to pay compensation immediately on occurrence of accident – And when he disputes extent of

compensation claimed, he is enjoined to make provisional payment to extent of liability he admits – Non- compliance of this statutory duty will result in imposition of penalty – Employer neither paid compensation nor deposited provisional payment – Commissioner justified in imposing penalty – Appeal dismissed – Award upheld. (Paras 4 & 5).

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| For the Appellant: | Ms. Jyotsana Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate. |
| For Respondent No.1 & 2: | Mr. Ashok Tyagi, Advocate. |
| For Respondent No.3: | Mr. Lalit K. Sharma, Advocate. |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed, against, the award pronounced, by, the learned Commissioner under Workmen's Compensation Act, Nahan, District Sirmaur, H.P., upon, case No. 6/07, whereunder, statutory penalty borne, in, a sum of Rs.77,000/-, stood, assessed, upon, the appellant herein, employer of the deceased workman.

2. The instant appeal was admitted, on, 22.02.2011, yet thereat, no, statutorily enjoined substantial question, of, law, stood, framed. However, during the course, of, hearing of the instant appeal, hence, upon hearing the counsel for the parties, this Court, has, framed the hereinafter extracted substantial question of law, for meteing, of, an adjudication thereon:-

> "1. On the Claimants accept from Insurance Company an amount as full and final amount of compensation, in a compromise arrived at during the pendency of the proceedings before the ld. Commissioner WCA, should that amount be treated as inclusive of all claims including penalty?"

3. The parties at contest, do not, wrangle over the factum qua the deceased workman, suffering his demise, during the course of his rendering employment, under, the appellant herein. However, the only contest which has emerged inter se the successors-in-interest, of, the deceased, and, the appellant herein, appertains, to the legality of the fastening of the penalty, upon, the appellant herein, the employer of the deceased workman, given, as aforestated the latter uncontrovertedly, dying, during the course of his performing employment, under, the appellant herein.

4. The learned counsel appearing for the appellant, has, with great vigour made an espousal before this Court (I) that with occurrence of a compromise, during, the pendency of the afore petition before the learned Commissioner concerned, compromise whereof occurred, inter se, the insurer, and, the claimants, and, when thereunder an amount of Rs.1,54,000/- stood agreed, to be paid as compensation, sparked by the demise of the predecessor-in-interest, of, the claimants, in the afore fatal accident, (ii) besides with the afore compromised settled amount also standing liquidated, by the insurer to the claimants, (iii) thereupon, there was no occasion, for the learned Commissioner, to, fasten the afore quantum, of penalty, upon, the employer/appellant herein. However, the afore contention, is, grossly flawed, as, it is beyond, the, ambit of a catena of judicial verdicts, made, upon an interpretation, of, sub-section (1), and, of sub-section (2), of, Section 4-A of the Workmen's Compensation Act (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter:-

> "4-A. Compensation to be paid when due and penalty for default.- (1) Compensation under section 4 shall be paid as soon as it falls due.
>
> (2) In cases where the employer does not accept the liability of compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim."

(a) whereunder, the employer, is, judicial expostulated, to, in contemporaneity, with, the ill occurrence, rather liquidate the compensation amount, vis-a-vis, the disabled workman or his successors-in-interest, as the case may be. The afore expostulation of law, appertain, to the afore connotation, being acquired by the statutory phrase "shall be paid as soon as it falls due", occurring in sub-section (1) of Section 4-A of the Act, (b) and, thereto reiteratedly an ascription, is, assigned qua in quick immediacy, to, the relevant mishap, the employer being fastened, with, the liability to pay compensation, vis-a-vis, the disabled workman or his successors-in-interest, as the case may be. Furthermore, vis-a-vis, sub-section (2) of Section 4-A, of, the Act, also a catena of judicial verdicts, have, settled the law, that, even when the employer, fails, to accept the liability, for hence liquidating the compensation amount, as, claimed, by the disabled workman, or his successors-in-interest, as the case may be, (c) his being enjoined to make provisional payment, to the extent he accepts his liability, and, the afore making, of, provisional payment, of, compensation, by the employer, being hence a statutorily enjoined,peremptory diktat, and, also it rather not prejudicing the right of the workman, to make any further claim, for compensation. The afore expostulation of law occurring, in, a catena of judicial verdicts, and, as stands rendered, upon, the afore valid interpretation, vis-a-vis, sub-section (1), and, of, sub-section (2), of, Section 4-A of the Act, does not obviously, hence lend any succor to the afore contention, reared before this Court by the counsel for the appellant, (d) nor any payment of compensation, under, any compromise occurring, inter se, the insurer and the claimants, rather not relieving, the employer, from, his statutorily enjoined duty, to, upon, his evident failure to comply, with, the afore mandate borne in sub-section (1), and, sub-section (2) of Section 4-A of the Act, to rather hence, liquidate the statutory penalty, vis-a-vis, the disabled workman, or his successors-in-interest, as the case may be. Tritely, the liability to defray the statutory penalty, is, always fastenable upon, the employer, vis-a-vis, the disabled workman, or his successors-in-interest, as the case may be, (e) AND upon, his making evident lapses in meteing compliance, with, the afore mandate, borne in sub-section (1), and, in sub-section (2) of Section 4-A, of, the Act. Since, trite forthright evidence exists on record, qua the employer, not, in quick immediacy to the mishap, hence meteing compliance, with, the afore mandate, occurring in sub-section (1), and, sub-section (2) of Section 4-A, of, the Act, (f) thereupon, the mandate embodied in cause (b), to, sub-section (3) of Section 4-A, of, the Act (provisions whereof stand extracted hereinafter), beget its apt attraction hereat, and, when in consonance therewith, under, the impugned award, the learned Commissioner, has, assessed the statutory penalty, at, 50%, of, the compensation amount, thereupon, the impugned award, does not, suffer from any legal fallacy. Provisions of clause (b) to sub-section (3) of Section 4 of the Act, read as under:-

> "(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent. of such amount way of penalty;"

Accordingly, substantial question of law is answered in favour of the respondents and against the appellant.

5. For the reasons recorded hereinabove, there is no merit in the instant appeal, and, it is dismissed accordingly. Consequently, the award impugned before this Court is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Oriental Insurance Co. Ltd. .....Appellant.
Versus
Daya Ram and others ....Respondents.

FAO No. 154 of 2013.
Reserved on : 13th November, 2018.
Decided on : 20th November, 2018.

**Workmen Compensation Act, 1923** - Section 3 – Motor Accident – Claim application – defences – Commissioner allowing application of legal representatives of deceased employee and fastening liability on insurer – Appeal – Insurer contending that deceased driver was driving under fake driving license and there was breach of terms of insurance policy – Held, in proceedings under Act arising out of death or permanent disability, it is not open to insurer to contend that driving license of employee was fake, unless it is proved by insurer that employer was negligent at time of engaging driver and he did not ascertain competence, proficiency and driving skills of driver. Appeal dismissed. (Para 33).

For the Appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.
For Respondent No.1 & 2: Mr. Raman Sethi, Advocate.
For Respondent No.3: Mr. D.S. Kainthla, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed, against, the award pronounced, by, the learned Commissioner (IV), Shimla exercising Power under Employee's Compensation Act, 1923, upon, case No. RBT 14/2 of 11/2010, whereunder, compensation amount borne in a sum of Rs.4,50,4400/- along with interest @12% per annum from 3.6.2010 till its realization, stood assessed, vis-a-vis, the legal representatives of the deceased driver.

2. The instant appeal was admitted, on, 15.10.2013, yet thereat, no, statutorily enjoined substantial question, of, law, stood, framed. However, during the course, of, hearing of the instant appeal, hence, upon hearing the counsel for the parties, this Court, has, framed the hereinafter extracted substantial questions of law, for meteing, of, an adjudication thereon:-

> "1. Whether the indemnification of the claim by insurer could be ordered when deceased-driver was not having valid and effective driving licence to drive the insured vehicle (Pick-up vehicle) and thereby, breach of the policy conditions as regards the driver's clause was committed by the owner/insured?
>
> 2. Whether interest for period from 3.6.2010 till 18.01.2013 could be ordered to be paid to claimant by the appellant/insurer when the compensation amount due and payable to claimants was determined by the ld. Commissioner vide the impugned order dated 19.01.2013, when the claim petition was decided?"

3. The learned counsel appearing for the contesting litigants, do not wrangle, over the factum of the demise, of, the deceased, occurring the during the course of his performing his employment under his employer. However, the learned counsel appearing for the insurer has contended with much vigour before this Court, that, with the licence held by the deceased driver, at the stage, contemporaneous to the occurrence ill-fated mishap, rather being proven by RW-4 to be fake, and, unauthentic, (i) thereupon, the computation of compensation assessed qua his legal heirs, being ingrained with, a, grave legal fallacy. However, the afore contention addressed before this Court by the learned counsel appearing for the insurer, cannot merit any countenancing by this Court, (ii) given this Court in a case titled as United India Insurance Co. Ltd. vs. Seema Devi and others, reported in 2006 ACJ 1357, the relevant paragraphs No. 22, 25, 26, 27 and 28 stand extracted hereinafter:-

> "22. The W.C. Act does not deal with the question raised in the present appeal. There is nothing in the Act to show whether an employer is liable in case the employee has taken employment on the basis of a forged or fake document, like the driving licence in the present case. The employer when he gave the employment had no reason to believe that the licence produced before him was a fake one. The contention raised on behalf of the insurance company is that no person can derive benefit from his own fraudulent act. The driver of the vehicle obtained the employment on the basis of the fake licence. This violates the provisions of the law, especially Motor Vehicles Act. It is a criminal offence.
>
> 25. In my opinion, the insurance company can raise all defences available to it in claims under the W.C. Act. It cannot be argued that insurance company is restricted to raise only those defences available to it under Section 149 of Motor Vehicles Act. Therefore, it can raise question whether the employee had a licence or not. However, the insurance company has agreed to indemnify the employer for his liability under the W.C. Act and if the employer is liable then the insurance company has to be held liable unless it can show that there has been breach of the policy on behalf of the insured. This view is in consonance with the judgment of the Supreme Court in National Insurance Co. Ltd. v. Swaran Singh . Though that was a case under the Motor Vehicles Act, the general principle of law laid down is that it is for the insurer to prove that the insured has breached the policy.
>
> 26. Taking a cue from Section 3 quoted supra it is my considered view that when an employee dies or suffers permanent total disablement in an accident arising out of and in the course of his

employment, then the fact that such employee had obtained employment on the basis of false qualification would not be a defence open to the employer and consequently the insurance company. However, in case the employee only suffers injury which does not disable him permanently, then the employer can take up a defence that the employee has obtained employment on the basis of false qualifications and, therefore, wilfully disregarded the law and in such an eventuality the employer and the insurance company may not be liable. This is in consonance with the intention of the legislature that when a person dies or suffers permanent disablement then it is not only he who suffers, but his dependants suffer with him. In the case of other injuries the employee alone suffers and, therefore, he has not been given the benefit. The intention appears to be that the dependants of the employee should not be denied compensation.

27. In the present case, there is nothing to show that the employer knew that the licence in question was fake. Ostensibly on the face of it, the driving licence appears to be valid. When the owner of a vehicle employs a driver he is only expected to see the driving licence. He is not expected to go to the registration and licensing authority to verify the genuineness of the licence. In the present case also, there is no breach on the part of the owner. No doubt, it is true that in the present case the deceased himself endangered his safety and life by inviting unnecessary calamity by engaging in driving of vehicles when he knew that he did not have a valid driving licence. In view of the provisions of proviso (b) to Section 3(1) of the Act, when a workman dies or is permanently disabled then even if it is proved that he acted recklessly or endangered his life by illegal means would, in my humble opinion, not be a defence open to the employer and consequently the insurance company. In case the employee only receives injuries, this would be a valid defence.

28. In view of the above discussion, I answer the two substantial questions of law raised herein as follows:

> (1) The insurance company has proved on record that the driving licence issued in favour of driver Gurnam Singh, was a fake driving licence.
>
> (2) The employer and consequently the insurance company is liable to pay the compensation to the dependants of the deceased, even if it is proved that the driver had a fake driving licence."

(i) making a clear expostulation of law, that, in proceedings drawn under the Workmen's Compensation Act, it being not open, for the insurer, to raise any contention qua with the deceased driver obtaining his employment, under, his employer under a fake and unauthentic driving lience, (ii) thereupon, his or his legal heirs being barred to strive, for, begetting quantification of compensation, by drawing proceedings under the Workmen's Compensation Act, (iii) rather its stand forthrightly expostulated therein, that, the insurer being amenable, to liquidate the compensation amount, vis-a-vis, the insured employer. Further it has also been propounded therein, only, upon within the ambit, of, the decision of the Hon'ble Apex Court rendered in National Insurance Co. Ltd. v. Swaran Singh, 20-04 ACJ 1(SC), (a) it stands proven by the insurer, that, the employer had willfully neglected or

breached the standards of due care and caution, at the time of his engaging the deceased driver, (b) negligence whereof being comprised in his failing to, ascertain the competence, proficiency, and, driving skills of the deceased driver,(c) thereupon, it not being open for the insurer to exculpate its indemnificatory liability, sparked by the contract of insurance executed by it, vis-a-vis, the insured. Since, the afore evidence stands unadduced by the insurer, and, also when evidence stands adduced qua the demise, of the deceased concerned, rather occurring during the course, of, his performing, his employment under his employer, thereupon, the fastening of the apt indemnificatory liability, upon, the insurer by the learned Commissioner, is to be concluded, to be legally apt.

4. The learned counsel appearing for the insurer has further contended that liability of interest, upon, the principal compensation amount by the learned Commissioner, is inapt, given it being not fastenable upon it. However, the afore submission is rudderless, given a perusal of the insurance policy, disclosing qua it not carrying any explicit exclusionary clause, qua the liability, of, interest accruable, upon, the principal amount, being fastenable upon it. Consequently, the levying of interest on the principal compensation amount, under, the impugned award, from, one month elapsing since the occurrence, of the ill-fated mishap, upto its deposit, does not suffer from any legal frailty. Consequently, both the substantial questions of law are answered in favour of the claimants/respondents, and, against the appellant/insurer.

5. For the reasons recorded hereinabove, there is no merit in the instant appeal, and, it is dismissed accordingly. Consequently, the award impugned before this Court is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

United India Insurance Company Ltd. .....Appellant.

Versus

Anil Kumar & others .... Respondents.

FAO No. 149 of 2018.
Reserved on: 31st October, 2018.
Decided on : 20th November, 2018.

**Motor Vehicles Act, 1988** – Sections 149, 166 & 185 – Motor Accident – Claim application – Defences – Drunken driving – Held, drunken driving is not statutorily recognized defence available to insurer – It cannot avoid its liability on ground that driver was driving vehicle in inebriated condition. (Para 2).

***Cases referred:***

Khem Chand vs. Smt. Uma Devi and others, Latest HLJ 2010(HP) 1
Lata Wadhwa v. State of Bihar, (2001)8 SCC 197

For the Appellant: Mr. Lalit K. Sharma, Advocate.
For Respondents No. 1 to3: Mr. Maan Singh, Advocate.
For Respondent No. 4: Mr. B.L. Soni, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts a challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-II, Kullu, District Kullu, upon, Claim Petition No. 04 of 2016, whereunder, compensation amount comprised, in, a sum of Rs.12,65,000/- along with interest accrued thereon, at the rate of 9% per annum, from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer.

2. The learned counsel appearing for the insurer has contended with much vigour before this Court, (i) that, with the report of the FSL concerned, borne in Ex.RW2/B, making a clear display qua ethyle alcohol hence being detected respectively, in, the blood, and, urine sample, of, Rakesh Kumar, owner-cum-driver of the offending vehicle, and, with per centum whereof being echoed hterein, to be, respectively 28 mg%, in, blood, and, 72-45% in urine, (ii) thereupon, when he was critically inebriated, at the relevant time, hence, the terms of the contract of insurance, stood evidently breached, (iii) and, thereupon, the apposite indemnificatory liability standing erroneously fastened, upon, the insurer. However, the aforesaid plea, is, misfounded, given this Court in a judgment rendered, in, a case titled as ***Khem Chand vs. Smt. Uma Devi and others***, reported in ***Latest HLJ 2010(HP) 1,*** the relevant paragraph No.4 whereof stand extracted hereinafter:

> "4. The law is very well settled that a claim which falls within the purview of the an Act Policy i.e. a liability falling within the ambit of Section 147 of the Motor Vehicles Act, 1988 (The Act) can only be contested by the Insurance Company on the grounds available to it under Section 149 of the Act. It is not permitted to contest the proceedings no any other grounds. Intoxication of the driver is not a ground available to the Insurance Company under Section 149 of the Act. Therefore, the liability which is statutory under Section 147 of the Act, has to be satisfied by the insurer. It may be clarified that in case the insurer in addition to the liability, which it is bound to cover under the Act covers other liability then in case of such extended liability, it may raise the defences available to it as per terms of the policy, but as far as statutory liability is concerned, the insurer has o authority to incorporate any term in the policy which is not contemplated in terms of Section 149 of the Act. Therefore, the insurance company could not have been permitted to raise this defence and it could not be permitted to recover the awarded amount from the insured."

(i) rather making a clear expostulation therein, that, the inebriation of the driver of the ill-fated vehicle concerned, not being, a, statutorily espousable ground for the insurer, and, concomitantly, if, the, afore inebriation stands proven, by the insurer, (ii) thereupon, it being not permissible for it, to, escape from its indemnificatory liability. Consequently, the afore submission addressed before this Court, is, rejected.

3. The learned counsel appearing for the appellant, has, thereafter contended with much vigour (i) that with the deceased being a house wife, hence, her services, as, a house holder, enjoined determination, of, value thereof, and, only to the extent, of,

deprivation(s) of monetary value thereof, the claimants being entitled, to, compensation amount, being determined qua them. He contends that with, no, evidence existing on record, qua the deceased earning any income, and, with no data existing on record, for, computing the monetary value, of, the services rendered by the deceased house wife, (ii) thereupon, in consonance with the verdict rendered by the Hon'ble Apex Court, in, a case titled as ***Lata Wadhwa v. State of Bihar***, reported in ***(2001)8 SCC 197***, the relevant paragraph No.10 whereof stand extracted hereinafter:-

> "10. So far as the deceased housewives are concerned, in the absence of any data and as the housewives were not earning any income, attempt has been made to determine the compensation, on the basis of services rendered by them to the house. On the basis of the age group of the housewives, appropriate multiplier has been applied, but the estimation of the value of services rendered to the house by the housewives, which has been arrived at Rs.12,000/- per annum in cases of some and Rs.10,000/- for others, appears to us to be grossly low. It is true that the claimants, who ought to have given datas for determination of compensation, did not assist in any manner by providing the datas for estimating the value of services rendered by such housewives. But even in the absence of such datas and taking into consideration, the multifarious services rendered by the housewives for managing the entire family, even on a modest estimation, should be Rs.3000/- per month and Rs.36,000/- per annum. This would apply to all those housewives between the age group of 34 to 59 and as such who were active in life. The compensation awarded, therefore should be re-calculated, taking the value of services rendered per annum to be Rs.36,000/- and thereafter applying the multiplier, as has been applied already, and so far as the conventional amount is concerned, the same should be Rs.50,000/- instead of Rs.25,000/- given under the Report. So far as the elderly ladies are concerned, in the age group of 62 to 72, the value of services rendered has been taken at Rs.10,000/- per annum and multiplier applied is eight. Though, the multiplier applied is correct, but the values of services rendered at Rs.10,000/- per annum, cannot be held to be just and, we, therefore, enhance the same to Rs.20,000/- per annum. In their case, therefore, the total amount of compensation should be re-determined, taking the value of services rendered at Rs.20,000/- per annum and then after applying the multiplier, as already applied and thereafter adding Rs.50,000/- towards the conventional figure."

the value of the services of the deceased being computable at Rs.3,000/- per mensem, whereas, the learned tribunal, in, computing the afore value at Rs.9,000/- per mensem, has, rather committed a gross error.

4. However, the afore submission is grossly misfounded, (i) as, it is anvilled, upon, a palpable misreading of the afore extracted paragraph, borne in the judgement supra, (ii) misreading whereof, arises, from the factum, that, the afore extracted para would be applicable only, upon, evidence existing on record qua the deceased house wife hence not earning any income. Contrarily, hereat, rather uneroded testification(s) hence exist on

record qua the deceased house wife earning an income of Rs.10,000/- per mensem, from, hers selling ready-made garments. Given, the existence of the afore uneroded testification, vis-a-vis, the afore settled income reared by the deceased, from, hers selling ready-made garments, thereupon, in, the learned tribunal computing her income at Rs.9000/- per mensem, has, not committed any gross fallacy or error.

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

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

Sh. Gian Chand .....Appellants/Petitioners.
Versus
State of H.P. & others ....Respondents.

RFA No. 71 of 2011.
Reserved on : 30th October, 2018.
Decided on : 20th November, 2018.

**Land Acquisition Act, 1894** - Sections 18 and 51 A - Acquisition of land for public purpose – Reference – Market Value – Determination – Sale deed – Proof – Reference court discarding sale deeds on ground of these not having been proved in accordance with law – Appeal – Held, certified copies of sale deeds per se readable in evidence without formal proof – However, their probative value will depend on facts and circumstance of case. (Para 2).

For the Appellants: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the Respondents: Mr. Hemant Vaid and Mr. Desh Raj Thakur, Additional Advocate Generals with Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed against the award rendered by the learned Additional District Judge, Ghumarwin, District Bilaspur, H.P., upon, Land Ref. Pet. No.5/4 of 2006/2005, whereunder, he rather dismissed the afore reference petition, as, preferred therebefore, by the landowners/appellants herein.

2. The learned Reference Court, had, discarded the probative vigour of sale exemplars, respectively, embodied in Ex.P-1, and, in Ex.P-2, whereunder, respectively, lands measuring 3 biswas, and, land measuring 4 biswas, stood respectively hence sold, for, sale considerations, of Rs.55000/-, and, Rs.80,000/-, (i) on anvil given theirs remaining unproven in accordance with law. The afore assigned reason by the learned Reference Court, for, discarding the probative vigour, of, the afore sale exemplars, as, embodied in Ex.P-1, and, in Ex.P-2, is rudderless, (ii) given a catena of decisions rather making a candid

expostulation of law, that, the mere tendering into evidence, of, certified copies, of, the apposite sale exemplars, rather beffitingly rendering the apposite sale exemplars being readable in evidence, nor there being any dire necessity, of, the apposite sale exemplars, being proven by the vendee thereof or vendors thereto. Since, the afore sale exemplars hence comprise rather certified copies thereof, hence, both are admissible, and, are also readable in evidence, (iii) dehors neither the vendors thereof, nor vendees thereof, hence, stepping into the witness box, for proving the factum of their valid, and, due execution. However, the probative vigour thereof, would be subsumed, upon, emergence of evidence, hence making trite displays, (iv) that, the sale consideration borne therein, being rigged, given the imminent likelihood, of, the land in proximity thereof, being brought to acquisition. However, the aforesaid evidence is amiss nor the appellant herein ever beffitingly endeavoured, for, hence enabling the making, of, a firm conclusion qua the signatures of the vendors and vendees thereof, as, borne thereon, being fictitious. In aftermath, the due and valid execution, of, the afore sale exemplars, hence, stands, cogently proven.

3. Be that as it may, the apposite statutory notification stood issued, on 8.6.2002, and, the sale exemplar, borne in Ex.P-1, is, of a period prior thereto, inasmuch as, its execution appertains, to 26.8.2000, (i) hence, the principle qua its execution, occurring, in close proximity, in time angle, vis-a-vis, the issuance, of, the statutory notification, rather remains unsatiated, (ii) whereas, the sale exemplar embodied in Ex.P-1, stood executed on 15.2.2001, and, the apposite statutory notification stood issued, in close proximity thereto, inasmuch, as on 8.6.2002, (iii) hence, Ex.P-2 does satiate, the principle of proximity in time angle, inter se the issuance of statutory notification, vis-a-vis, the execution of Ex.P-2. The afore conclusion, vis-a-vis, hence satiation being meted by Ex.P-2, vis-a-vis, principle of proximity in time angle, vis-a-vis, its execution, and, the issuance of the statutory notification, (iv) gathers immense momentum, for, want of adequate evidence, in rebuttal thereof hence remaining unadduced by the respondents, (v) besides, despite, the appellants tendering, it, into evidence, the respondents not adducing any evidence, in display, qua it being discardable, on anvil of Ex.P-2, not satiating, the, secondary principle of proximity in location angle, (vi) principle whereof is anchored, upon, the trite factum of the lands borne therein, holding proximity, vis-a-vis, acquired lands, (vii) thereupon, the respondents stand, concluded to hence acquiesce qua the afore principle also coming to be satiated by the lands, borne in Ex.P-2. In aftermath, the market value of the acquired land, on anvil of Ex.P-2, is assessed in a sum of Rs.20,000/- (Rs.twenty thousand only) per biswa.

4. The learned counsel appearing for the appellants contends, that, no compensation stood assessed, vis-a-vis, five fruit bearing trees, wherefrom he was rearing cash crops worth Rs.40,000/- each, (i) hence, he strives for assessment of compensation in respect of fruit bearing trees, growing upon the acquired land. For sustaining the afore espousal, the learned counsel for the appellants, has relied, upon, the bald depositions of PW-1, and, of PW-2. Both of whom whereof were during the course of their respective cross-examinations, put apposite suggestions qua no fruit growing trees standing, upon the acquired land, nor from each hence cash crop worth Rs.40,000/- per annum, being reared. Dehors, the afore manner of denial of the afore propagation, of the claimant/petitioners/appellants herein, yet it was incumbent upon them to tender into evidence, the best documentary evidence, comprised in the apt receipts, personifying the factum qua, from, each mango tree, theirs rearing, an, income of Rs.40,000/- per annum. However, the afore documentary evidence remained unadduced, hence, non computation of compensation by the learned Reference Court, qua therewith, is, both apt besides tenable.

5. Furthermore, the learned counsel, appearing for the appellants, (i) has strived to seek computation, of compensation, vis-a-vis, damages encumbered, upon, their

unacquired land, abutting the acquired land. However, in respect thereof, apart, from the bald testimony of the claimants, no cogent evidence, hence, making a loud display qua the unacquired land of the landowner, abutting the acquired land, prior to the apposite acquisition, rather rearing immense profit to the landowners, and, after acquisition of land(s), hence, abutting thereto, there being evident diminution of profit. The non adduction, of, the afore best evidence, hence, constrains this Court to conclude, that, no damages accrued or stood encumbered upon the landowners, vis-a-vis, their land(s) abutting the acquired land, hence, no compensation, is assessable, in respect thereof.

6. For the foregoing reasons, the instant appeal is partly allowed and the market value of the acquired land is assessed at Rs.20,000/- (Rs. Twenty thousand only) per biswas, irrespective of the kind, and, nature of the land, at the time of notification issued under Section 4 of the Act, and, the appellants/landowners are also held entitled, to all the statutory benefits, under the Act. Consequently, the impugned award is modified to the above extent only. All pending applications also stand disposed of. No order as to costs.

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

The Land Acquisition Collector and others .....Appellants.
Versus
Kishan Chand ....Respondent.

RFA No. 281 of 2010.
Reserved on : 1st October, 2018.
Decided on : 20th November, 2018.

**Land Acquisition Act, 1894 -** Sections 4 & 36 - Use and occupation charges – Determination – Beneficiary found in actual possession of acquired land since before issuance of Notification under section of 4 of Act – Reference Court granting use and occupation charges at rate of Rs. One Thousand per biga per annum from date of possession (1969) till Notification ( 1989) with interest – Appeal against – State relying on revenue entries showing land as uncultivated indicating that it was not generating any agricultural income – Held, likelihood of land owners making improvements and rendering it cultivable cannot be ignored – Assessment not unreasonable – RFA dismissed. (Paras 5 & 6).

For the Appellants: Mr. Yudhvir Singh and Mr. Vikrant Chandel, Deputy Advocate Generals.
For the Respondent: Mr. Rupinder Singh, Advocate vice Ms. Devyani Sharma, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed against the award rendered by the learned District Judge, Solan, H.P., upon, Land Ref. Pet. No.36-S/4 of 1992, whereunder, he assessed compensation, vis-a-vis, the acquired land, at the rate of Rs.48,000/- per bigha, along with statutory interest accrued thereon, besides assessed use and occupation charges, at the rate of Rs.1000/- per bigha, per annum, from the year 1969, till the date of issuance

of notification, and, upon the afore quantum, of use and occupation charges, interest at the rate of 7.5 % hence stood levied, from, the date of possession, till deposit, of the afore quantum of use and occupation charges.

2. The afore impugned award stood rendered in pursuance to the hereinafter extracted directions, being meted, upon, the learned Reference Court, by this Court while making a decision, upon, RFA No. 114 of 2000, in case titled as LAC & others vs. Kishan Chand:-

> "(i) the appeals are remanded to the Reference Court, i.e. the court of learned District Judge, Solan
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> (ii) On remand, the Reference Court will redetermine the compensation in accordance with the decision in Nartoam Ram v. Land Acquisition collector and others (2002 (3) Shim. L. C.45); Siddappa Vasappa Kuri and another v. Special Land Acquisition Officer and another(2002) 1 SCC 142 and R.L. Jain (D) by Lrs v. DDA and others (2004) SCC 79) and Land Acquisition Officer v. Hemanagouda and others (2205) 12 SCC 443.
>
> (iii) The claimants will be at liberty to establish their claim for reimbursement of money/compensation for use of their property by the State without recourse to proceedings under the Act. For this purpose the claimants as well as the State would be free to adduce evidence in accordance with law. It is clarified that no other evidence except that which is for determination of compensation for use of the land and deprivation of its use by the claimants by the State prior to notification under Section 4 of the Act will be allowed.
>
> (iv) Parties are directed to appear before the learned Reference Court on 18.6.2008. The reference court shall dispose of the matter before 31.3.2009."

3. The learned Deputy Advocate General, has contended with much vigour before this Court (i) that the compensation amount computed, in, a sum of Rs.48,000/- per bigha, falls outside the realm, of evidence, as, exists on record, and, hence, the, computation of compensation, rather meriting interference by this Court. However, the aforesaid contention is rudderless, given the learned Reference Court, while pronouncing a common decision, upon, land reference petitions, bearing No.18-S/4 of 1992, No.8-S/4 of 1992, No.6-S/4 of 1992, No.14-S/4 of 1992, No.15-S/4 of 1992, No.9-S/4 of 1992, No.28-S/4 of 1992, No.30-S/4 of 1992, No.33-2/4 of 1992, No.34-S/4 of 1992, No.36-S/4 of 1992, No.37-S/4 of 1992, No.39-S/4 of 1992, No.40-S/4 of 1992, No.41-S/4 of 1992, No.64-S/4 of 1992, No.67-S/4 of 1992, No.31-S/4 of 1992, No.35-S/4 of 1992, No.66-S/4 of 1992 etc., amongst which land reference petitions, the respondent herein, had also, instituted land reference petition No. 36-S/1992, (ii) rather adjudging compensation borne in a sum o Rs.48,000/- per bigha, (iii) and, in an appeal carried therefrom, by certain aggrieved landowners, this Court, while pronouncing a common decision, upon, the apposite RFA No. 81 of 1993, along with other connected RFAs, rather affirming the common award rendered, by the learned Reference Court, upon, all the apposite land reference petitions, (iv) one amongst whereof, is, the reference petition constituted, before, the learned Reference Court, by the respondent herein.

4. Apart therefrom, also he proceeded to contend with much vigour before this Court, (i) that the computation of the quantum, of, use and occupation charges,

as, made by the learned Reference Court, from, the period commencing, from, the year 1969, upto, the date of issuance of the statutory notification, (ii) being outside the domain, and, ambit of the order, of, remand made to the learned Reference Court. However, the aforesaid contention is also wanting in vigour, (iii) given the hereinabove extracted order of remand made by this Court, to the learned reference Court, rather making a clear echoing qua the claimants, being at liberty, to, establish their claim, for determination of use and occupation charges, for the period whereupto, rather they for possession held,, of, the subsequent therewith acquired lands, hence, stood deprived, of, benefits thereof, (iv) thereupon, when evidence in consonance, with the afore order of remand made by this Court, vis-a-vis, the learned Reference Court, stood also adduced, (v) hence, the computation, of, the monetary value, of, use and occupation charges, as, made by the learned Reference Court, does fall, within the domain, and, ambit of the order of remand made by this Court, vis-a-vis, the learned Reference Court.

5. Nonetheless, the learned Deputy Advocate General, has contended with much fervor, (i) that, the amount of Rs.1000/- per bigha per annum, determined as value of use and occupation charges, from, the period, commencing, from, the year 1969 to the year 1989, being grossly exorbitant, and, exaggerated. He submits that while making the afore computation, the learned Reference Court (ii) ignoring evidence, adduced by the appellants, comprised in the jamabandi, appertaining to the period contemporaneous, to, the taking of possession, vis-a-vis, subsequent therewith acquired lands, (iii) with clear pronouncement(s) borne therein, that, given the acquired lands being uncultivated, (iv) thereupon, the meteing of credence to the deposition of one Shanti Devi qua hers sowing crops, of, tomatoes and ginger, being meritless. However, the aforesaid contention is also rudderless, (v) given assumingly, even if, the apposite lands were uncultivated, and, also if the afore deposition of PW-8 is also unmeritworthy, (vi) nonetheless, the preeminent factum of likelihood of the landowners, upon, making improvements upon the acquired land, hence, rendering it cultivable, and, also rendering it imminently crop bearing, yet being not discardable, (vii) thereupon, the prolonged period of utilization, of the acquired land, from 1969, till its acquisition, under, a statutory notification issued in the year 1989, (viii) obviously entailed making, of, the afore just quantification of damages per bigha per annum, and, nor the levying of interest thereon, is, outside the mandate of law.

6. For the foregoing reasons, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned award is maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Paras Ram .....Appellant/defendant.

Versus

Smt. Pushpa & anr. ....Respondents/Plaintiffs.

RSA No. 358 of 2008 a/w
CMP No. 7045 of 2017.
Reserved on : 30th October, 2018.
Decided on : 20th November, 2018.

**Specific Relief Act, 1963**- Sections 34 & 38 – Suit for declaration and injunction – Trial Court decreeing suit and holding plaintiffs as owner in possession of suit land – Also denying defendant's plea of ownership and possession over said land by observing that their predecessor in interest was not occupancy tenants and he never acquired proprietary rights – First Appellate Court dismissing defendants appeal – Regular Second Appeal – Evidence revealing mutation in favour of predecessor - in - interest of plaintiffs "M" showing him in possession of suit land, attested on basis of some orders passed by Revenue Officers – Such orders however not adduced in evidence - Held – Substitution of entries in favour of "M" was wrong – And revenue entries carried forward in Jamabandies on basis of said mutation do not carry presumption of truth. (Para 9).

**Himachal Pradesh Land Revenue Act, 1954 -** Section 45 – Entries in Periodical records – Conflict between new and old entries - Held, new entries in periodical records if without basis do not have any presumption of truth – In that eventuality, old entries are to be taken as correct. (Para 9).

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| For the Appellant: | Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajit Jaswal, Advocate. |
| For the Respondents: | Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate. |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed against the concurrently recorded verdicts by both the learned Courts below, whereunder, they decreed the plaintiffs' suit, for rendition of a decree, for permanent prohibitory injunction besides in the alternative for rendition, of, a decree, for possession of the suit khasra numbers.

2. Briefly stated the facts of the case are that the plaintiffs filed a suit before the learned trial Court with the averments that the suit land comprised iin Khewat No.24, Khatauni No. 50, and, Khasra No.320 and 321, measuring 0-09-41 hectares situated at Chak Janog-Abal, Pargana Khalagad, Tehsil Theog, District Shimla, is, owned and possessed by them. It was earlier under the tenancy of Motia, and, he was conferred the proprietary rights. His estate was inherited by the plaintiffs and Smt. Dhanko, respectively, as daughters and widow of Sees Ram son of Motia. The estate of Smt. Dhanko has also been inherited by the plaintiffs herein. It has been pleaded that the defendant has no right, title or interest over the suit land, but recently he tried to get his name entered in the column of possession. The Assistant Collector 2nd Grade Settlement, Theog declined to do so and his appeal was also dismissed by the settlement Collector, Shimla, and, the case has been remanded to the Assistant Collector 2nd Grade, Theog for fresh decision. It has been pleaded that the defendant had been threatening to cause interference in the suit land. Hence the suit.

3. The defendant contested the suit and filed written statement, wherein, he has pleaded that in fact Devata Chikhdaishvar is the owner of the suit land, and, the defendant is a tenant under the "deity". Earlier Sadh, father of the defendant and prior to him grand father of the defendant were tenant under the 'deity'. This land was earlier shown by Khasra No.37. Sadh used to render services to 'deity' and used to pay 1/4th of the land revenue of this land. The Kardar of Devata Chikhdaishvare took the services of "pooja" etc. from Sadh and Kapuru and gave this land for cultivation to them. So they were

in settled possession of the suit land, during their life time. It is denied that the plaintiffs ever remained in possession of the suit land. The entries in the name of Motia are wrong.

4. The plaintiffs filed replication to the written statement of the defendant, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiffs are entitled for relief of injunction? OPP.
2. Whether plaintiffs in alternative are entitled for the relief of possession? OPP.
3. Whether Devata Chikhdaishvar is owner of suit land and defendant Maurusee tenant under him, as alleged?OPD.
4. Whether Sh. Motia was tenant of suit land, and, was conferred proprietary rights by compensation officer, vide order dated 31.8.1967, as alleged? OPP.
5. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court hence decreed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom, by the defendant/appellant herein before the learned First Appellate Court, the latter Court dismissed the appeal, and, affirmed the findings recorded by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein, he assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 30.06.2006, this Court, admitted the appeal instituted by the defendant/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the property belonged to the Deity under the management of Kardar showing Shri Sadh and others the predecessor-in-interest of defendant-appellant to be the occupancy tenant, have not both the courts below acted in erroneous, illegal and perverse manner in relying upon the revenue entries, which were not proved to be lawfully substituted to hold that Shri Motia was non occupancy tenant, especially when there was no evidence adduced by the plaintiffs to show the lawful basis of substitution of the entries?

b) Whether both the Courts below have misread the revenue entries, presumption to which was duly rebutted and on the basis of conflict in the earlier and lateral entries and on account of plaintiff having failed to prove the lawful substitution of the entries of Shri Motia as a non occupancy tenant, have not both the Courts below acted in erroneous and perverse manner in putting reliance on such entries which had no legal value?

c) Whether both the Courts below have ignored the principle of law that the mutation does not confer any title and Lower Appellate Court relying upon the judgment which had no applicability to hold that order of conferment of proprietary rights cannot be challenged after such a long period, has not the Lower Appellate Court acted in erroneous, illegal and perverse manner in ignoring that the order passed by Assistant Collector Second Grade was without jurisdiction and the copy of the order was not placed on record by the plaintiff?

**Substantial questions of Law No.1 to 3:**

8. The material res controversia engaging the parties at contest, is, centered upon (a) the validity of the contested substitution, in the year 1966-67, in the apposite column, of, possession, of, the jamabandi apposite vis-a-vis, the suit land, of one Sadh, the predecessor-in-interest of the defendant, by one Motia, the predecessor-in-interest of the plaintiffs; (b) the validity of mutation bearing No. 220, mutation whereof stood hence attested, on, 31.8.1967, whereunder, the apt proprietary rights were, as reflected in Ex.P-5, stood, attested, vis-a-vis, the suit land, qua the afore Motia.

9. The afore contested substitution, as, stood further carried in the apt revenue records, does, prima facie, hence carry a rebutable presumption of truth. However, for the afore presumption of truth, assignable to the entries, occurring, in the revenue records, rather acquiring, an, enhanced aura of validity, thereupon, the revenue records were enjoined to make, a, clear display (i) qua the substitution of Motia, the predecessor-in-interest of the plaintiffs, in place of one Sadh, the predecessor-in-interest of the defendant, being a sequel of valid orders being rendered hence by the competent Revenue Officer. However, the aforesaid orders remained unadduced into evidence. Consequently, for want of existence on record, of, rendition, of, any valid order, rather by the competent Revenue Officer, whereafter, the apt substitution of Motia, in the revenue records, rather occurred, (a) thereupon, rather renders his substitution to hold no legal validity, rather hence the presumption of truth, ascribed to the afore substitution,and, carried aforesaid, in the revenue records, hence, getting eroded and dislodged. (b) Particularly, when all the jamabandis appertaining to the suit land, and, borne in Exts. D-2, D-3, D-4, D-5 and Ex. D-6, stood, prepared prior to the contested jamabandi(s) borne in Ex.P-1 and P-2, and, they rather make a candid display qua the predecessor-in-interest of the defendant, hence being recorded, as, a tenant under the land owner. However, the effect of the afore purported inefficacies, of, the afore narrations, borne in the revenue records, is espoused by the counsel for the respondents/plaintiffs, to hence stand benumbed by (i) the attestation of mutation No.220, recorded on 31.8.1967, and, borne in Ex.P-5, whereunder, the apt proprietary rights were conferred, upon, one Motia, the predecessor-in-interest of the plaintiffs. However, the aforesaid submission cannot gather any weight, (a) given, the simplicitor attestation, of, the afore mutation, whereunder, hence, proprietary rights, stood conferred upon one Motia, visibly appearing, to, stand recorded, in, a slip shod manner, and, also in its making, rather it relegating into, the, oblivion of insignificance, the, prior thereto entries, occurring in the revenue records, whereunder, the predecessor-in-interest of the defendant, was, recorded to be in possession, of, the suit khasra number. The afore non attribution of sanctity, to, the afore prior thereto apt entries existing in the revenue records, by, the Officer concerned, who attested mutation No. 220, whereunder, proprietary rights were conferred, upon, the predecessor-in-interest of the plaintiff, would acquire tenacity, (b) reiteratedly, upon, the Revenue Officer concerned, evidently bearing in mind, the factum qua any valid apt substitution, rather occurring, (c) thereupon, existence on

record of the apt order, rendered by the Revenue Officer concerned, whereunder, the apt contested substitution occurred, rather was imperative, especially, in contemporaneity, vis-a-vis, its making. However, re-emphasisingly, the afore purported valid order of substitution remained rather unadduced into evidence, and, therefrom, it is to be concluded, that, the mere attestation of mutation No.220 on 31.08.1967, hence wanting in legal vigour, and, nor per se on its making any inference being drawable qua the apt contested substitution, hence, acquiring, any, sanctified aura of validity.

10. During the pendency of the instant appeal before this Court, the learned counsel appearing for the appellant, has, through casting an application, borne under the provisions of Order 41, Rule 27 of the CPC, application whereof, bears CMP No. 7045 of 2017, (i) hence strived to seek leave of this Court to place on record certain orders rendered by the Compensation Officer, (ii) orders whereof appear to stand rendered in contemporaneity, vis-a-vis, the attestation, of, the apt mutation, (iii) and, also has strived to seek leave of this Court, to adduce into evidence, the compensation amount, tendered by the predecessor-in-interest of the plaintiffs, in pursuance to the orders borne in Annexures A-1 to A-4, Annexures, whereof, are, appended with the application at hand. His strivings hence, for, seeking the leave of this Court to place on record the afore documents, appears, to, hence sanctify, mutation No.220, and, also appears to, hence, validate the apt contested substitution. Even though, application bearing CMP No. 7045 of 2017, stands belatedly instituted before this Court, yet, the mere belated institution of the afore application, would not bar this Court to grant, the, apposite leave to the applicants/plaintiffs, (iv) conspicuously, upon, this Court being satisfied that, upon, the apt leave being granted to the applicants/plaintiffs, it, being facilitated to render clinching findings, upon, the afore material *res controversia*, and, hence, there adduction into evidence being just and essential, for, resting the apt controversy. Even though, the pronouncements, occurring in Annexures A-1 to A-4, do make portrayals, that an order being rendered by the Compensation Officer, for conferment of proprietary rights, upon, the predecessor-in-interest of the plaintiffs, (v) yet therein occurs, no narration that the afore contested substitution, standing, therein either alluded to, or standing meted adjudication, (vi) whereas, the occurrence, of, the afore pronouncement therein, vis-a-vis, the afore facet, rather was an utmost dire necessity, for, making, a, firm conclusion, that, the afore annexures, hence, establishing the factum, that, the apt contested substitution hence was validly made, and, also the afore mutation, hence, standing validly attested, in, pursuance thereof. Contrarily, even though the afore Annexures, appear, to stand, rendered in discharge of official duty(ies), hence, acquire, a, rebuttable presumption of truth, (vii) yet with the afore apt echoings remaining uncommunicated therein, also, with an apt valid order, for hence sanctifying the apposite contested substitution, being enjoined to stand adduced earlier or appended with the application at hand, (viii) given appendings thereof being of critical importance, whereas all afore rather remaining unappended. Consequently, the rebuttable presumption, of, truth qua hence the afore being recorded, by a public servant, during discharge, of his official duties, rather stands hence rebutted. It appears that the afore annexures appended with the application at hand also alike the making of an inapt contested substitution, rather standing perfunctorily rendered, by the revenue officer concerned, without his ensuring, that, the apt contested substitutions, rather being evidently preceded, by rendition, of, an apt valid order. Consequently, the leave as prayed for, stands declined, and, in sequel, CMP No. 7045 hence stands 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 being not based upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned Courts below have excluded germane and apposite material from consideration.

Substantial questions of law No.1 to 3, are answered in favour of the appellant/defendant, and, against the respondents/plaintiffs.

12. In view of above discussion, the instant appeal is allowed. In sequel, the plaintiff's suit is dismissed and the concurrently recorded judgment(s) and decree(s) by both the learned Courts below are set aside. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Harpreet Singh .....Appellant/Plaintiff.
Versus
Subhash Chand ....Respondent/defendant.

RSA No. 246 of 2008.
Reserved on : 31st October, 2018.
Decided on :20th November, 2018.

**Specific Relief Act, 1963** – Sections 5 & 39 – Possession and mandatory injunction – Grant of – Plaintiff filing suit for possession of land allegedly encroached by defendant by way of construction – Plaintiff relying upon demarcation report – Trial Court dismissing suit and first Appellate Court dismissing appeal also – Regular Second Appeal – Demarcation report relied upon by plaintiff found to have been held invalid in previous litigation inter se parties – Previous decree attained finality – Held, suit based on such demarcation report righty dismissed by Court – Regular Second Appeal dismissed. (Paras 9 & 10).

For the Appellant: Mr. Dinesh Bhanot, Advocate.
For the Respondent: Mr. J.R. Poswal, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed against the concurrently recorded verdicts by both the learned Courts below, whereunder, they dismissed the plaintiff's suit for rendition of a decree, for permanent prohibitory injunction besides in the alternative for rendition, of, a decree, for mandatory injunction, and, for possession of the suit khasra numbers.

2. Briefly stated the facts of the case are that the plaintiff claimed himself to be owner in possession of land bearing Khasra No.432, situated in Mini Secretariat, Nalagarh and that the alleged encroachment of the suit land to the extent of 1.16 square meters, 5.80 meters in length 0.20 meters in width by the defendant and on which the defendant was alleged to have raised walls of his shops. The defendant was stated to have purchased the land measuring 173.99 sq. meters, but has wrongly and illegally raised the wall on the old foundation of the plaintiff by way of encroachment and for removal of the encroachment and for possession, the suit was filed by the defendant.

3. The defendant contested the suit and filed written statement, wherein, he had denied the claim of the plaintiff. The defendant through admitted of his having purchasing the land measuring 173.99 square meters but denied having made any encroachment on the land of the plaintiff. He leveled counter allegations and denied the making of any encroachment by raising wall on the existed foundation. It was alleged that the plaintiff used the wall of the defendant without raising his own walls. It was also alleged that he had also filed a suit earlier against the plaintiff and the present suit is not maintainable and the earlier suit between the parties is pending and prayed for dismissal of the suit.

4. The plaintiff filed replication to the written statement of the defendant, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is owner of the suit land? OPP.
2. Whether the defendant has encroached upon the suit land without any right title or interest? OPP
3. Whether the suit is not maintainable? OPD.
4. Whether the plaintiff is having no locus standi? OPD.
5. Whether the plaintiff has no come to the court with clean hands?OPD.
6. Relief.

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

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein, he assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 17.12.2008, 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 both the learned Courts below have misread and mis-interpreted the documentary evidence on the record and has come to a conclusion which is not sustainable in the eyes of law?

b) Whether the failure of the Lower Appellate Court in not getting the are of 41.34 sq. meters demarcated has resulted in the miscarriage of justice, if so the appeal deserves to be allowed remanded back to the Lower Appellate Court?

c) Whether the ld. Lower Appellate Court has failed to take into consideration the finding of the ld. Trial Court on issue No.1 and issue No.2, if so its effect?

**Substantial questions of Law No.1 to 3:**

8. The plaintiff's suit, whereunder, he sought rendition of a decree of permanent prohibitory injunction, and, of mandatory injunction, vis-a-vis, the suit khasra numbers, is, anvilled, upon, a demarcation report, borne in Ex.P-4. The efficacy of the afore demarcation report, embodied in Ex.P-4, (a) is, omnibusly eroded, given, in an earlier litigation, inter se the parties at contest, and, appertaining to suit khasra numbers, Khasra number whereof, visibly holds analogity, vis-a-vis, the khasra number hereat; (b) in suit whereof, the plaintiff herein was arrayed as defendant; (c) a conclusive verdict standing rendered thereon, whereunder, the hereat defendant, therein suing, as, plaintiff, hence, succeeded, in obtaining a decree for permanent prohibitory injunction, vis-a-vis, the suit khasra number(s), (d) and, the afore demarcation report stood adduced therein into evidence, and, rather stood pronounced to be infirm. Fortifying conclusivity to the judgments, and, decrees rendered respectively, by, the learned trial Court, and, the learned First Appellate Court, verdicts whereof stand respectively borne in Ex. D-1, and, in Ex.PA, is, acquired (i) by the factum of the verdict, of, dismissal of the review petition, by the learned First Appellate Court, as stood, reared therebefore, against the pronouncement, borne in EX.PA, rather standing affirmed by this Court, in, a verdict rendered upon C.R. No.70 of 2007, wherethrough, the order of dismissal of the review petition, directed, against the verdict borne in Ex.PA, hence, stood assailed. In aftermath, with immense formidable conclusivity, standing, acquired by Ex.PA, and, with the suit khasra numbers in both, the earlier suit, and, in the extant suit being similar, and, besides the apt litigating parties also holding analogity, (ii) thereupon, the principle of res judicata is attractable, vis-a-vis, the extant plaintiff' suit, (iii) conspicuously, when the reliance in the instant suit, is, anvilled upon Ex.P-4, exhibit whereof, comprises, a, demarcation report, reliance whereon also stood placed, in, the earlier suit, and, rather stood rejected, (iv) thereupon, on anvill of Ex.P-4, no decree being renderable, vis-a-vis, the suit khasra numbers, and, qua the plaintiff.

9. Be that as it may, the learned counsel for the appellant, has, contended with much vigour, that, dehors any purported lack of tenacity being bestowable, upon, Ex.P-4, yet with Ex.P-4, comprising a demarcation report, rendered by the Demarcating Officer concerned, during, the pendency of the suit, and, with occurrence therein, of, echoings rather holding leanings towards the plaintiff, and, hence, on anvill thereof, the plaintiff's suit being decreeable. However, any reliance thereupon, at this stage hence is misplaced, (i) given the parties, recording a compromise, borne in Ex.P-14, and,on anvill thereof, the Assistant Collector 2nd Grade concerned, opining, that, hence with the compromise occurring, inter se, the litigating parties, (ii) thereupon, the report is not "Kable Samayat", and, also with the contesting parties not placing tenacious reliance, upon, Ex.P-10, and, upon Ex.P-14, (iii) thereupon, the placing, of, any reliance thereon, at this belated stage is inapt, more so, when as aptly concurrently concluded by both the learned Courts below qua the report borne in Ex.P-10, being drawn in gross transgression, of, the mandate contained in the H.P. Land Records Manual.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court being based upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned Courts below have not excluded germane and apposite material from consideration. Substantial questions of law No.1 to 3, are answered in favour of the respondent/defendant, and, against the appellant/plaintiff.

11. In view of above discussion, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the concurrently recorded judgment(s) and decree(s) by both the learned Courts below are affirmed and maintained. Decree sheet be

prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Sunder Lal .....Appellant/Plaintiff.
Versus
Sh. Ravinder Singh ....Respondent/Defendant.

RSA No. 351 of 2005.
Reserved on : 16th November, 2018.
Decided on : 20th November, 2018.

**Joint land** – Rights inter se of Co- sharers – Held – Co-sharer can raise construction over joint land either with consent of all other co-sharers or he can raise construction within his share over land in his possession provided it is not over best or valuable portion of joint property. (Para 8)

For the Appellant: Mr. G.D. Verma, Sr. Advocate with
Mr. B.C. Verma, Advocate.
For the Respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal is directed against the verdict recorded, upon, Civil Appeal No. 54 of 2004 by the learned District Judge, Kinnaur Civil Division at Rampur Bushahr, H.P., whereunder, he reversed the verdict recorded, upon, Civil Suit No. 67-1 of 2003, by the learned Civil Judge, (Junior Division), Rampur Bushahr, and, dismissed the plaintiff's suit.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for permanent prohibitory injunction against the defendant on he averments that his brother Surinder Kumar and himself on 28.10.1998 had purchased 1/10 the share in the land described in Khasra No.1557 measuring 0-31-105 hectare situate in Up Mohal Singla for Rs.25,000/- from Sh. Kesari Dass., Mutation on the strength of sale deed of 28.10.1998 stood sanctioned in favour of the plaintiff and his brother on 2.1.1999. After the execution of sale deed, Shri Kesari Dass had handed over possession of a definite and specific portion of Khasra No.1557 to the plaintiff. Shri Surinder Kumar had relinquished his share in sale deed dated 28.10.1998 in favour of the plaintiff. As such, the plaintiff ha been absolute owner in possession of 1/10th share in the suit property. In field map, the plaintiff had been recorded owner in possession of Khasra No.2872/1557/2/1 measuring 0-03-50 hectare. The plaintiff avers that he had constructed his house in the suit land described in Khasra No.2872/1557/2/1 in February, 2000. It has been pleaded that Shri Kesari Dass had sold a definite and specific portion of Khasra No.1557 to Sh. Tula Ram, Ishwar Lal, Kamla Devi and Shakuntla Devi vide field map of 31.7.1992. Thereafter Shri Ishwar Lal and Kamla Devi had sold their definite entire share in Khasra No.1557 to one Sh. Basant Lal. It

is averred that on 20.9.2002, Sh. Basant Lal had sold his definite share of Khasra No.1557 to the defendant. Mutation on the strength of sale deed of 20.9.2002, had been attested in favour of the defendant on 24.9.2002. The defendant is stated to be owner in possession of Khasra No. 1557/1/1 as a result of partition between him, Tula Ram and Shankutla Devi. Mutation of partition in between the defendant, Tula Ram and Shakulta Devi had been attested on 7.10.2002. The defendant was stated to have started construction in his Khasra No. 1557/1/1 and had extended his construction into a portion of Khasra No. 2872/1557/2/1/ as per site plant Ex.PW3/A. The defendant had extended steel bars into a portion of land owned and possessed by the plaintiff. The plaintiff had requested the defendant not to encroach upon the suit land as per field map Ex.PW3/A but without any result. The plaintiff says that plot of defendant abutted NH-22 to the extent of 7 meters. As against this, the defendant had covered area measuring 13 meters abutting NH-22 in the area of Up Mohal Singla. The defendant was sought to be restrained from encroaching upon the suit land by issuance of a decree of permanent prohibitory injunction.

3. The defendant contested the suit and filed written statement, wherein, he had admitted the ownership and possession of the plaintiff upon land bearing Khasra No.2872/1557/2/1. The plaintiff had not completed construction of his house in February, 2000. It had been stated that the plaintiff had started construction of his house in his own land in November, 2002. The plaintiff had started the construction without the sanction of the competent authority. The defendant had stated having purchased khasra No.1557/1/1 from Sh. Basant Lal. The defendant had denied of his having in any way encroached upon Khasra No.2872/1557/2/1. The defendant had averred that the plaintiff wanted access from his house to NH-22 through the land of the defendant. The house of the plaintiff was not directly approachable from NH-22. As against this, the plot and house of the defendant abutted NH-22. When the defendant had refused to provide direct access to NH-22 to the plaintiff, false and frivolous suit had been instituted against him by the plaintiff. The plaintiff was not entitled to any relief much less to the discretionary relief of permanent and prohibitory injunction.

4. The plaintiff filed replication to the written statement of the defendant, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether portion of the land depicted by red ink in the annexed site plan, forms part of Khasra No.2872/1557/2/1, as alleged?OPP.
2. If issue No.1, is proved in the affirmative, whether the defendant is trying to usurp that portion of land, as alleged?OPP.
3. If issue No.2 is proved in the affirmative, whether the plaintiff is entitled to the relief of perpetual injunction, as prayed?
4. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom, by, the defendant/respondent herein, before the learned First Appellate Court,

the latter Court allowed, the, appeal, and, reversed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 15th July, 2005, admitted the appeal instituted by the plaintiff/appellant, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the ld. District Judge has acted illegally by failure to allow application under Order 26, Rule 9 CPC for appointment of Local Commissioner for determination of boundaries and to ascertain the extent of encroachment made by Respondent over land of Plaintiff over the area as recorded against Khasra No.2872/1557/2/1 and thereby he has failed to comply with law as laid down by this Hon'ble Court reported in 2000(1) SLJ 430 and AIR 2003 HP 87?

b) Whether the plaintiff having been found to be exclusive owner in Khasra No.2872/1557/2/1 and which fact is clear from Tatima PW1/H and mutation No. Ex.PW1/B and Jamabandi, Ex.PW1/A, therefore, the plaintiff is entitled to relief of declaration that he is owner of this land and decree is required to be passed for removal of encroachment found to have been made by respondent?

c) Whether findings as recorded by learned District Judge are vague and he has failed to exercise jurisdiction for determination of dispute in accordance with law and findings are vitiated on account of misreading and misconstruction of material on record and also for failure to comply with prescribed procedure and law as laid down by this Court?

**Substantial questions of Law No.1 to 3:**

8. A perusal of jamabandi appertaining tot he suit land, and, as embodied in Ex.PW1/A (i) hence makes, a, palpable disclosure qua the suit kahsra number being undivided. Consequently, till occurrence, of, a valid dismemberment of the suit khasra number, thereupto, none of the co-owners holds any absolute indefeasible right, to exclusively hence appropriate or use any portion of the undivided suit property,(ii) as, affording of the aforesaid leeway to the co-owners concerned would rather beget eroding, of, the basic rubric ingraining, the concept of joint undivided suit property, (iii) salient canon whereof, is, grooved, in, the further salient underlying principle qua till a valid dismemberment of the undivided joint property, hence occurs, each co-owner holding unity of title, and, community of possession, vis-a-vis, the apposite joint suit property, unless, (a) the construction(s) carried thereon or user(s) thereof, as, made by any co-owner, being consented, by all the co-owners; (b) the aggrieved co-owner also exclusively utilizing a portion of the undivided suit property, (c) utilization by the co-owner concerned, of, a part of the undivided suit property hence falling within his share, in, the undivided suit property, (iv) and its not comprising, the, best, and, valuable portion of the undivided joint suit property.

9. Be that as it may, a presumption of truth is garnered by EX.PW1/A, (i) and, though Ex.PW1/A makes a disclosure qua dismemberment of the joint estate purportedly therethrough hence occurring, and, wherethrough, the, plaintiff hence stood allotted a

specific field number, (ii) yet, no efficacy can be assigned thereto, as no order has been placed, on record, whereunder the afore dismemberment, as, borne in Ex.PW1/A, hence validly occurred. Consequently, the presumption of truth assigned to EX.PW1/A, stands undislodged and unrebutted, and, concomitant effect thereof, is that, (iii) till any valid dismemberment, of, the joint estate hence occurs, none of the parties being bestowed with any indefeasible right, to, rather utilize the undivided suit khasra number. Even though, the afore ascriptions of conclusivity, vis-a-vis, the reflections borne in Ex/.PW1/A, would entitle the plaintiff to claim rendition of a decree for permanent prohibitory injunction, hence, being pronounced against the defendant. However, the predominant factor which is to be borne in mind, for, refusing relief, to, the plaintiff, (iv) is comprised in the factum of the plaintiff completing construction, of, his house upon the undivided suit khasra number, and, when it has not been demonstrated, that, in the defendant raising construction, upon, a portion, of, the undivided suit khasra numbers, his hence utilizing any portion, of, the undivided suit property, hence apparently falling beyond the domain of his share therein, (v) nor when evidence stood adduced, qua, the defendant utilizing a valuable portion of the suit property, (vi) consequently, the ensuing effects, are qua, when the equitable relief of permanent prohibitory injunction, enjoins, qua none of the parties to the lis, rather evidently disturbing equities, (vii) whereas, with the plaintiff raising construction, upon, a part, of, the undivided suit property, and, when the defendant is not proven, to raise construction, beyond, the domain of his share therein, nor he is shown to raise construction, upon, a valuable portion of the undivided suit property, (ix) thereupon, ex-facie equities, and, estoppel both are loaded against the plaintiff, and, rather are leaned, vis-a-vis, the defendant, with the concomitant effect, that, the rendition of a decree of permanent prohibitory injunction, vis-a-vis, the plaintiff would be grossly inapt, as tenably, done by the learned First Appellate Court.

10. Be that as it may, the plaintiff had contended that the defendant, had, while raising construction,hence proceeded to encroach, upon, a portion of the property, hence, falling within his share in the undivided suit property, and, he also prayed for appointment of, a, local commissioner, for determining the afore factum. The afore relief was tenably declined by the learned First Appellate Court, as no pleading in consonance therewith stood cast in the plaint, nor any relief in consonance therewith, stood espoused in the plaint, nor any leave for making the afore amendment was hence concerted by the plaintiff, by his casting, an application, under, the provisions of Order 6, Rule 17 of the CPC. The effects of the aforesaid omissions, are, qua the afore relief(s) hence standing tenably declined. However, upon, a valid dismemberment of the joint estate, it is open, to, the plaintiff, to, in accordance with law, hence, institute a fresh suit for rendition, of, a decree for mandatory injunction, against, the defendant.

11. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court hence being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, all the substantial questions of law, are, answered in favour of the respondent/defendant, and, against the plaintiff/appellant.

12. In view of the above discussion, there is no merit in the instant appeal and it is dismissed accordingly. Consequently, the judgment and decree rendered by the learned First Appellate Court, upon Civil Appeal No. 54 of 2004 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Bala Ram (since deceased) through his legal heirs .....Appellants/defendants.
Versus
Smt. Dassi Devi ..Respondent/Plaintiff.

RSA No. 405 of 2003.
Reserved on : 14th November, 2018.
Decided on : 20th November, 2018.

**Co-sharers** – Joint land – Sale of specific portion of land from joint Khata – Nature – Held, sale of specific portion of land from joint Khata amounts to sale of undivided share – Vendee becomes co-sharer with all corresponding rights and liabilities vis-a- vis other co- sharers. (Para 8)

For the Appellants: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the Respondent: Mr. R.K. Bawa, Sr. Advocate with Mr. Jeevesh Sharma, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the impugned verdict recorded, upon, Civil Appeal No.14 of 2003, by the learned First Appellate Court, whereby, it reversed the verdict pronounced by the learned trial Court, upon, Civil Suit No.57-1 of 2000, whereunder, the latter Court, had, dismissed the plaintiff's suit, for rendition of a decree, for, perpetual injunction, and, for mandatory injunction, and, rather the learned First Appellate Court hence partly allowed the plaintiff's appeal, vis-a-vis, rendition of a decree for perpetual injunction, (a) whereas, it declined relief qua rendition of a decree for mandatory injunction, vis-a-vis, the construction raised, upon, the contentious suit khasra numbers, till, the occurrence, of, a valid partition qua the undivided estate, hence inter se the contesting parties.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for perpetual injunction restraining the defendants from raising any construction on the land comprised in Khata/Khtauni No. 116/326 min, Khasra No.864, measuring 0-07-17 hectare, situated in village Tayawal, PO Jeori, Teh. Rampur Bushahr, District Shimla, H.P., and, for mandatory injunction for demolition of the structure illegally raised on the suit land. It has been pleaded that the suit is shown in the ownership of the plaintiff and Chhergu and son and daughter of the plaintiff and the land is in joint ownership and possession of the co-sharers and that the land has been wrongly shown in possession of the chhergu co-sharer in the column of possession. It has been further pleaded that Sh. Chhergu co-sharer during the year 1999 sold half share of Khasra No.865/2/1 measuring 0-01-12 hectare to the defendants and mutation to this effect was attested and as per the averments in the sale deed and the mutation attested thereafter, the defendants were put in possession of this land. It has been further pleaded that as per the share of Chhergu the total land which comes to his share is 0-01-28 hectare out of this Chhergu has already sold land comprised in Khasra No.865/1, measuring 0-00-40 hectare to one Dila Ram and only 0-00-88 hectare remained in is share and that the defendants were ought to raise construction on more than

the share of Sh. Chhergu which he could sell and for that reason suit for perpetual injunction was filed by the plaintiff and her son Sohan Lal against the defendants. It has been further pleaded that during the pendency of the suit, defendant No.1 made false complaint against the plaintiff and her son with the police at Jhakri and the Dy. S.P. Jhakri along with the police visited the spot and directed the parties to get the land verified and when the Patwari visited the spot and measured the land, it was revealed that the defendants have raised the construction on khasra No. 864 instead of Khasra No.865/2/1 and the plaintiff then abandoned that suit. It has been further pleaded that the defendants despite the fact told by the Patwari did not agree to stop the construction on Khasra No.864 on which khasra they have no right and title and that the defendants are co-sharer so far Khasra No.865/2 is concerned. It has been further pleaded that the land is in joint ownership of plaintiff and the other co-sharers and is not yet partitioned and the widow of Chhergu has filed a partition application before the A.C.1st Grad, Rampur which is pending. It has been further pleaded that as the land has been purchased jointly by the defendants comprised in Khasra No.865/2/1, therefore, all the three purchasers have been made party in the suit but factually the hero of the whole show is defendant No.1 and that the defendant No.1 illegally encroached upon part of Khasra No.864 and started raising the construction on the suit land knowing fully well that he and his sons, i.e. defendants No.2 and 3 have no right and title in the suit land. It has been further pleaded that the plaintiff and her son and daughter are entitled to half share in the suit land and factually the suit land is in possession of the plaintiff and her son and the entries in the column of possession have been wrongly made in favour of Chhergu. It has been further pleaded that the plaintiff shall suffer irreparable loss and injury which cannot be measured in terms of money in case the defendants are not restrained from raising any further construction on the suit land and the construction illegaly raised is not demolished. Hence the suit.

3. The defendants contested the suit and filed written statement, wherein, they have pleaded that he entries qua khasra No.864, situated in village Tayawal are not correct as per the spot position as the said khasra number along with khasra number 865 was allotted to Sh. Chhergu in family partition about 40 years back and since then late Sh. Chhergu has been coming in exclusive possession of Khasra No.864 and 865. It has been further pleaded that Khasra No.865/2/1 stands sold in favour of the defendants by late Sh. Chhergu but the spot on which construction has been raised by the defendants is the same which was shown and possession of which was delivered on the spot by late Sh. Chhergu to the defendants. It has been further pleaded that late Sh. Chhergu being exclusive owner in possession of Khasra No.864 and 865 was within his power and entitled to sell even the entire khasra number, where the plaintiff along with one Sh. Sohan and Shanta Devi are in possession of Khasra No.749, 862 and 863 and the said khasra numbers in their possession are much more than their share in the entire khata. It has been further pleaded that the spot was not visited by the Patwari and the land was not measured and in fact Patwari is not entitled to give demarcation of the land, and, therefore, in case any such demarcation given by the Patwari is illegal. It has been further pleaded that the plaintiff has no right, title and interest to stop the defendants from raising construction over Khasra Nos. 864 and 865 in any way. It has been further pleaded that the plaintiff and her sons are not in possession of Khasra No. 864 and 865 and did not remain in possession at any point of time. It has been further pleaded that partition took place about 40 years ago.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled for the decree of perpetual injunction, as prayed for?OPP.
2. Whether the plaintiff is entitled to a decree of mandatory injunction as prayed for?OPP.
3. Whether the suit land, i.e. Khasra No.864 and 865 fall in the share of Chhergu in family partition?OPD.
4. Whether Chhergu had sold the suit land to the defendants?OPD.
5. Whether Chhergu has delivered the possession of suit land, i.e. Khasra No.865 and 864 to the defendants?OPD.
6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom by the plaintiff/respondent herein before the learned First Appellate Court, the latter Court partly allowed the appeal, and, modified 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, on 12.07.2004, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

a) Whether the 1st Appellate Court has misread and misinterpreted the documents P-1 and PX thereby misleading it to come to a right conclusion?

b) Whether the 1st Appellate Court has misconstrued the legal position qua the rights of co-sharers to sell/transfer the land?

**Substantial questions of Law No.1 to 2:**

8. The learned counsel appearing for the appellant has contended with much vigour before this Court (i) that with the defendants under Ex.P-4, exhibit whereof comprises a sale deed executed inter se them with one Chhergu, (ii) and, with the afore exhibit containing recitals, vis-a-vis, a specific portion of land, being alienated thereunder, (iii)and, when in pursuance to the afore exhibit, mutation borne in Ex.P-1, also stood, hence attested by the revenue officers concerned, with, categorical communication(s) borne therein qua (a) within his share , the aforesaid Chhergu alienating the suit property, vis-a-vis, the appellants, (b) besides Categorical communications akin, vis-a-vis, the recitals borne in Ex.P-4, also occurring therein, (c) besides when tatima, is also reflected in Ex.P-1, with clear disclosures therein qua a specific portion of the undivided suit property rather being mutated, vis-a-vis, the defendants/appellants,(d) thereupon, the counsel for the defendants/appellants has contended with much vigour that (e) hence the presumption of truth attached to the revenue entries, as, borne in Ex.DW1/A, exhibit whereof appertains to the suit khasra numbers, and, with a clear manifestation borne therein, qua the suit property, inclusive of the contentious suit khasra numbers, being undivided inter se the

parties at contest, rather, coming to be dislodged, (f) and, even when no mutation with respect to the family partition which purportedly occurred, inter se, the afore Chheragu, and, his other family members, qua, the undivided suit property, thereupon, its non attestation, renders, not, underwhelmed, the afore communication borne in Ex.P-1. However, the aforesaid contention is meritless, for, the reason, (a) the recitals borne in Ex.P-1 qua Chheragu hence alienating a specific portion of the undivided suit property, and, any tatima appended thereto, and, also the latter in tandem therewith, hence carrying akin reflections, cannot, render unnecessary, the dire and grave legal necessity, of, dismemberment of the joint estate, rather occurring only in pursuance, to, a valid order of partition, hence being pronounced, vis-a-vis, the joint undivided suit khasra numbers; (b) compatibly, hence, the order, of mutation borne in Ex.P-1, holding therewithin hence echoings akin to the one borne in Ex.P-4 also likewise, cannot acquire, any validity, nor hence the presumption of truth ascribed to the revenue entries borne in jamabandi Ex.DW1/A, also cannot be construed hence to be either dislodged or overcome. The further effect of the aforesaid inferences is qua, when no valid dismemberment, of, the joint estate has occurred, (i) thereupon, even if defendants/appellants, are holding settled possession of a specific portion, of the undivided joint suit property, their possession thereof, is, irrelevant, for constraining this Court to decline relief, of, permanent prohibitory injunction, (ii) given any declining to the plaintiff of the aforesaid relief rather tantamounting qua this Court rather rendering hence nugatory the trite principle, underlining, the jurisprudential concept of joint ownership, (iii) principle whereof is anchored, upon, the salient canon qua till occurrence, of a valid dismemberment, of, the joint estate inter se all the co-owners concerned, thereupto, all the co-owners holding unity of title and community of possession, vis-a-vis, every inch, of, the apposite undivided joint estate, (iv) and, with the further corollary qua possession of any portion of the undivided suit property, by any co-owner, being construable to be his, hence, vicariously holding possession thereof, on, behalf of other co-owners, (v) and, also his settled possession rather not bestowing any legal entitlement qua him, to claim, that, the aggrieved co-owners being not entitled, for rendition, of, a decree, of, permanent prohibitory injunction, (vi) unless, evidence erupts qua the possession of any co-owner, vis-a-vis, any undivided suit property, is, with the evident consent of other co-owners in the joint khata. Since, vis-a-vis, the afore excepting cannons qua the afore jurisprudential concept, of, joint ownership, no, satiating therewith, hence, evidence stands adduced, thereupon, the rendition, of, a decree of injunction qua the plaintiff, is not wanting in legal vigour.

9. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondent/plaintiff, and, against the defendants/appellants.

10. In view of the above discussion, there is no merit in the instant Regular Second Appeal, and, it is dismissed accordingly. In sequel, the judgement and decree rendered by the learned District Judge, Kinnaur Civil Division at Rampur Pushahr, H.P., upon, Civil Appeal No. 14 of 2003, is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Baldev Singh .....Appellant
Versus
State of H.P. ...Respondent

Cr. Appeal No. 96 of 2016
Reserved on : 21.11.2018
Decided on: 26.11. 2018

**Indian Penal Code, 1872**- Sections 376 and 506 – Rape and criminal intimidation – Proof – Trial Court convicting and sentencing father-in-Law of raping his daughter-in-Law solely on basis of statement of victim and medical evidence – Allegations against accused being that he had been raping victim on pretext of curing her while practicing witchcraft on her – Appeal - Accused contending gross misappreciation of evidence by trial Court – On facts, victim though raped in February, 2014 disclosing incident to her husband in April 2014 and to her father in June, 2014, no evidence that accused had been doing witchcraft and treating people with his super natural power, husband did nothing and went to his work place despite knowing in April, 2014 of accused raping his wife- Medical evidence of prosecutrix of having been subjected to sexual intercourse not much of help since she being married lady and husband having access to her – Held, evidence does not disclose commission of offence by accused – Probability of false implication cannot be ruled out- Appeal allowed. (Paras 22 to 31).

**Indian Evidence Act,1872** - Section 3 – Appreciation of evidence – Rape case – Testimony of prosecutrix – Held, statement of prosecutrix cannot be universally and mechanically applied in every case of assault – Court must keep in mind cardinal principles of criminal justice system. (Para 21).

***Cases referred:***

Kaini Rajan vs. State of Kerala, JT 2013 (12) SC 538
Rajesh Patel V. State of Jharkhan, AIR 2013 SC 1497
Ramdas and others V. State of Maharashtra, AIR 2007 SC 155
State of Punjab Vs. Gurmeet Singh and others, AIR 1996 SC 1393
Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175
Vivek Singh V. State of H.P., ILR 2017 (V) HP 395 (D.B.)

For the appellant: Mr. Rajiv Rai, Advocate.
For the respondent: Mr. R.P. Singh and Mr. Kunal Thakur, Dy. A.Gs.

The following judgment of the Court was delivered:

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**Dharam Chand Chaudhary, Judge.**

Appellant Baldev Singh (hereinafter referred to as the 'accused') is a convict. He has been convicted by learned Additional Sessions Judge, Hamirpur (H.P.) for the commission of an offence punishable under Sections 376 and 506 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years and to pay Rs.20,000/- as fine under Section 376 IPC and to undergo simple imprisonment for one year for the commission of offence punishable under Section 506 IPC vide judgment passed in Sessions Trial No. 2 of 2015.

2. The present is a case wherein either way, a very pious and sensitive relationship between father-in-law and daughter-in-law are at stake, because the victim of the occurrence is none-else but the daughter-in-law of accused Baldev Singh. Therefore, if the prosecution case as disclosed from the final report and the documents filed therewith, if ultimately turns as correct, the pious relationship between the father-in-law and daugther-in-law would certainly get tarnished and in case turns to be false, the result would remain the same.

**FACTS OF THE CASE**:

3. PW-4 Jaspal is the son of accused Baldev Singh. He was married to the prosecutrix (PW-10) (name withheld) on 8.8.2013. He had been working in some private company at Baddi, Tehsil Nalagarh, District Solan, H.P., and used to visit his house at village Dharyara, Tehsil Tonidevi, District Hamirpur intermittently. In his absence, his wife, the prosecutrix used to live with his parents, accused Baldev Singh and mother Shakuntla Devi. In the month of May, 2014, the prosecutrix went with her father to her parental house situated at village Dain, Tehsil Barsar, District Hamirpur, H.P., and did not return to matrimonial home. He, therefore, came to his village from Baddi in the month of June, 2014. He accompanied by PW-2 Pawan Kumar, PW-3 Sushma Devi and also his uncles Anil Kumar and Kashmir Kumar went to the house of his in-laws at village Dain on 28.6.2014 to bring the prosecutrix back to the matrimonial home. They all persuaded her to join the company of PW-4 and return to matrimonial home, but at the pretext that the accused had subjected her to sexual intercourse repeatedly while in unconscious condition on account of smoke of "***Dhuni***", he had been administering to her to cure the disease from which she allegeldy was suffering during mid night, she refused to return to the matrimonial home.

4. As per further case of the prosecution, the prosecutrix accompanied by her father Balbir Singh, PW-11 went to Police Station, Bhoranj on 4.7.2014 and lodged the FIR Ext. PW-15/A with the allegation that she fell ill in the Month of February, 2014. When disclosed this fact to her mother-in-law, the latter advised her to take treatment from her father-in-law, the accused who allegedly was "***Chela***" and professes to have treated many patients with the help of witchcraft, he had been knowing. On the advise of her mother-in-law, the prosecutrix went to the accused, who on seeing her told that she was suffering from "***Opra***" (psychological disorder). He advised her that with the help of "Dhuni" (mixture of grain items/herbs etc. etc., duly mashed with either Desi Ghee or oil), which he will administer to her during mid-night i.e. in between 11.00-12.00 and she will be alright. The accused accordingly started treating her by administering "*Dhun*i". In the beginning for 2-3 days, the effect of smoke emanating from "*Dhuni*" was not so severe, rather mild. However, after 2-3 days, due to smoke emanating, she started becoming unconscious. It is taking advantage of such a situation, the accused allegedly subjected her to sexual intercourse, while she being in a state of unconsciousness. On one day, when she all of sudden woke-up, noticed herself naked and accused sleeping with her. It is on that day, finding herself in naked condition and the accused sleeping with her, she came to know that she had been subjected to sexual intercourse. When she told him that what he did is not right and that she will apprise her husband and mother-in-law, he threatened her with dire consequences. In the month of March, 2014, accused asked her to accompany him to Shimla for getting her ultrasound conducted. When she refused, he told that he will not allow her to go to her parents. Her cellphone was also snatched.

5. It is in the month of April, 2014, her husband came to the house and she apprised him about the entire episode. He, however, did nothing and returned to Baddi. In the month of May, 2014, her father Balbir Chand (PW-11) came to her matrimonial home. She went with him to the house of her parents. Her father taking note of her condition,

asked as to what happened. She, however, did not disclose anything to him due to fear and to save the honour of the family. However, in the month of June, 2014, on being asked by her father, she disclosed such act the accused committed with her to him also. On this, her father called the accused repeatedly, however the latter failed to respond to his calls. It is on such allegations, the FIR Ext. PW-15/A came to be recorded in Police Station, Bhoranj against the accused.

6. The police swung into action. ASI Jai Chand after registration of FIR Ext. PW-15/A arranged to send the prosecutrix to CHC, Bhoranj for getting her medical examination conducted through Constable Santosh Kumari PW-13. Application Ext.PW-15/B in this regard was made to the Medical Officer and she was examined and MLC Ext.PW-5/A was obtained and taken on record. The accused was arrested on 5.7.2014 and also interrogated. On the same day, he was also got medically examined in the Community Health Centre, Bhoranj. PW-14 LHC Sanjay Kumar and Constable Surinder Kumar had taken the accused to Hospital and his medical examination was conducted by Dr. Prithi Chaudhary PW-6 vide MLC Ext.PW-6/B. On the identification given by the prosecutrix, the map of the place Ext.PW-15/C, where the accused had been administering 'Dhuni' and subjecting the prosecutrix to sexual intercourse was prepared. The photographs of that place were also taken and the investigation conducted there videographed by HHC Kuldeep Singh, PW-9. On 7.7.2014, the statement of prosecutrix was got recorded under Section 164 Cr.P.C in the Court of learned JMIC, Hamirpur. On the same day, her ultrasound was also got conducted in Regional Hospital, Hamirpur vide report Ext.PW-12/C. The thermo prints thereof are Ext.PW-12/B. Shri Kashmir Singh PW-1 has prepared the CDs of photographs Ext. PW-1/A and Ext.PW-1/B. The Secretary, Gram Panchayat, Kanjian PW-7 Pawan Kumar had produced the copy of Parivar register Ext.PW-7/A and it was taken on record. The statements of witnesses Ext.PW-15/D, Ext.PW-15/E, Ext.PW-15/E, Ext.PW-15/F and Ext.PW-15/G were recorded as per their version. The statements of remaining prosecution witnesses under Section 161 Cr.P.C were also recorded.

**THE OUTCOME OF THE INVESTIGATION CONDUCTED:**

7. On the completion of the investigation and receipt of report from the Forensic Science Laboratory, Inspector/SHO Om Chand PW-16 has prepared the final report and filed the same in the Court. Since the offence the accused allegedly committed was triable exclusively by the Court of Sessions, therefore, committed accordingly.

8. On completion of investigation, it transpired that somewhere in the month of February, 2014, the accused subjected his own daugther-in-law (name withheld) to sexual intercourse at a time while unconscious on account of impact of "Dhuni", which he had been administering to her to cure her disease. In order to save the honour of the family and being afraid of from the accused, the matter was not reported to the police till 4.7.2014. Though, such an act attributed to the accused was disclosed by the prosecutrix to her mother-in-law and her husband, but of no avail, as they did nothing. She did not disclose the incident even to her father also till June, 2014, irrespective of being inquired from her because of her deteriorating health condition.

9. With such allegations, the final report came to be filed against the accused in the Court. On commitment of the case by learned Magistrate, learned Additional Sessions Judge had appreciated the final report and on finding a *prima-facie* case having been made out against the accused framed charge against him for the commission of offence punishable under Sections 376 and 506 IPC. The accused, however, pleaded not guilty and claimed trial. The prosecution, as such, was called upon to produce the evidence in support of its case.

**PROSECUTION EVIDENCE IN NUT-SHELL**:

10. The prosecution in order to sustain the charge against the accused has examined 16 witnesses in all. The material prosecution witnesses are the prosecutrix, PW-10, her father Balbir Chand PW-11, Pradhan Gram Panchayat, Kanjian Pawan Kumar PW-7. Ward Panch Sushma Devi PW-3. Jaspal, the husband of the prosecutrix PW-4. Dr. Sapna Dhiman PW-7 and Dr. Prithi Chaudhary PW-6. The remaining prosecution witnesses are formal as PW-1 Kashmir Sing, proprietor of Sangam Studio, Bassi (Bhoranj). He developed CDs (PW-1/A & Ext.PW-1/B) from a memory card handed over to him by the police. He has also issued the certificate Ext.PW-1/C in this regard. PW-7 Pawan Kumar, the Secretary of Gram Panchayat who has produced the abstract of parivar register Ext.PW-7/A qua family of accused Baldev Singh. PW-8 Raghujit Singh was posted as MHC who has received the case property and retained the same and further sent to Forensic Science Laboratory for analysis. Kuldeep Chand PW-9 had videographed the proceedings qua identification of the place where the accused had been subjecting the prosecutrix to sexual intercourse, which later on developed in the form of CDs by PW-1 Kashmir Singh, proprietor of Sangam Studio, Bassi (Bhoranj). PW-12 Dr. Rakesh Sharma is the Radiologist who had conducted the ultrasound of the prosecutrix and submitted the report Ext.PW-12/C along with thermoprints Ext.PW-12/B. As per ultrasound he conducted, the prosecutrix was found with gestation age as 25 weeks and three days. PW-13 Lady Constable Santosh Kumari who had been accompanying the prosecutrix to the hospital at the time of her medical examination and collected various parcels preserved in the hospital by the Medical Officer, which she has deposited with MHC in the Police Station. PW-14 LHC Sanjay Kumar who accompanied the accused to the hospital for getting his medical examination conducted. PW-15 ASI Jai Chand is the Investigating Officer, whereas, PW-16 Inspector Om Chand, the then Inspector/SHO, Police Station, Bhoranj, District Hamirpur has prepared the final report and presented the same in the Court.

11. The statement of accused under Section 313 Cr.P.C was also recorded. The prosecution case that the prosecutrix is married to his son Jaspal PW-4, had been residing with them in the matrimonial home as Jaspal was working in private Company at Baddi and that the prosecutrix fell ill in the month of February, 2014 have been admitted as correct while answering questions No. 2 to 6. The facts that PW-11, the father of the prosecutrix had been doing some private job at Ahmadabad (Gujarat) and that in the month of May, 2014 he visited his native village Dain and their house have also been admitted, while answering question Nos. 24 and 25. It is also admitted while answering question No. 31 that Jaspal, his son accompanied by Pradhan/Ward Panch etc., went to the house of parents of the prosecutrix, however, it is denied that she refused to return to the matrimonial home at the pretext that the accused had been subjecting her to sexual intercourse. It was also admitted while answering question No. 36 that prosecutrix was pregnant. He has also admitted that after his arrest on 5.7.2014, he was subjected to medical examination. The rest of the incriminating circumstances appearing against him in the prosecution evidence have, however, been denied either being wrong or for want of knowledge. According to him, he is innocent and has not committed any offence. He, however, opted for not producing any evidence in his defence.

**CONCLUSION DRAWN BY LEARNED TRIAL COURT**:

12. Learned trial Court on appreciation of the oral as well as documentary evidence available on record and hearing learned Public Prosecutor and learned defence counsel has convicted and sentenced the accused, as pointed out at the very outset.

**GROUNDS OF CHALLENGE:**

13. The legality and validity of the impugned judgment has been questioned on the grounds inter-alia that the prosecution has miserably failed to prove its case against the accused beyond all reasonable doubt and as such, learned trial Court has returned the findings to the contrary, convicting and sentencing the accused on the basis of hypothesis, conjectures and surmises. In view of the prosecution evidence not inspiring any confidence, the benefit of doubt should have been given to the accused. The settled principles in criminal administration of justice that the accused cannot be convicted until and unless it is proved beyond reasonable doubt that he has committed the alleged offence have been ignored. As per the statement of prosecutrix recorded under Section 164 Cr.P.C., she had disclosed the incident to her father PW-11 in the month of May, 2014. The registration of case was, therefore, stated to be delayed thereafter also till July, 2014. There is no evidence suggesting that the accused attacked the prosecutrix with 'Khukri' as she disclosed in her statement under Section 164 Cr.P.C., as she has not stated so while in the witness box. Also that, the alleged sexual assault committed upon her in the month of February, 2014 was not disclosed by her to her husband immediately and rather disclosed the same in the month of April, 2014. As per her statement, after solemnization of marriage on 8.8.2013, she stayed with her husband Jaspal for a period about five months. Therefore, it is doubtful that she was living there in the month of February, 2014 also, when allegedly assaulted sexually. The failure on the part of the Investigating Officer to obtain the record pertaining to the treatment of the prosecutrix because as per her own version, she had conceived child in the month of January and was going for routine check-up to the hospital at Bhota alone is also stated to be fatal to the prosecution case. The failure of the I.O to take in possession the 'Dhuni' items or atleast container in which the same was being administered, is also fatal to the prosecution case. Whether the accused was really a 'Chela' and knowing witchcraft, the independent witnesses from the vicinity should have been examined. Nothing has come in the statement of the prosecutrix recorded under Section 154 Cr.P.C that she had disclosed the occurrence to her mother-in-law, therefore, by stating so while in the witness box she has improved her version. Rajan, the cousin of the prosecutrix was not bed ridden, however, driving scooty and also holding the driving licence. The accused allegedly failed to arrange for such defence being in custody. The impugned judgment, therefore, has been sought to be quashed and the accused acquitted of the charge framed against him.

**RIVAL SUBMISSIONS**:

14. Mr. Rajiv Rai, learned counsel representing the appellant-convict has argued with all vehemence that learned trial Judge in a case of no evidence has not only held the accused, none-else but the father-in-law of the prosecutrix guilty of subjecting the prosecutrix, his daughter-in-law to sexual intercourse but also convicted him to rigorous imprisonment for seven years and to pay Rs.20,000/- as fine under Section 376 IPC and to undergo simple imprisonment of for one year for the commission of offence punishable under Section 506 IPC. The highly doubtful and interested evidence having come on record by way of own testimony of prosecutrix and her father PW-11 has erroneously been relied upon. According to Mr. Rai, it is writ large on the face of the record that the prosecutrix and her father were interested to involve the accused in a false case to the reasons best known to them. The conduct of the prosecutrix that she did not disclose the occurrence either to her mother till April, 2014 or even to her husband also amply demonstrates that a false case has been engineered with due deliberation against the accused. When the occurrence was disclosed by her to PW-11 in the month of May, 2014, why the registration of case was delayed, is also a circumstance which renders the prosecution case highly doubtful. Learned trial Judge while holding that the accused should have produced the evidence to show otherwise according to Mr. Rai are highly illegal and unknown in the

criminal administration of justice because the prosecution has to stand on its own legs. Also that, when on the basis of evidence available on record two possible views emerge, the view favouring the accused has to be accepted is also not taken into consideration. It is also pointed out that the statement under Section 313 Cr.P.C could have not been used against the accused until and unless the prosecution itself produced cogent and reliable evidence, suggesting the involvement of the accused in the commission of the offence. Therefore, it is urged that the accused has been falsely framed in this case by leveling heinous allegations without there being any proof qua the same. The impugned judgment, as such, has been sought to be quashed.

15. On the other hand, Mr. R.P. Singh, learned Deputy Advocate General has argued that the own statement of the prosecutrix in this case is sufficient to hold the accused guilty of the offence. The same according to Mr. Singh finds corroboration from other evidence i.e. the statement of her father PW-11 and also the medical evidence. It has, therefore, been urged that well reasoned judgment passed by learned trial Court calls for no interference in the case in hand.

**MY FINDINGS:**

16. On hearing Mr. Rajiv Rai, learned counsel representing the appellant-convict and Mr. R.P. Singh, learned Deputy Advocate General as well as going through the evidence comprising oral as well as documentary, no doubt the offence the accused allegedly committed is not only heinous but grievous also because it is the father-in-law who allegedly has subjected the daughter-in-law to sexual intercourse at such a stage when after administration of 'Dhuni', she had been becoming unconscious. The prosecution, as noticed supra, has not only made an effort to persuade this Court to believe its story as correct but also that such an act by the accused with the prosecutrix was without her consent and against her will.

17. The rival submissions as made though have to be scrutinized in the light of the evidence having come on record, however, before that I deem it appropriate to discuss as to what constitutes the offence punishable under Section 376 IPC in legal parlance.

18. The present in the given facts and circumstances is a case which falls under first and second description to Section 375 IPC. The same reads as follows:

> "**375-Rape.** A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:
>
> First:- Against her will.
>
> Secondly:- without her consent.
>
> Thirdly:- xxxx
>
> Fourthly:- xxxx
>
> Fifthly:- xxxx
>
> Sixthly:- xxxx
>
> Explanation:- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape".

19. What constitutes consent has been discussed by the Apex Court in ***Kaini Rajan vs. State of Kerala, JT 2013 (12) SC 538,*** as follows:

> "12. Section 375 IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

20. The principle settled in the judgment supra, therefore, is that the prosecutrix was a consenting party to the sexual intercourse or not can only be ascertained on careful study of all relevant circumstances. Since the prosecutrix on the day of her examination i.e. 8.7.2015 had disclosed her age as 27 years, therefore, in the month of February-March, 2014 when allegedly subjected to sexual intercourse, she must be 25-26 years of age. It is now to be seen that the evidence as has come on record is sufficient to form an opinion that the accused subjected her to sexual intercourse and if it is so, whether such an act was without her consent and against her will.

21. 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 ***Vimal 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."

22. As per the facts, which are not in controversy, the prosecutrix got married to Jaspal PW-4 on 8.8.2013. The said witness had been working in a private company at Baddi and used to visit his native place intermittently. The prosecutrix had been living behind with her father-in-law, the accused and the mother-in-law in the matrimonial home. The prosecution in order to bring the guilt home to the accused has placed reliance on the statement of the prosecutrix PW-10 and her father PW-11. Besides, her husband PW-4, Pradhan Gram Panchyat Pawan Kumar PW-2, Ward Panch Sushma Devi PW-3 were also associated. Learned trial Judge relying upon the sole testimony of the prosecutrix and on that of her father PW-11 and also the medical evidence has held the accused guilty and convicted him. This Court, however, finds that the present is not a case where the findings of conviction could have been recorded against the accused on the basis of sole testimony of the prosecutrix, particularly when she did not disclose the incident as per her own version till April, 2014 to anyone, including her husband PW-4. Her husband though denied she having disclosed the episode to him in the month of April, 2014. As regards her father PW-11, as per her own version she informed him in the month of June, 2014 for the first time about the alleged sexual assault committed by the accused. True it is that the delay is not always fatal in such cases, but its impact has to be seen vis-a-vis the facts and circumstances of each case. Support in this regard can be drawn from the judgment of the Apex Court in ***Rajesh Patel*** V. ***State of Jharkhan, AIR 2013 SC 1497***. This judgment reads as follows:

> "9. Further, there is an inordinate delay of nearly 11 days in lodging the FIR with the jurisdictional police. The explanation given by the prosecutrix in not lodging the complaint within the reasonable period after the alleged offence committed by the appellant is that she went to her house and narrated the offence committed by the appellant to her mother and on assurance of Purnendu Babu– PW3, the mother remained silent for two to four days on the assurance that he will take action in the matter. Further, the explanation given by the prosecutrix regarding the delay is that at the time of commission of offence the appellant had threatened her that in case she lodges any complaint against him, she would be killed. The said explanation is once again not a tenable explanation. Further, the reason assigned by the High Court regarding not lodging the complaint immediately or within a reasonable period, it has observed that in case of rape, the victim girl hardly dares to go to the police station and make the matter open to all out of fear of stigma which will be attached with the girls who are ravished. Also, the reason assigned by the trial court which justifies the explanation offered by the prosecution regarding the delay in lodging the complaint against the appellant has been erroneously accepted by the High Court in the impugned judgment. In addition to that, further observation made by the High Court regarding the delay is that the prosecutrix as well as her mother tried to get justice by interference of PW3, who is a common friend of both of them and PW4, the Doctor with whom the prosecutrix was working as a Nurse. When the same did not materialize, after lapse of 11 days, FIR was lodged with the jurisdictional police for the offence said to have been committed by the appellant. Further, the High Court has also proceeded to record the reason that prosecutrix had every opportunity to give different date of occurrence instead of 14.2.93 but she did not do it which reason is not tenable in law.

> Further, the High Court accepted the observation made by the learned trial Judge wherein the explanation given by the prosecutrix in her evidence about being terrorized to be killed by the appellant in case of reporting the matter to the police, is wholly untenable in law. The same is not only unnatural but also improbable. Therefore, the inordinate delay of 11 days in lodging the FIR against the appellant is fatal to the prosecution case. This vital aspect regarding inordinate delay in lodging the FIR not only makes the prosecution case improbable to accept but the reasons and observations made by the trial court as well as the High Court in the impugned judgments are wholly untenable in law and the same cannot be accepted. Therefore, the findings and observations made by the courts below in accepting delay in lodging the FIR by assigning unsatisfactory reasons cannot be accepted by this Court as the findings and reasons are erroneous in law."

23. Similar is the law laid down again by the Apex Court in ***Ramdas and others*** V. ***State of Maharashtra, AIR 2007 SC 155***. The relevant extract of this judgment is also reproduced as under:-

> "23. Counsel for the State submitted that the delay in lodging the first information report in such cases is immaterial. The proposition is too broadly stated to merit acceptance. It is no doubt true that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a given case the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them. In the case of sexual offences there is another consideration which may weigh in the mind of the court i.e. the initial hesitation of the victim to report the matter to the police which may affect her family life and family's reputation. Very often in such cases only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are also cases where the victim may choose to suffer the ignominy rather than to disclose the true facts which may cast a stigma on her for the rest of her life. These are case where the initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate

> analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No strait jacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. (See AIR 1956 SC 216 : Pandurang and others vs. State of Hyderabad). Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact."

24. The delay, in the case in hand, to my mind, is fatal. It appears that nothing of the sort did take place with the prosecutrix and the accused has been implicated falsely for some reasons best known to the prosecutrix or her parents. The prosecution story right from the very beginning is highly doubtful. Nothing has come on record as to what was the nature of the disease from which the prosecutrix was suffering. Though, it has come in her statement that she was suffering from fever, however, if it is believed to be true, the same could have been cured in a much better way by getting medical treatment. Nothing has come in the prosecution story that she was suffering from "Opra" (psychological disorder). This story has been introduced while submitting that it is the accused who when examined the prosecutrix disclosed that she was suffering from "Opra". Even if the prosecution story is believed to be true that he administered "Dhuni" to her for few days, nothing specific has come on record qua the exact duration of such treatment. Even if she was suffering from any such disease, whether it got cured by way of administering 'Dhuni" by the accused for few days, if not, whether she went for treatment on medical side, nothing to this effect has also come on record. In such a situation, the only reasonable and plausible conclusion would be that the prosecutrix neither fell ill nor administered any treatment by her father-in-law, the accused. There is nothing on record to suggest that the accused was a "Chela/Tantrik" and with the help of supernatural power, having come to know about the ailments/problems of patients brought to him, suffering and that after coming to know about the disease he had been treating his patients with the help of such super natural powers. The story so invented is, therefore, palpably false, hence could not have been believed to be true at all by any stretch of imagination.

25. Admittedly, the prosecutrix was pregnant because as per her own version, she had conceived the pregnancy from the lions of her husband PW-4. It seems to be not true that the accused asked her either to accompany him to the hospital for ultrasound test conducted or she will not be allowed to go out of the house including the place of her parents. Even if the accused wanted to get her ultrasound conducted and she having been subjected to sexual intercourse, it is not understandable as to why she refused for undergoing such test. This also casts a doubt about the authenticity and genuineness of the prosecution story.

26. Interestingly enough, the accused as per the prosecution story had been subjecting her to sexual intercourse after she having been becoming unconscious with the smoke emanating from the items including herbals being used in that "Dhuni", however, she could feel it only during that night when woke up all of sudden and found herself sleeping in naked condition, whereas, accused was also sleeping with her. In the considered opinion of this Court, at the first instance, it is not possible to commit sexual intercourse with an

unconscious lady, secondly, even if committed, she will definitely come to know about such an act committed with her immediately on regaining the consciousness. Such common things having escaped the notice of learned trial Judge is not only disturbing but amazing to this Court. Learned trial Judge has acted and behaved in a fashion and believed the prosecution case as find mentioned in the police report as correct, without making any effort to critically analyzing the whole material available on record.

27. As is noted hereinabove, it is highly doubtful that the prosecutrix has disclosed the episode to her husband in the month of April, 2014 and to her mother-in-law also. Had it been so, they both would have certainly not tolerated such an act and behaviour of the accused at all. Even if it is believed that her husband did nothing and returned to Baddi, she should have not tolerated such unbecoming behaviour of the accused at all and rather reported the matter atleast to her parents, if not police or the Gram Panchayat straightway. There was no occasion to her to have concealed such a ghastly act on the part of the accused till June, 2014, had it actually been taken place.. Even if it is believed to be so, in that event also, the FIR should have been registered without wasting any further time. However, the same has been registered in the month of July i.e. 4.7.2014. If not shocking, it is painful to point out that in order to implicate father-in-law falsely without caring that what will be the repercussions thereof in the public at large, the FIR was registered after due deliberation to the reasons best known to the prosecutrix and her father.

28. As per prosecution story, the prosecutrix left the matrimonial home in the month of May, 2014 and did not come back. Her husband PW-4 came to the village on 27.06.2014. He went to the Pradhan Gram Panchayat and also the Ward Panch and requested them to help him by persuading his wife, the prosecutrix to come back to the matrimonial home. The Pradhan PW-2, Ward Panch PW-3, husband of the prosecutrix PW-4 accompanied by his uncles went to the prosecutrix at her parents' house. They intervened and persuaded her to return to the matrimonial home, however, as per version of Pradhan, Ward Panch and also that of her husband PW-4, the prosecutrix refused to return to the matrimonial home. She, according to them, did not disclose any reason therefor. The prosecution story that she refused to accompany them to the matrimonial home at the pretext that she has been sexually assaulted by the accused, in the manner, as claimed by the prosecution, has been denied by them when allowed to be cross-examined by learned Public Prosecutor. Their testimony that the prosecutrix did not disclose any reason of her not accompanying them to the matrimonial home, however, remained unshattered.

29. Though, as per opinion of Dr. Sapna Dhiman, PW-5, on examination of the prosecutrix, the possibility of she being subjected to sexual intercourse cannot be ruled-out. However, if the report of the chemical examiner Ext.PW-15/H is seen, blood and semen could not be detected on shirt, dupatta, salwar, pubic hair and endocervical swab and on the pubic hair of accused Baldev Singh. Blood even could not be detected on underwear of accused Baldev Singh, however, human semen was detected on that. Such medical evidence and scientific investigation got conducted is also of no help in the case in hand, because the occurrence is of February, 2014, whereas, she was got medically examined in the month of July, 2014, therefore, such investigation is merely an eye wash. Otherwise also, she was a married lady and there is nothing surprising or important in the opinion of the doctor because she must be cohabiting with her husband and as per her own version even carrying the pregnancy also from his lions.

30. The evidence as has come on record by way of the official witnesses as discussed hereinabove could have been used as link evidence, had the prosecution been otherwise able to prove its against the accused beyond all reasonable doubt.

31. Therefore, the close scrutiny of the evidence, in the manner as aforesaid amply demonstrates that the prosecutrix and for that matter her father to the reasons best known to them have implicated falsely the accused in this case and thereby if not totally destroyed the social fibre has certainly weakened it and also put a big question mark on the pious relations between a father-in-law and daughter-in-law. Additionally, the prosecution story which in the opinion of this Court has been engineered and fabricated has culminated in a discussion that a father-in-law can also assault sexually his own daughter-in-law.

32. In a Division Bench judgment authored on 22.09.2017 by me in Criminal Appeal No. 31 of 2017 titled ***Vivek Singh*** V. ***State of H.P.,*** a case having more or less similar facts, it is observed as under:-

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

33. In this case also, neither the investigating agency has made an effort to separate grain from the chaff nor the I.O. made any effort to find out the truth and to the contrary investigated the matter as usual and in a routine manner to implicate the accused in this case by hook and crook with the result that he has been convicted and sentenced, as pointed out at the very out set.

34. Being so, the findings recorded against the accused are neither legally nor factually sustainable. The impugned judgment, as such, does not stand the test of judicial scrutiny, hence, deserves to be quashed and set aside.

35. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the impugned judgment is quashed and set aside and the accused is acquitted of the charge framed under Section 376 and 506 IPC. He presently is undergoing sentence, therefore, if not required in any other case, be set free forthwith. The release warrant be prepared accordingly. The fine amount as imposed upon the accused, if deposited, shall be refunded to him against proper receipt.

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

Balbir Singh @ Rinku .....Petitioner.
Versus
Yashwant Pirta ..... Respondent.

Cr.MMO No. 313 of 2018.
Date of decision: 26.11.2018.

**Code of Criminal Procedure, 1973** – Section 82 – Proclamation – Purpose – Held, provisions regarding proclamation enacted in Code to secure presence of accused before Court – Once said purpose achieved, proclamation proceedings stand withdrawn. (Para 4)**.**

***Case referred:***
Vimlaben Ajitbhai Patel vs. Vatslaben Ashokbhai Patel and others (2008) 4 SCC 649

For the Petitioner : Mr. D.N.Sharma, Advocate.
For the Respondent : Ms. Anu Tuli Azta, Advocate.

The following judgment of the Court was delivered:

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**Tarlok Singh Chauhan, Judge (Oral).**

The petitioner is the accused in a complaint instituted by the respondent under Section 138 of the Negotiable Instruments Act wherein proclamation has been directed to be issued under Section 82 Cr.P.C. for declaring him as a proclaimed offender vide order dated 23.06.2018 (for short impugned order).

2. Even though the prayer made in this petition appears to be innocuous, however, nonetheless, the moot question remains whether such a petition is maintainable.

3. Section 82 Cr.P.C. reads as under:

> "***82. Proclamation for person absconding***. *(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.*
>
> *(2) The proclamation shall be published as follows:-*
>
> *(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;*

*(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;*

*(c) a copy thereof shall be affixed to some conspicuous part of the Court- house;*

*(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.*

*(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub- section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on suchday."*

4. It is more than settled that the aforesaid provisions i.e. Section 82 were enacted to secure the presence of the accused and once the said purpose is achieved, even if the property is attached, then the proceedings stand withdrawn. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Vimlaben Ajitbhai Patel vs. Vatslaben Ashokbhai Patel and others (2008) 4 SCC 649,*** more particularly para 32 thereof, which reads thus:

*"32. The provisions contained in Section 82 of the Code of Criminal Procedure were put on the statute book for certain purpose. It was enacted to secure the presence of the accused. Once the said purpose is achieved, the attachment shall be withdrawn. Even the property which was attached, should be restored. The provisions of the Code of Criminal Procedure do not warrant sale of the property despite the fact that the absconding accused had surrendered and obtained bail. Once he surrenders before the Court and the Standing Warrants cancelled, he is no longer an absconder. The purpose of attaching the property comes to an end. It is to be released subject to the provisions of the Code. Securing the attendance of an absconding accused, is a matter between the State and the accused. Complainant should not ordinarily derive any benefit therefrom. If the property is to be sold, it vests with the State subject to any order passed under Section 85 of the Code. It cannot be a subject matter of execution of a decree, far less for executing the decree of a third party, who had no right, title or interest thereon."*

5. Thus, it is absolutely clear that instead of invoking the jurisdiction of this Court under Section 482 Cr.P.C., the petitioner was required to surrender before the learned trial Court and obtain bail. Once he had surrendered then obviously the standing warrants would be cancelled and he no longer would be an absconder.

6. In view of the aforesaid discussion, it is manifestly clear that the present petition is totally misconceived and is accordingly dismissed as such. However, this order would not prevent the petitioner from surrendering before the trial Court and obtaining bail in accordance with law.

7. The petitioner is disposed of in the aforesaid terms, so also the pending application(s) if any.

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

Vishwajeet Kumar ....Petitioner
Versus
State of H.P. ....Respondents

Cr.MP(M) No. 1042 of 2018
Date of Decision 20th November, 2018

**Code of Criminal Procedure, 1973** – Section 439 – Regular Bail – Grant of – Accused involved in offence under section 302 Indian Penal Code, 1860, jumping bail and not making himself available before Court – Surety as well as father of Accused showing inability to trace him out and produce accuse before Court – Police arresting accused pursuant to Non-Bailable warrants by tracking his phone – Held, in circumstances, accused not entitled for Bail – Petition dismissed. (Paras 6 to 10).

***Cases referred:***
Dataram Singh vs. State of Uttar Pradesh, 2018(1) Him.L.R. 273
Deepak Kumar vs. State of H.P. 2015(1) Him.L.R. 308
Jai Krishan vs. State of H.P., 2018(1) Him.L.R. 588
Mast Ram vs. State of Himachal Pradesh, 2018(1) Him.L.R. 325
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 40

For the Petitioner: Shri Jagan Nath, Advocate.
For the Respondent: Shri Anil Jaswal, Additional Advocate General with Mr.R.R. Rahi and Mr. R.P. Singh, Deputy Advocate General.
ASI Hem Raj P.S. Kala Amb District Sirmaur is present in person.

The following judgment of the Court was delivered:

**Vivek Singh Thakur, J.(oral)**

This petition has been filed, under Section 439 Cr.P.C., seeking regular bail on behalf of the petitioner, who is presently in judicial custody pending trial in case FIR No. 71 of 2016 dated 4.9.2016 under Section 302 read with Section 34 IPC before learned Additional Sessions Judge, Sirmaur at Nahan.

2. Pending investigation, petitioner was arrested on 6.9.2016 and thereafter he was sent in judicial custody. Later on, on 3.1.2017, he was released on bail by learned Sessions Judge. After release on bail, he appeared in the trial Court once on 22.2.2017, on which date case was adjourned for 2.3.2017 for consideration on charge. However, on 2.3.2017 petitioner did not appear and an application for exemption filed on his behalf on the ground that, as per information supplied by his father, Shri Bhim Kumar, he had taken admission in a school. Thereafter, he did not appear on 15.3.2017, however, on his appearance in Court on 20.3.2017, case was again listed for consideration on charge on 27.3.2017 on which date case was again adjourned on his request for 30.3.2017. On 30.3.2017, an application for exemption was filed on his behalf on the basis of information supplied by his brother that he could not present in Court as the petitioner and his father

had met with an accident. Prayer for exemption was allowed and case was listed on 17.4.2017. Thereafter, again petitioner did not appear on 17.4.2017, 29.4.2017 and 5.5.2017. On 5.5.2017, father of petitioner had appeared and moved another application for exemption on the ground that petitioner had been advised rest for 3-4 weeks by the doctor. Believing his plea, the exemption from appearance was again permitted by the trial Court and case was adjourned for 20.5.2017. But on that day, neither petitioner nor his father appeared, but his bail was not cancelled on that day expecting his appearance on the next date i.e. 25.5.2017. On 25.5.2017 surety of petitioner appeared and had expressed inability to produce the petitioner, whereafter, neither petitioner nor his father appeared in the Court resulting into issuance of bailable warrants on various occasions.

3. For execution of bailable warrants, police visited the native place of petitioner and during that course, father of petitioner had made a statement that police had raided his house on 19.7.2017 at about 8.15 PM, but his son was absconding since 18.5.2017 without informing his whereabouts to any member of family and thus, he did not know where petitioner was residing. Shri Vijay Singh, Pradhan Gram Panchayat Raj Kochra had also issued the certificate to the same effect stating therein that petitioner was absconding since 18.5.2017 and was not having any link or contact with his family members and therefore, his relatives and villagers were not able to tell anything about him. The certificate to the same effect was again issued by Shri Vijay Singh Pradhan Gram Panchayat Raj Kochra by reiterating the version given in the previous certificate with further statement that he was not having knowledge about the whereabouts of petitioner. On the same day, father has again deposed before the police to the same effect. Ultimately, on the basis of call records, he was traced and in execution of non-bailable warrants, after keeping track upon him, he was arrested in March, 2018 after about one year. After his arrest, he had again moved an application for releasing him on bail before learned Additional Sessions Judge, which stands dismissed on 24.4.2018.

4. Learned counsel for the petitioner, relying upon the pronouncements of this Court in ***Mast Ram vs. State of Himachal Pradesh*** reported in ***2018(1) Him.L.R. 325*** and judgment of the Apex Court in ***Sanjay Chandra vs. Central Bureau of Investigation reported in (2012)1 SCC 40***, has canvassed that object of bail is to secure the appearance of accused persons during the trial by imposing certain terms and is neither punitive nor preventative and bail is not to be denied merely because of sentiments of the community against the accused. Relying upon the decision of this Court in ***Deepak Kumar vs. State of H.P.*** reported in ***2015(1) Him.L.R. 308,*** and ***Dataram Singh vs. State of Uttar Pradesh*** reported in ***2018(1) Him.L.R. 273***, it is also argued that bail is rule and committal to jail is an exception and by refusing the bail, personal liberty of the individual guaranteed under Article 21 of the Constitution of India cannot be curtailed unless there are compelling circumstances for doing so. It is further argued that accused is to be presumed to be innocent till the conviction by competent Court of law and relying upon ***Jai Krishan vs. State of H.P.*** reported in ***2018(1) Him.L.R. 588*** it has been submitted that detention in custody, pending completion of trial, can cause a great hardship to the petitioner and therefore his release on bail has been prayed.

5. The petitioner has also relied upon affidavit of Vijay Singh, Pradhan Gram Panchayat Raj Kochra, wherein he has deposed about factum of accident wherein petitioner was injured. According to this affidavit, after the accident he was at Bermo in District Bokaro with his brother for his treatment. Certain documents with regard to medical treatment of petitioner have also been placed on record. According to which, he had suffered dislocation in left leg in an accident.

6. Affidavit of Vijay Singh, Pradhan of Gram Panchayat Raj Koachra is not trustworthy for the reason that in paras 4 and 5 of the affidavit he has narrated the story of accident, wherein petitioner was allegedly injured and was taken by family members for his treatment to Bermo in District Bokaro where his elder brother was residing. But in the same affidavit in para 6, he has admitted the issuance of certificate to the police stating therein that he was not having any knowledge about whereabout of petitioner. It is not a case where only Pardhan Gram Panchayat had issued the certificate but Mr. Bhim Singh, father of petitioner had also made the statement to the police in July, 2017 that his son was absconding since 18.5.2017 without telling anything to family members and the relatives. It is also noticeable that on 5.5.2017 father of the petitioner had appeared in Court with plea that after receiving injury in the accident the petitioner was advised rest for 3-4 weeks by the doctor, whereupon the case was adjourned for 20.5.2017 and thereafter for 25.5.2017. But it is a fact that petitioner did not appear in Court after 20.3.2018 and thereafter he was arrested by police after tracking his call records.

7. At the most, even if affidavit of Vijay Kumar Pardhan Gram Panchayat and medical record is believed, it can be said that petitioner had met with an accident in April, 2017 and was under treatment till May 2017. But thereafter his whereabouts were not known even to his father, as stated by him to the police officials visited his native place in the months of July and September, 2017. Similar statement was also made by Panchayat Pardhan by issuing the certificates. Therefore, absence of petitioner after May 2017 is not justifiable.

8. There is no quarrel about the proposition that object of bail is to secure the appearance of petitioner and detention in custody pending completion of trial can be a cause of great hardship and every person is deemed to be innocent until duly tried and found guilty. But in present case, it is not the case of petitioner that he is seeking bail for the first time. In fact, he was released on bail earlier and thereafter he jumped over the bail and thereafter he was arrested by police after tracking his call records and therefore, at this stage it cannot be believed that after his release on bail he would be available for trial particularly, in view of the certificates of Pardhan and statements of his father.

9. As this stage, learned counsel for the petitioner submits that the trial Court be directed to expedite the trial. As per status report, trial is in progress and statements of certain witnesses have been recorded w.e.f. 13.11.2018 to 16.11.2018 and now the case has been listed for 22.11.2018 for fixing the date for recording the evidence of prosecution witnesses. It is apparent that learned trial Court is conducting the trial expeditiously as is required in the case of under trial prisoners.

10 In view of above discussion, petition is dismissed.

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**BEFORE HON'BLE MR. JUSTICE SURYA KANT, CJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.**

Virender Singh and another ....Petitioners.

Versus

State of HP and others .....Respondents.

CWP No. 619 of 2017.
Reserved on 05.11.2018

Decided on: 22.11.2018

**Constitution of India, 1950** - Article 256 – Motor Vehicles Act, 1988 - Held State under obligation to give effect to laws made by Parliament as also directions issued by Central Government from time to time –Therefore, State of H.P. is obliged to give effect to Motor vehicles Act and Rules framed thereunder. (Paras 22 and 23).

**Interpretation of Statutes** - Conflict between Central and State Acts - Principles – Held, even in situation of conflict between Central and State Laws, Court would attempt to reconcile conflicting items through harmonious or reconciliatory construction of provisions – Court should interpret Statutes liberally and not technically in narrow spirit – Pith and substance of Act and its reasonable intent would be guiding factor. (Para 25).

**National Highways Act, 1956** – **Motor Vehicles Act, 1988** – Sphere of applicability – Held, parliament has consciously segregated subject of manufacturing, size or design of Motor Vehicle vis-a-vis construction, maintenance and safety of National Highways – For these two subjects, two independent sets of legislations have been enacted – Powers exercisable under Motor Vehicles Act, are totally unconnected and independent of powers which may be exercised by competent authorities under National Highways Act. (Para 26).

**National Highway Authority Act, 2002** (Act) – **Motor Vehicles Act, 1988** – Sphere of applicability - Held, Act has been enacted to provide for control of land within National Highways, right of way and traffic moving on National Highways – And removal of unauthorized occupation thereon – Source to legislate Motor Vehicles Act is entry 35 of Concurrent List – These two are distinct and different fields of legislations without any overlapping and multiplicity of powers exercisable thereunder. (Para 27 & 28).

**Motor Vehicles Act, 1988** – Section 115 – Prohibition against of plying of vehicles – Scope – Held, powers which can be invoked by State Government under section 115 of Motor Vehicles Act are spread over to ban or prohibit driving of any specified Motor Vehicle either generally in specified area or on specified road. (Para 30).

**Motor Vehicles Act, 1988** – Section 2 (1) – "Area" – Meaning – Held, expression "Area" may include land or area where National Highway, State Highway or Local road has been constructed. (Para 33).

**Motor Vehicles Act, 1988** – Section 115 – National Highways Act, 1956- Sections 4 and 5 - National Highway Authority Act,2002 - Section 35 – Ban on entry of Sleeper Coaches – State Government in exercise of powers conferred by Section 115 of Motor Vehicles Act banning entry of Sleeper Coaches in State – Challenge thereto – Petitioners contending that such powers vest only in Central Government under Act of 1956 or Act of 2002 – And notification of State Government is ultra virus of Constitution – Held power exercisable under Act of 2002 is restricted qua National Highways only – Whereas wider powers have given to State Government through Section 115 of Motor Vehicles Act for banning or restricting any specified class or description of Motor Vehicles in specified area as compared to corresponding power conferred on National Highways Authority in respect of National Highways and not the other areas - There is no conflict or overlapping of powers between State Government and National Highways Authority of India – Petition dismissed. (Paras 34 & 35).

***Cases referred:***

Ashoka Marketing Ltd. and another versus Punjab National Bank and others, (1990) 4 SCC 406

Chhatwal versus Government of NCT of Delhi and another, 2016 (1) RCR (Civ) 855

Ethiopian Airlines versus Ganesh Narain Saboo, (2011) 8 SCC 539

M.C. Mehta versus Union of India and others (1997) 8 SCC 770

Sarabjeet Rick Singh versus Union of India, (2008) 2 SCC 417
Shweta Kapoor; Sarvesh Singh; Nipun Malhotra; Anit Kumar Bahutay and others; Karuna Usmanbhai Dawoodbhai Memon and others versus State of Gujarat, (1988) 2 SCC 271
Zakir Hussain and others versus State of Maharashtra and another AIR 2001 Bombay 21

For the petitioners: M/s R.K. Kapoor and Kiran Dhiman, Advocates.
For the respondents: Mr.Ashok Sharma, Advocate General with M/s J.K. Verma, Adarsh Sharma and Ashwani Sharma, Additional Advocate Generals.

The following judgment of the Court was delivered:

**Surya Kant, Chief Justice.**

The petitioners are residents of Village Badarkha, Baghpat (UP) and Nehru Vihar, Delhi respectively. They have laid challenge to the Notification dated 4th August, 2008 (Annexure P-1), issued by the State of Himachal Pradesh in purported exercise of its powers under Section 115 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act 1988").

2. Before scrutinizing the facts or legal provisions referred to by learned counsel for the parties any further, it will be useful to reproduce the contents of the Notification dated 4th August, 2008, which read as follows:

> *"NOTIFICATION.*
>
> *The Governor, Himachal Pradesh in exercise of the powers conferred by Section 115 of the Motor Vehicles Act, 1988 (Act No. 59 of 1988) having regard to the road condition, safety of the passengers and convenience of the general public is pleased to prohibit the entry of "Sleeper Coaches" of the neighbouring States plying under various permit in the territory of the Himachal Pradesh which do not conform with the provision of Rule-93 and 128 of the Central Motor Vehicles Rules 1989, with immediate effect.*
>
> *By order*
>
> *Additional Chief Secretary (Transport)*
> *Government of Himachal Pradesh."*

3. As averred by the petitioners, the aforementioned Notification is liable to be quashed as it *ultra vires* the provisions of the National Highways Act, 1956 (hereinafter referred to as "the 1956 Act), National Highways Authority of India Act, 1988 (hereinafter referred to as "the NHAI Act 1988") and The Control of National Highways (Land and Traffic) Act, 2002 (hereinafter referred to as "the 2002 Act"). Additionally, the petitioners have averred that the impugned Notification violates Article 304, besides Articles 14, 19 (1) (d), 19 (1) (g), and 21 of the Constitution of India. A prayer to restrain the respondents from impounding the vehicles of the petitioners under Section 207 of the MV Act 1988 in furtherance of the impugned Notification has also been sought in conjunction with an additional direction that the respondents should not impede/prohibit the entry of the "Sleeper Coach" vehicles belonging to the petitioners in the State of Himachal Pradesh. The petitioners also seek to restrain the respondents from hindering the free flow of plying these vehicles on the National Highways.

4. The petitioners have further averred that as All India Tourist Permit Vehicles (which are essentially contract carriage vehicles), their "Sleeper Coaches" strictly observe all terms and conditions as they are plied on the National Highways. Their "Sleeper Coaches" are booked to carry tourists for tourist/ religious destinations, namely, Manali, Shimla etc., and the vehicles are mostly plied on National Highways, including National Highway No.5, maintained by the Central Government or the National Highways Authority of India. It is also the case of petitioners that their vehicles do not ply on State Highways. The petitioners posit that they have been granted All India Tourist Permits under Section 88 of the MV Act 1988, which are not required to be counter-signed by the Regional Transport Authorities of the Regions except the Regional Transport Authority which has issued such permits.

5. The petitioners have relied upon sub-Section (9) of Section 88 of the MV Act 1988, which contains a *non-obstante* Clause to the effect that subject to the Rules made by the Central Government under sub-Section (14), any State Transport Authority for the purpose of promoting tourism, may grant permit in respect of tourist vehicles valid for the whole of India, or in such contiguous States not being less than three in number including the State in which the permit is issued as may be specified in such permit. The petitioners claim to have been issued All India Permit under sub-Section (9) of Section 88 of the MV Act 1988, and thus assert that they are entitled to ply their tourist vehicles in the whole of India notwithstanding the fact that the permit is not counter-signed by the Regional Transport Authority of other Regions where their vehicles are plied.

6. The petitioners have further averred that they have been granted All India Tourist Permits by the respective State Transport Authorities under sub-Section (9) of Section 88 of the MV Act 1988 and they have been operating their tourist vehicles as per terms and conditions contained in the All India Tourist Permit. Their vehicles have a valid Registration Number and All India Tourist Permits are also valid up to January 2022 or so. The details of such vehicles are given in para 8 of the writ petition. The petitioners, however, allege that by virtue of the impugned Notification dated 4th August, 2008, the State of Himachal Pradesh has banned/prohibited the entry of their vehicles carrying all India Tourist Permits and that the said Notification has been issued in a colourable exercise of powers under Section 115 of the MV Act 1988 read with Rules 93 and 128 of the Central Motor Vehicles Rules, 1989 (hereinafter referred to as "the 1989 Rules").

7. The petitioners thus contend that what is expressly permitted under Section 88 (9) of the MV Act, 1988, namely, to ply a vehicle for tourists throughout the country for the purpose of tourism on the basis of an All India Permit, has been curtailed in every respect by the State of Himachal Pradesh by issuing the impugned Notification whereby entry of "Sleeper Coaches" of the neighbouring States has been banned in the State of Himachal Pradesh regardless of the fact that the said vehicles do not violate the provisions of Rules 93 or 128 of the 1989 Rules. It is claimed that the "Sleeper Coaches" are made for the convenience of the general public-cum-tourists as sometimes the tourists spend the whole night in transit, for India is a vast country with many tourist places and religious pilgrimages.

8. Learned counsel for the petitioners contended that the National Highways are covered under Union List 1, Entry Number 23, in the 7th Schedule of the Constitution of India and in respect thereto the State Government is incompetent to make any 'Law'.

9. Mr. Kapoor, learned counsel for the petitioners, urged that Entry 23 in List 1 of the 7th Schedule is referable to Article 246 (1) of the Constitution whereunder the Parliament alone has exclusive power to make laws with respect to any of the matters enumerated in List 1. Hence, any direct or indirect attempt by the State of Himachal

Pradesh to usurp this power is in derogation of the constitutional mandate. Learned counsel further argued that the impugned Notification also impedes free trade and intercourse throughout the territory of India and is in total disregard to the guarantee of such freedom conferred under Article 304 of the Constitution of India. He urged that Section 4 of the 1956 Act vests all National Highways in the Union, and as per Section 5 thereof, it is the responsibility of Central Government to develop and maintain the National Highways. The 1956 Act is a complete Code as it also contains provisions like Section 8B in relation to 'committing any mischief' and provides punishment for any act which renders a National Highway impassable or less safe for traveling or conveying property.

10. Learned counsel further argued on this premise that if "Sleeper Coaches" are found to have caused any danger to the free flow of traffic or the safety of National Highways, the law provides punitive action for it. Therefore also, the State Government cannot impose a blanket ban on the entry of "Sleeper Coaches" when the Prescribed Authority for National Highways has not found such vehicles to have caused any safety risk for traveling on National Highways. The power to make Rules under the National Highways Act is also conferred on the Central Government under Section 9 of the 1956 Act and the State Government is totally alien to the Scheme of development, maintenance or repairs of National Highways. He, in particular, referred to the provisions of the 1988 Act, whereunder the Central Government is empowered to vest or entrust any National Highway in the National Highways Authority of India, constituted under Section 3 (3) thereof. Section 19 (2) (d) of the aforesaid Act is relied upon to contend that one of the specific functions entrusted to the National Highways Authority is to *"regulate and control the plying of vehicles on the highways vested in, or entrusted to, it for the proper management thereo*f."

11. Mr. Kapoor laid special emphasis on Section 35 of the 2002 Act which, according to him, is *pari materia* to Section 115 of the MV Act 1988 and whereunder the power to restrict the use of any type of vehicle on the National Highways is expressly conferred upon the National Highways Administration. Section 35 of the 2002 Act reads as follows:

> **"35. Power to restrict the use of vehicles.**
>
> *If the Highway administration is satisfied that it is necessary in the interest of public safety or convenience, or because of the nature of any road or bridge so to do, it may, by notification in the Official Gazette, prohibit or restrict, subject to such exceptions or conditions as may be specified in the notification, the use of any highway or part thereof by a class or classes of traffic either generally or on specified occasion or time as specified in the notification and when such prohibition or restriction is imposed, the Highway Administration shall cause such traffic signs to be placed or erected at suitable places for the convenience of the traffic as may be prescribed:*
>
> *PROVIDED that where any prohibition or restriction under this Section is to be remained for a period of one month or less, such prohibition or restriction may be imposed without issuing notification in the Official Gazette:*
>
> *PROVIDED FURTHER that the prohibition or restriction imposed under the first proviso shall be published widely for the knowledge of the users by other possible means."*

12. On a combined reading of the above referred provisions of different Statutes, learned counsel for the petitioners urged that the State Government has no authority whatsoever to impose any restriction on the plying of vehicles on National Highways and the impugned Notification being directly inimical to powers exercisable by the Central

Government or the National Highways Administration, unequivocally *ultra vires* the provisions of the Central Statute(s) and is thus unsustainable in law.

13. Lastly, the petitioners' counsel urged that the impugned Notification also imposes unreasonable, unguided and unbridled restrictions on the fundamental right of the petitioners to carry on any occupation, trade or business throughout the country as guaranteed under Article 19 (1) (g) of the Constitution of India, and is hence liable to be declared unconstitutional.

14. Reliance has been placed upon ***Usmanbhai Dawoodbhai Memon and others*** versus ***State of Gujarat,*** reported in **(1988) 2 SCC 271** to support the plea that where an enactment provides for a special procedure, it is that procedure alone that must be followed and not the one prescribed by the General Laws. ***Ethiopian Airlines*** versus ***Ganesh Narain Saboo,*** reported in ***(2011) 8 SCC 539*** has been cited to reiterate the settled principle of statutory interpretation that the specific statutes that come later in time trump prior general statutes and that the general provisions should always yield to specific provisions of Special Laws. In this context, it was pointed out that the Parliament while enacting Section 35 of the 2002 Act was fully aware of the existing statute, namely, Section 115 of the 1988 Act. In this regard, further reliance was placed on ***Ashoka Marketing Ltd. and another*** versus ***Punjab National Bank and others,*** reported in ***(1990) 4 SCC 406***. Lastly, learned counsel for the petitioners pressed into aid ***Sarabjeet Rick Singh*** versus ***Union of India***, reported in ***(2008) 2 SCC 417*** to repeat his contention that Special Statute shall prevail over the provisions of General Statute. Hence, Section 115 of the 1988 Act must yield to give full effect to the provisions like Sections 5, 8B and 9 of the 1956 Act read with Section 35 of the 2002 Act as the latter is a Special Statute dealing with the National Highways.

15. State of Himachal Pradesh, on the other hand, has filed its written statement/reply justifying the issuance of the impugned Notification having regard to the road conditions, safety of the passengers and convenience of the general public. It is maintained that under Section 115 of MV Act 1988, the Parliament has conferred such powers exclusively on the State Government. It is also averred that there is no provision of "Sleeper Coaches" under Rule 129 of the 1989 Rules for the grant of All India Tourist Permit. There is no provision under the Act or the Rules to envisage the installation of *"Sleepers in the buses plied under an All India Tourist Permit."* The Rules prescribe the seats for seating as can be seen from Rule 10 of the Motor Vehicles (All India Permit for Tourist Transport Operators) Rules, 1993, (hereinafter referred to as "1993 Rules") as well as Rule 128 of the 1989 Rules.

16. Mr. Ashwani Sharma, learned Additional Advocate General pointedly referred to Section 115 of the MV Act 1988 and maintained that entry in the State of Himachal Pradesh of "Sleeper Coaches" of the neighbouring States plied under various permits, has been proscribed only in respect of such vehicles which do not conform with the provisions of Rules 93 and 128 of the 1989 Rules. He relied upon Rule 128 of 1989 Rules which describes the seating capacity and seating arrangement of transport vehicles to which National Permit can be granted. The said Rule specifies that the seating layout shall be (two and two or one and two or one and one) on either side, all seats facing forward, with a clear gangway of at least 355 millimeters width at the centre. It also provides that frames shall be sturdy, properly finished and so mounted as to transfer the weight directly to the structural members of the framework. Rule 10 of 1993 Rules was also referred to in support of the plea that the seating capacity of a vehicle having All India Tourist Permit cannot be more than 39 seats, excluding driver and conductor. He thus urged that the Scheme of the Act refers to a vehicle having seats and seating capacity and there is no provision under the Act or the

Rules, which expressly or by implication, permits to manufacture or ply "Sleeper Coaches". What has been therefore banned by the State of Himachal Pradesh is the entry of such vehicles which are prohibited to be manufactured under the 1988 Act.

17. We have heard learned counsel for the parties at a considerable length. Having given our thoughtful consideration to the rival submissions, we do not find any merit in the challenge laid down on behalf of the petitioners, for the reasons recorded hereinafter.

18. Though the writ petition is liable to be dismissed at the outset on the ground of inordinate delay and laches, for the petitioners have challenged the Notification issued in the year 2008 by way of writ petition filed in the year 2017, nevertheless, we have heard the matter on merits owing to the fact that some substantial questions of law are sought to be raised in the instant writ petition.

19. There is no gainsaying that the subject matters, which are part of Union List 1 in 7th Schedule of the Constitution, fall in the exclusive domain of the Parliament for the purpose of legislating. The powers of the State Legislature are obviously ousted and so would be the case when powers are to be exercised by a Subordinate Legislation under an Act. In the event of any inconsistency having arisen between the Laws made by the Parliament and the Laws enacted by the Legislature of a State, the consequences as contemplated under Article 254 of the Constitution are inevitable and the Laws made by the Parliament, whether passed before or after the Laws made by the Legislature of the State, shall prevail and the Laws made by the Legislature of the State shall, to the extent of repugnancy, be void. We, however, do not find that any such situation has arisen in the instant case.

20. The MV Act, 1988 is a Central Act. The Parliament in its wisdom has conferred express powers through Section 115 of the said Act on the State Government to satisfy itself in the interest of public safety and convenience, or because of the nature of any road or bridge, to prohibit or restrict, subject to such exceptions and conditions as it may specify, the driving of motor vehicles of any specified class or description or the use of trailers either generally or in a 'specified area' or on a 'specified road'.

21. If one juxtaposes the Notification dated 4th August, 2008, within the frame work of the powers conferred on a State Government under Section 115 of the Central Act, there remains no room of doubt that the State Government has acted well within the four corners of its power as it has prohibited the entries of only those "Sleeper Coaches" of neighbouring States, which do not conform to Rules 93 and 128 of the 1989 Rules.

22. A State is under Constitutional obligation in terms of Article 256 of the Constitution of India to give effect to the Laws made by the Parliament as also the directions issued by the Central Government from time to time.

23. MV Act 1988 being an Act of Parliament and the 1989 Rules having been framed by the Central Government, the State of Himachal Pradesh is otherwise obliged to give effect to the Act and the Rules in deference to its above stated Constitutional obligation. There is thus neither any usurp of powers of Central Government nor a case of repugnancy between the Laws made by the Parliament viz-a-viz an Act of Legislature of the State. Arguments to this effect are totally misconceived and misdirected.

24. In ***M.C. Mehta*** versus ***Union of India and others (1997) 8 SCC 770***, the Hon'ble Supreme Court, in the context of Legislative Policy of 1988 M.V. Act has held that:

> *"The existing provisions of the Motor Vehicles Act alone are sufficient to clothe the members of the police force and the transport authorities with ample*

*powers to control and regulate the traffic in an appropriate manner so that no vehicle being used in a public place poses any danger to the public in any form. The requirement of maintaining the motor vehicles in the manner prescribed and its use if roadworthy in a manner which does not endanger the public, has to be ensured by the authorities and this is the aim of these provisions enacted in the Act. This conclusion can be drawn even without reference to the general powers available to the police officers under the Police Act and the Code of Criminal Procedure."*

25. We may now advert to much reliance placed on behalf of the petitioners on certain provisions of the 1956 Act, MV Act, 1988 and 2002 Act. It will be useful to state at the outset that even in a situation of perceived conflict or head-on collision between the Central and State Laws, it is a well- settled proposition that the Court would attempt to reconcile the alleged conflicting items, if need be, through a harmonious or reconciliatory construction of the provisions. While doing so, the Court should interpret the statute liberally and not technically or in a narrow spirit. The pith and substance of the Act and its reasonable intent would indeed be the guiding factors.

26. Keeping these principles in mind, it may be noticed that the 1956 Act has been enacted to declare certain Highways to be the National Highways and its Section 5 makes the Central Government responsible for the development and maintenance of National Highways though it may, by a Notification in the Official Gazette, delegate such function upon the Government of the State also, within which the National Highways situate. Section 8B of the 1956 Act enables the imposition of punishment which may include an imprisonment or fine or both, if a person commits mischief by doing an act which renders a National Highway impassable or less safe for traveling or conveying property. Section 8B of the 1956 Act comes into operation where damage is caused to the National Highways as a public property and something is done to make it unsafe for traveling. It does not apply in the context of the make of a vehicle or the manner in which passengers are asked to sit therein. To say it differently, the Parliament has consciously segregated the subject of manufacturing, make, size or design of a motor vehicle viz-a-viz the construction, maintenance or safety of a National Highway and for these two subjects, two independent sets of Legislations have been enacted. The powers exercisable under provisions of the MV Act, 1988, including under Section 115 thereof are thus totally unconnected and independent of the powers which may be exercised by the Central Government, National Highways Authority of India or by the State Government, as the case may be, under the provisions of 1956 Act.

27. The 2002 Act too is an Act of Parliament and it has been enacted to provide for control of land within the National Highways, right of way and traffic moving on the National Highways and also for removal of unauthorized occupation thereon. This Act has also been enacted with reference to the powers enjoyed upon by the Parliament under Entry 23 of Union List 1 of 7th Schedule.

28. It is true that Section 35 of the 2002 Act, referred to above and Section 115 of the MV Act 1988, are couched with somewhat similar language but the source to legislate the MV Act 1988 is altogether different, i.e., Entry 35 of the Concurrent List-III.

29. These are two distinct and different fields of Legislation without any overlapping or multiplicity of powers exercisable thereunder. The scope of Section 35 of 2002 Act has to be therefore limited (even after giving the widest latitude) to the powers exercisable by National Highways Authority in respect of a National Highway only.

30. On the other hand, powers which can be invoked by a State Government under Section 115 of the MV Act 1988 are spread over to ban or prohibit driving of any specified motor vehicle ***either generally in a specified area or on a specified road.***

31. While considering the scope of powers exercisable under Section 115 of the MV Act, 1988, the Bombay High Court in ***Zakir Hussain and others*** versus ***State of Maharashtra and another*** reported in **AIR 2001 Bombay 21** held that:

> *"20. .....The Competent Authority is the best Judge of the situation and circumstances and is expected to exercise the power under Section 115 of the Act in the interest of public safety or convenience etc. The jurisdiction of the Court, in such situation, can be extended only to find out whether there was material available before the Competent Authority in order to reach the requisite satisfaction contemplated under Section 115 of the Act for issuing prohibitory order or Notification. In our opinion, jurisdiction cannot be extended to find out adequacy or inadequacy of the material which warrants such exercise by the Competent Authority, which should to be left to the Competent Authority to act in the situation as per the Scheme of the section....."*

32. A Division Bench of Delhi High Court also examined the Policy Notification issued under Section 115 of the MV Act 1988 in ***Shweta Kapoor; Sarvesh Singh; Nipun Malhotra; Anit Kumar Bahutay and others; Karuna Chhatwal*** versus ***Government of NCT of Delhi and another,*** reported in ***2016 (1) RCR (Civ) 855,*** and it held that:

> "*13. The views on the efficacy of such government policy may differ, however, the question is whether the policy decision warrants interference by this Court in exercise of power of judicial review. The law is well settled that on matters affecting policy this Court will not interfere unless the policy is unconstitutional or contrary to statutory provisions or arbitrary or irrational or in abuse of power, since the policy decisions are taken based on expert knowledge and the Courts are normally not equipped to question the correctness of the same. The scope of judicial enquiry is therefore confined to the question whether the decision taken by the Government is against any statutory provision or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution of India."*

33. The expression ***"area"*** has been defined in Section 2 (1) of MV Act 1988, which means *"such area as the State Government may, having regard to the requirements of the provisions, specified by Notification in the Official Gazette."* Thus the area, as referred to under Section 115 of the MV Act 1988, may include the land or area where a National Highway, State Highway or Local road has been constructed. No such power has been vested in the National Highways Authority under Section 35 of the 2002 Act, for the said power is restricted qua National Highways only. The Parliament in its wisdom has given wider powers to the State Government through Section 115 of MV Act 1988 for the purpose of banning or restricting any specified class or description of motor vehicles in a 'specified area' as compared to the corresponding powers conferred on the National Highways Authority only in respect of the National Highways.

34. This is neither a conflict of power nor overlapping of powers between the State Government and the National Highways Authority of India. While the Notification issued by the State Government shall apply to the specified area, even if a National Highway passes through it, the Notification or Order issued by the National Highways Authority

under Section 35 of 2002 Act will be confined to National Highways only and not the other areas.

35. For the reasons afore-stated, we do not find any merit in the writ petition which is accordingly dismissed.

36. Pending applications, if any, also stand disposed of accordingly.

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

Shri Rajesh @ Raju. .....Petitioner.
Versus
Shri Dayawant Singh & anr. .....Respondents.

C.R. No. 3 of 2011.
Reserved on: 22.10.2018.
Decided on: 26.11.2018.

**Himachal Pradesh Urban Rent Control Act, 1987 -** Section 24 - Appeal - Notification of State Government dated 10th December, 2006 - Whether appeal against order of Rent Controller dismissing application for restoration of dismissed rent suit, maintainable before Appellate Authority ? Held, yes – Rent Controller dismissing application of land lord seeking restoration of his rent suit which stood dismissed in default - Appellate Authority allowing appeal and ordering restoration of rent suit – Revision – Tenant contending that appeal against said order not provided by Notification 10th December, 2006 and order of Appellate Authority being without jurisdiction – Held, order of Rent Controller which finally decides fate of aggrieved is appealable before Appellate Authority. (Para 11).

**Code of Civil Procedure, 1908** – Order IX Rule 9 – **Limitation Act, 1963 -** Section 5 - Condonation of delay – Sufficient cause – Eviction suit stood dismissed in default – Rent Controller rejecting application for restoration but Appellate Authority allowing same and ordering restoration of suit – Revision – Landlord very old and ailing – His advocate had already died when suit was dismissed in default – Power of Attorney executed by land lord in favour of other advocates though on record but no evidence whether such Power of Attorney was already in brief during life time of deceased advocate – Landlord nothing to gain by delayed filing of application of restoration – Held, delay in filing application sufficiently explained -Order of Appellate Authority upheld - Revision dismissed. (Paras 13 & 14).

***Cases referred:***
Vinod @ Raja versus Smt. Joginder Kaur, 2012(3) Him. L.R. (FB) 1401

For the petitioner: Mr. G. C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.
For the respondents:Ms. Seema K. Guleria, Advocate, for respondent No. 1.
Respondent No. 2 already exparte.

The following judgment of the Court was delivered:

**Dharam Chand Chaudhary, J.**

This revision petition has been preferred against the judgment dated 30.12.2010 passed by learned Appellate authority, Shimla in an appeal registered as CMA No. 53-S/14 of 2010 quashing thereby the order dated 26.5.2010 passed by learned Rent Controller-(IV), Shimla whereby an application under Order IX Rule 9 read with Section 151 CPC registered as case No. 31/6 of 2008 was dismissed.

2. Petitioner herein is one of the tenants in the demised premises namely "Chur View Estate" near main Sanjauli Chowk, Shimla. The respondent No. 1 is landlord, whereas proforma respondent No. 2, the mother of the petitioner his co-tenant. The landlord Dayawant Singh had sought the eviction of both tenants on the grounds, inter alia, that they have not paid the rent from 1.1.1990 onwards and respondent-tenant No. 1 Smt. Lalita Devi had subleted the demised premises in favour of respondent No. 2.

3. In the rent petition on completion of the pleadings and framing issues, the evidence of petitioner-landlord has already been recorded. The petition was at the stage of recording the respondents' evidence when taken up for the purpose on 29.8.2007, was dismissed under Order IX Rule 8 of the Code of Civil Procedure for non-prosecution.

4. The petitioner-landlord claims that he is residing at Mohali in Punjab. He had engaged Shri M.M. Vaid (since dead) Advocate to represent him in the rent petition. He being 79 years of age and not keeping good health on account of hypertension and diabetes had not been visiting or residing at Shimla during winter season. It was, therefore, in July 2008 when visited Shimla and went to the office of the Lawyer he engaged to ascertain the status of the rent petition had shocked to know about his death. He came to know that the rent petition was dismissed on 29.8.2007. He applied for certified copy of the order and immediately on receipt thereof filed the application under Order IX Rule 9 read with Section 151 of the Code of Civil Procedure for quashing the order dated 29.8.2007 and restoration of the eviction petition to its original number and file. He also filed an application under Section 5 of the Limitation Act to condone the delay as had occurred in filing the application under Order IX Rule 9 CPC.

5. The application was resisted and contested by the respondents-tenants. On the pleadings of the parties, the following issues were framed:-

i) Whether there are sufficient grounds for restoration of the petition which was dismissed in default on 29.08.2007 and condone the delay in filing this application as alleged? OPA

ii) Final order.

6. Petitioner-landlord has himself stepped into the witness box in support of his case as set out in the application. Similarly, respondent No. 2 Rajesh also stepped into the witness box as RW1. Learned trial Judge on appreciation of the given facts and circumstances and also the evidence available on record has arrived at a conclusion that the petitioner-landlord has failed to show sufficient cause warranting the condonation of delay as occurred in filing the application under Rule 9 CPC. Consequently, the application under Section 5 of the Limitation Act and also the application under Order IX Rule 9 CPC both were dismissed vide order dated 26.5.2010.

7. This order was challenged in an application registered as CMA No. 53-S/14 of 2010 before learned Appellate Authority below. Learned lower Appellate Court as noticed at the outset has accepted his appeal and quashed the order passed by learned Rent Controller. As a consequence thereof the Rent petition has been ordered to be restored to its

original number and file with a direction to learned Rent Controller to decide the same within four months.

8. Anyhow, the judgment passed by learned Appellate Authority has been challenged before this Court on the grounds, inter alia, that it is only the application under Section 5 of the Limitation Act has been decided vide impugned judgment and not the application under Order IX Rule 9 of the Code of Civil Procedure. The said application, according to respondents-tenants, could have not been entertained unless and until the delay condoned. It is also pointed out that the impugned order could have not been challenged in a civil miscellaneous appeal under Order XLIII Rule 1(c) of the Code of Civil Procedure as the appeal against an order passed by learned Rent Controller lies to the Appellate Authority only under the provisions of the H.P. Urban Rent Control Act and not under the provisions of Code of Civil Procedure. The approach of learned Appellate Authority, as such, is altogether contrary to law. Even if the appeal was maintainable according to respondents-tenants, in that event also, the application under Order IX rule 9 CPC could have not been decided on merits unless and until the application under Section 5 of the Limitation Act decided. The findings that the provisions contained under the Code of Civil Procedure are applicable to the proceedings under the Rent Control Act are also erroneous. In this case learned Appellate Authority has allegedly decided the application under Order IX Rule 9 CPC first and the application 5 of the Limitation Act thereafter. In the absence of reasonable and plausible explanation the delay as occurred was rightly not condoned by learned Rent controller. After the death of late Shri M.M.Vaid, Advocate, S/Shri Tarun Vaid and Pradeep Verma, Advocates had filed power of attorney on behalf of the petitioner-landlord. Therefore, according to respondents-tenants it cannot be said that the petitioner-landlord was unrepresented. It has, therefore, been submitted that learned Appellate Authority while allowing the appeal and quashing the order passed by learned Rent Controller has exceeded the jurisdiction vested in it. The impugned judgment, as such, has been sought to be quashed and set aside.

9. On hearing Mr. Gian Chand Gupta, learned Senior Advocate assisted by Ms. Meera Devi, Advocate for the petitioner and Ms. Seema K. Guleria, Advocate for petitioner-landlord (respondent No. 1 in this revision petition) and also going through the record, the only question arises for determination in the case in hand is as to whether learned Lower Appellate Authority has exceeded its jurisdiction in entertaining the appeal and quashing the order passed by learned Rent Controller whereby the application under Order IX Rule 9 CPC filed with a prayer for restoration of the Rent Petition was dismissed on the sole ground that the petitioner-landlord has failed to show sufficient cause warranting the condonation of delay as occurred in filing the same.

10. The main ground of challenge is that no appeal is maintainable before the Appellate Authority under an order passed by the Rent Controller in the exercise of the jurisdiction vested under the provisions of H.P. Urban Rent Control Act. Learned trial Court in the given facts and circumstances has formed an opinion that since the provisions contained under the Code of Civil Procedure are applicable in rent proceedings, therefore, the appeal under Order XLIII Rule 9 (c) CPC against an order passed in an application under Order IX Rule 9 CPC is maintainable. The bare perusal of the provisions contained under Order XLIII Rule 1(c) CPC reveals that an order passed in an application under Order IX Rule 9 CPC is appealable thereunder. Mr. Gian Chand Gupta, learned Senior Advocate has mainly emphasized that as per the notification dated 10th October, 2006 an appeal is maintainable before learned Appellate Authority only against an order passed under Sections 4,5,11,12,13,14 except 14(3)(a)(iii) and Section 21 of the HP Urban Rent Control Act. Therefore, according to Mr. Gupta any other order passed by learned Rent Controller

can be challenged in the High Court only by way of filing a revision petition. This Court, however, is not in agreement with the submissions so made for the reasons that a Full Bench of this Court in ***Vinod @ Raja*** versus ***Smt. Joginder Kaur, 2012(3) Him. L.R. (FB) 1401*** has held that any person aggrieved by an order which finally decides his fate in the case and against which Appellate Authority has not been prescribed in the notification issued by the government, an appeal is maintainable as per the scheme of the Civil Procedure Code, until otherwise specified by the government by way of issuance of an appropriate notification. This judgment reads as follow:

> "Wherever a right is provided by a statute, a remedy though not expressly provided for, may necessarily be implied. Whenever there is a right, there should also be an action for its enforcement and the legal procedure should be sufficiently elastic and comprehensive to afford the requisite means for the protection of the rights which the law has recognized, as held by the apex Court in Constitution Bench decision in Makhan Singh Tarsikka versus The State of Punjab, reported in AIR 1964 SC 381.
>
> Guided thus by the salutary and first principles in the matter as above, we hold that any person aggrieved by an order which finally decides his fate in the case for which appellate authority is not otherwise provided in the notification issued by the government under Section 24(1) of the Himachal Pradesh Urban Rent Control Act, 1987, an appeal is maintainable as per the scheme of the Civil Procedure Code, until otherwise specified by the government by way of an appropriate notification. The Registry will send back the records to the learned Single Judge for appropriate further orders in the case."

11. An order passed under the provisions of Order IX Rule 8 CPC decides the fate of the person aggrieved finally. Since in the notification, as discussed hereinabove, there exists no provisions to challenge an order of this nature and as the impugned order has decided the fate of the rent petition finally, therefore, in view of the law laid down by the Full Bench of this Court in *Vinod's* case cited supra, learned Appellate Authority has not committed any illegality or irregularity in entertaining the appeal. The contentions to the contrary brought to this Court in the present petition are not legally sustainable.

12. It is worth mentioning that the rules of procedure being hand made are meant for advancement of justice and not to thwart it. When by way of notification the forum to challenge an order dismissing the rent petition in default has not been provided by the legislature, therefore, the petitioner-landlord has rightly preferred the appeal under the Scheme of the Civil Procedure Code as per the law laid down by the Full Court in *Vinod's* case cited supra.

13. Now if coming to the merits of the case, there is no denial to the factum that the petitioner-landlord is an old man of 79 years of age. There is also no denial to the averments in the application that he is a patient of hypertension and diabetes. Merely, that he allegedly concocted false story as has come in reply to the application is not enough to form an opinion that he failed to show sufficient cause. It can reasonably be believed as true that a litigant is not required to remain present on each and every date of hearing that too when he is represented by a Counsel. The petitioner-landlord in the rent petition was represented by late Shri M.M. Vaid, Advocate, Shri Vaid admittedly was not in the land of living on the date when the petition dismissed in default. The power of attorney signed by S/Shri Tarun Vaid and Pradeep Verma, Advocates may be on record, however, signed by the petitioner-landlord in their favour or was lying already in the brief during life time of

Shri M.M. Vaid, nothing has come on record in this regard. Therefore, it is doubtful that the factum of S/Shri Tarun Vaid and Pradeep Verma, Advocates being representing him was in the knowledge of the petitioner-landlord. Nothing can be said in this regard also. Otherwise also, had the factum of the rent petition dismissed in default been in the knowledge and notice of the petitioner-landlord, it is not understandable as to why he should have not pursued the same and rather delayed the filing of application under Order IX Rule 9CPC. He had nothing to gain thereby and ultimately by delaying the filing of application for its restoration. True it is that on the expiry of the period prescribed for filing an application under Order IX Rule 9 CPC a valuable right had accrued in favour of the respondents-tenants. However, the present is not a case where such right has been taken away without any justifiable reasons and rather on the petitioner-landlord having satisfactorily explained the delay as occurred has shown sufficient cause warranting the condonation of delay. The present, as such, is a fit case which need adjudication on merits instead of its dismissal for want of prosecution. The present, therefore, is a case where the petitioner-landlord has successfully shown sufficient cause warranting the condonation of delay as occurred in filing the application under Order IX Rule 9CPC. Learned Appellate Authority, therefore, has not misdirected or erred legally while allowing the application and condoning the delay.

14. The another submission that no issue nor any consideration having taken place in the application under Order IX Rule 9 CPC is again without any substance for the reasons that the application under Order IX rule 9 CPC and the application under Section 5 of the Limitation Act are being taken up together for disposal. The moment it is established that the delay as occurred stands satisfactorily explained, there hardly remain anything to deny the relief sought in the application under Order IX Rule 9 CPC for the reasons that such an application otherwise also deserves to be allowed in case the applicant-petitioner succeeds in explaining his absence or the absence of learned counsel representing him on the date of hearing when the petition/L*is* dismissed in default. In the case in hand Shri M.M. Vaid, Advocate representing the petitioner-landlord had already expired. The petitioner himself was residing at Mohali in Punjab. He being an old man of 79 years and a patient of hypertension as well as diabetic, on account of health ground was not residing at Shimla during winter season. Therefore, he has no occasion to have come to know about the order passed in the rent petition on 29.8.2007 by learned Rent Controller dismissing thereby the same in default. Therefore, nothing much was for consideration by learned Appellate Authority after recording its satisfaction qua the sufficient cause shown by the petitioner-landlord and condoning the delay, to quash the order whereby the rent petition was dismissed in default and restoration of the same to its original number and file.

15. It is worthwhile to mention here that the scope of interference by the High Court in the exercise of its revisional jurisdiction is very limited and it is well settled at this stage that such jurisdiction should only be exercised in a case of sheer miscarriage of justice caused to the aggrieved party. The present, however, is not a case of sheer injustice having been caused to the respondents-tenants and rather it is the petitioner-landlord who would have suffered with loss and injury more serious in nature had the order of dismissal of rent petition in default been quashed and set aside as in that event he would have been deprived of getting the dispute adjudicated on merits.

16. In view of what has been said hereinabove, there is no merit in this petition and the same is accordingly dismissed. Learned Rent Controller is directed to decide the Rent Petition at the earliest being old one, preferably within six months from today.

17. The parties through learned Counsel representing them are directed to appear before leaned Rent Controller on *20.12.2018.*

18. The petition is accordingly disposed of, so also the pending application(s), if any.

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

Biri Singh .....Petitioner.
Versus
State of H.P. .....Respondent.

Cr. Revision No.357 of 2017.
Decided on: 01.11.2018.

**Code of Criminal Procedure, 1973** - Section -197 - Sanction to prosecute –"Public servant removable by or with sanction of Government" – Meaning – Held, sanction to prosecute required only when public servant is removable by or with sanction of Government – Junior Engineer , PWD, who can be removed by Head of Department, can be prosecuted without sanction – Section 197 of code not attracted.(Paras 3 and 4).

***Cases referred:***
Fakhruzamma Vs. State of Jharkhand and another, (2013) 15 SCC 552
Rakesh Kumar Mishra Vs. State of Bihar, (2006) 1 SCC 557
State of Orissa Vs. Ganesh Chandra Jew, (2004) 8 SCC 40

For the petitioner: Mr. Tenzin Tashi Negi, Advocate.
For the respondents: Mr. Kunal Thakur, Dy. Advocate General.

The following judgment of the Court was delivered:

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

Petitioner herein is one of the accused persons in FIR No.315/11, registered in Police Station, Palampur, District Kangra, under Sections 336, 337, 338 and 304-A of the Indian Penal Code, with the allegations that when he was Incharge of the site of construction of Palampur-bye-pass (including high level bridge) Kilometer 113/285 to Kilometer 113/705 on Pathankot-Chakki-Mandi Road, the bridge suddenly collapsed when the execution of the concrete work between Piers P5 and P6 was in progress, resulting in loss of life and property. On completion of the investigation, Challan stands filed against him and his co-accused. He, however, filed an application for his discharge from the case on the ground that for want of prosecution sanction he cannot be prosecuted.

2. Learned trial Judge having taken on record the response of the State-respondent has arrived at a conclusion that since the post of Junior Engineer is a Class-III post, therefore, the prosecution sanction within the meaning of Section 197 Cr. P.C. is not required to be obtained before launching prosecution against him. Reliance has been placed on a judgment of the Apex Court in ***Fakhruzamma*** *Vs.* ***State of Jharkhand and another***, ***(2013) 15 SCC 552***.

3. The accused-petitioner, however, being not satisfied with the impugned order has questioned the legality and validity thereof in this petition. The complaint is that the Court below has failed to consider the facts of the case and also the law applicable as well as the provisions contained under Section 197 Cr. P.C. in its right perspective. This Court, however, is not in agreement with the submission so made for the reasons that admittedly the accused-petitioner, at the relevant time, was working as a Junior Engineer, a Class-III post. A plain reading of the provisions contained under Section 197 of the Code reveals that when a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him in the discharge of his official duty, cognizance of the offence,, if any, committed by him, cannot be taken by any Court, except with the previous sanction of the Government.

4. The Junior Engineer in Public Works Department can be removed from service by the Head of the Department, i.e. Engineer-in-Chief, as stated by learned Deputy Advocate General at bar. Therefore, when for removal of Junior Engineer the sanction of the Government is not necessary, the prosecution sanction under Section 197 of the Code is also not required to be obtained to prosecute him for the commission of an offence, even if committed during the discharge of official duty. It is even held so by Hon'ble the Apex Court in ***Fakhruzamma's*** case cited supra. This judgment reads as follows:

> "8. A similar issue came up for consideration before this Court in Nagraj case, wherein this Court was called upon to examine the scope of Section 197 Cr. P.C. read with Sections 4 (c), 8, 26(1) and 3 of the Mysore Police Act,1908. Interpreting the abovementioned provisions, a here-judge Bench of this Court held that an Inspector General of Police can dismiss a Sub-Inspector and, therefore, no sanction of the State Government for prosecution of the appellant was necessary, even if he had committed the offence alleged while acting or purporting to act in discharge of his official duty."

5. It is thus seen that when an Inspector General of Police was competent to remove a Sub-Inspector-accused, it has been held that no sanction of the State Government was necessary, even if he had committed the offence in the discharge of his official duty. The point in issue, therefore, is squarely covered against the accused-petitioner by the judgment cited supra.

6. Learned counsel representing the accused-petitioner though has placed reliance on the judgments of the Apex Court in ***Rakesh Kumar Mishra*** *Vs.* ***State of Bihar, (2006) 1 SCC 557*** and ***State of Orissa*** Vs. ***Ganesh Chandra Jew***, ***(2004) 8 SCC 40***, however, unsuccessfully for the reason that nothing has come therein, suggesting that the prosecution sanction is required, even in the case of a public servant, removable by an authority, other than the State Government.

For the fore-going reasons, there is no merit in this petition and the same is accordingly dismissed.

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

Ramesh Kumar and others .....Petitioners.

Versus

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

Cr.MMO No. 500 of 2018.
Date of decision: 27.11.2018.

**Code of Criminal Procedure, 1973** – Sections 407 and 482 – Transfer of case – Grounds – Held, power to transfer case is to be exercised cautiously and in exceptional situation where it becomes necessary to provide credibility to trial – Order not to be passed as matter of routine or merely because interested party has expressed some apprehension about proper conduct of trial. (Para .6)

**Code of Criminal Procedure, 1973** – Sections 407 and 482 – Transfer of case – Grounds-Apprehension – Held, apprehension of party must be real – Petitioners seeking transfer of trial on ground that Bar Association of District having passed resolution not to defend them – Copy of resolution of Bar not annexed nor names of Advocates whom petitioners contacted and they refused to defend them, mentioned in petition – Apprehension mercurial and not reasonable – Petition dismissed. (Para 8).

***Cases referred:***

Abdul Nazar Madani v. State of T.N., (2000) 6 SCC 204
Captain Amarinder Singh v. Parkash Singh Badal and others, (2009) 6 SCC 260
Gurcharan Dass Chadha v. State of Rajasthan, AIR 1966 SC 1418
Lalu Prasad alias Lalu Prasad Yadav v. State of Jharkhand, (2013) 8 SCC 593
Usmangani Adambhai Vahora vs. State of Gujarat and another (2016) 3 SCC 370

For the Petitioners : Mr. H.S. Rangra, Advocate.
For the Respondents : Mr. Sudhir Bhatnagar, Addl. A.G., with Ms.Svaneel Jaswal, Dy. A.G.
Nemo for respondent No.2.

The following judgment of the Court was delivered:

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**Tarlok Singh Chauhan, Judge (Oral).**

By medium of this petition under Sections 407/482 Cr.P.C. the petitioners have sought transfer of case i.e. Sessions Trial No.10/7 of 2017 titled State vs. Ramesh Kumar and others from the Court of learned Special Judge, Bilaspur, District Bilaspur to any other Court/ Court of learned Special Judge, Mandi, District Mandi, H.P.

2. The petitioners are the prime accused in FIR No. 229/2016 registered against them on 14.10.2016 at Police Station, Sadar, District Bilaspur, H.P. under Sections 354-A, 341, 232, 325, 504, 506 and 34 IPC read with Section 8 of POCSO Act. After completion of the investigation, Final Report under Section 173 Cr.P.C. stands filed and the petitioners also stand summoned.

3. The only ground sought for transfer of the case is that one of the alleged victim/witness is the daughter of Ex-Member of Legislative Assembly (MLA) of H.P., who is prominent Advocate practicing in District Courts, Bilaspur and the Bar Association, District Bilaspur has passed a resolution not to defend the petitioners in the present criminal case.

4. On 13.11.2018, the learned counsel for the petitioners sought time to place on record the copy of alleged resolution passed by the Bar Association, Bilaspur, but today he candidly admitted that there in fact is no such resolution.

5. It cannot be denied that the petitioners in terms of Article 21 of the Constitution of India are entitled to a fair trial but then can they seek transfer of the case, that too, without placing any substantive material on record to show that the Advocates at Bilaspur are not ready to defend the petitioners.

6. It is more than settled that seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power in such cases has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice, which is absent in the present case.

7. Here, it shall be apposite to refer to one of the fairly recent judgment of the Hon'ble Supreme Court in **Usmangani Adambhai Vahora vs. State of Gujarat and another (2016) 3 SCC 370**, wherein while dealing with the question of transfer of case, the Hon'ble Supreme Court observed as under:

> *"6. On a careful scrutiny of the order passed by the High Court, it is not clear whether the High Court has been convinced that the accused has any real apprehension or bias against the trial judge. However, the observations of the learned single Judge, as it seems to us, is fundamentally based on apprehension and to justify the same, he has referred to the remarks offered by the learned Additional Sessions Judge to the Sessions Judge when explanation was called for. First, we shall refer to the issue of apprehension. The apprehension is based on some kind of conversation between the informant and another that the accused persons shall be convicted. There is also an assertion that the trial judge is a convicting Judge and that is why, the High Court has observed that he is in dilemma.*
>
> *7. So far as apprehension is concerned, it has to be one which would establish that justice will not be done. In this context, we may profitably refer to a passage from a three-Judge Bench decision in Gurcharan Dass Chadha v. State of Rajasthan, AIR 1966 SC 1418, wherein it has been held: (AIR p. 1423, para 13)*
>
> > *"13.... The law with regard to transfer of cases is well-settled. A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."*
>
> *8. This Court in Abdul Nazar Madani v. State of T.N., (2000) 6 SCC 204, has ruled that: (SCC p. 210-11, para 7)*

> *"7.....The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."*

*9. In Captain Amarinder Singh v. Parkash Singh Badal and others, (2009) 6 SCC 260, while dealing with an application for transfer petition preferred under Section 406 CrPC, a three-Judge Bench has opined that for transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It has also been observed therein that mere an allegation that there is an apprehension that justice will not be done in a given case alone does not suffice. It is also required on the part of the Court to see whether the apprehension alleged is reasonable or not, for the apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension. In the said context, the Court has held thus: (SCC p.273, paras 19-20)*

> *"19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC.*
>
> *20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the court to be a reasonable one."*

*10. In Lalu Prasad alias Lalu Prasad Yadav v. State of Jharkhand, (2013) 8 SCC 593, the Court, repelling the submission that because some of the distantly related members were in the midst of the Chief Minister, opined that from the said fact it cannot be presumed that the Presiding Judge would conclude against the appellant. From the said decision, we think it appropriate to reproduce the following passage: (SCC p.600, para 20)*

> *"20. Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial,*

*the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-à-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or those managing the affairs of the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstance gets devalued. The public interest demands that the trial should be conducted in a fair manner and the administration of justice would be fair and independent."*

*The aforesaid passage, as we perceive, clearly lays emphasis on sustenance of majesty of law by all concerned. Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice.(See Nahar Singh Yadav vs. Union of India (2011) 1 SCC 307)."*

8. Bearing in mind the aforesaid exposition of law and now adverting to the facts of the instant case, I am disposed to think that apprehension which has been stated by the petitioners is absolutely mercurial and cannot remotely be stated to be reasonable and, therefore, cannot be acceded to. Encouraging such kind of practice would only embolden the unscrupulous litigants to indulge themselves in court hunting. The petitioners have not even cared to name of a few advocates whom they contacted and they refused to conduct their case on the aforesaid ground and this fact in itself casts a serious doubt on the bonafides of the petitioners.

9. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed, so also the pending application(s) if any.

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

Surinder Singh .....Appellant/Plaintiff.
Versus
Narinder Singh and others ....Respondents/Defendants.

RSA No.240 of 2004.
Judgment reserved on: 20.11.2018.
Date of decision: 27th November, 2018.

**Indian Registration Act, 1908 -** Section 17 (2)(vi) - Decree**,** whether compulsorily registrable ? Held – Decree or order merely declaring pre-existing right of party and by itself not creating new right title or interest inpreasnti in immovable property of value of rupees more than one hundred, does not require registration – It is duty of court to examine

whether party had pre-existing right to immovable property or under order or decree of court one party having right interest of title agreed or suffered to extinguish same and created right inpreasenti in such property in favour of other party for first time either by compromise or pretended consent – If latter be the position, decree requires registration. (Para 18)**.**

**Indian Registration Act,1908 -** Section 17(2) (vi)- Decree**,** whether compulsorily registrable ? – Suit of "NR" decreed for pre-emption with respect to suit land – Suit was filed for plaintiff and his brother "N" without impleding plaintiff since he was minor – Plaintiff filing suit for declaring for his rights in land for which pre-emption rights were claimed in earlier suit- This suit decreed on basis of compromise – Held, compromise decree merely reconised pre-existing right of plaintiff in said land – Decreed did not require registration. (Paras 20 & 21).

**Code of Civil Procedure, 1908** – Section 96 - First appeal – Disposal thereof – Duty of Court – Held, it is duty of first Appellate Court to appreciate entire evidence on record – Judgment of Appellate Court must reflect its conscious application of mind and record findings supported by reasons on all issues arising and contentions putforth before it. (Para 25).

***Cases referred:***

Bhoop Singh versus Ram Singh Major, (1995) 5 SCC 709

K. Raghunandan versus Ali Hussain Sabir (2008) 13 SCC 102

Laliteshwar Prasad Singh & Ors. versus S.P. Srivastava (dead) through legal representatives (2017) 2 SCC 415

Phool Patti and another versus Ram Singh(dead) through LRS and another, (2009) 13 SCC 22

Phool Patti and another versus Ram Singh (dead) through LRs and another, (2015) 3 SCC 465

S. Noordeen versus V.S. Thiru Venkita Reddiar and others, (1996) 3 SCC 289

Som Dev and others versus Rati Ram and another, (2006) 10 SCC 788

| | | |
|---|---|---|
| For the Appellant | : | Mr.Karan Singh Kanwar, Advocate. |
| For the Respondents | : | Mr. R.K. Gautam, Senior Advocate with<br>Ms. Megha Kapur Gautam, Advocate, for respondent No.2.<br>None for respondent No.1.<br>Respondents No.3 & 4 *ex parte.* |

The following judgment of the Court was delivered:

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**Tarlok Singh Chauhan, Judge**

The plaintiff is the appellant, who after having lost before both the learned Courts, has filed the instant appeal. The parties hereinafter shall be referred to as the 'plaintiff' and the 'defendants'.

2. The plaintiff filed a suit for declaration against defendants No.1 to 3 that he is owner in possession of land comprised in Khata No. 81, Khatauni No. 131, Khasra No.200/65, measuring 100-16 Bighas, sitaute in Village Palhori, Tehsil Paonta Sahib, District Sirmaur. Munshi Khan, defendant No.4, is a tenant on land measuring 26-4 bighas, comprised in Khasra No. 200/65/1 under plaintiff and entry showing defendants No.2 and 3 as co-owners qua the suit land is illegal, wrong and void. The case of the plaintiff is that he and defendant No.1 are real brothers. The father of the plaintiff and defendant No.1, Shri Harpal Singh had ½ share in the property and other ½ share was

that of their uncle Shri Jai Pal Singh. Their father sold his ½ share for a sum of Rs.13,000/- out of Khasra No. 28, Khatauni Nos. 92 to 108 to the extent of 308.19 bighas out of 617.19 bighas to one Shri Balbir Singh, Khasra No. 65 measuring 254.12 bighas was also included in the said sale.

3. It was averred that plaintiff and defendant No.1 were minors at the time of said sale. Narinder Singh defendant No.1 through Nathu Ram filed a suit for pre-emption against Balbir Singh and Harpal Singh challenging the sale and suit was decreed on 3.7.1970. It was further averred that plaintiff was not impleaded as co-owner in that suit through the said suit was filed on behalf of the plaintiff and defendant No.1 and in these circumstances, the plaintiff could not figure in that suit. In order to rectify this defect, the plaintiff filed a Civil Suit No.104/1 of 1975 in the Court of learned Senior Sub Judge, Nahan, titled as 'Surinder Singh versus Narinder Singh', wherein it was claimed that the earlier decree dated 03.08.1970 was fraudulent. This suit was decreed on 25.10.1978 and plaintiff got ½ share in the land, which was sold to Balbir Singh. The plaintiff and defendant No.1 thus became owner in possession of that land. It was also averred that the share of plaintiff No.1 exceeded the limit of ceiling under the Himachal Pradesh Ceiling on Land Holdings Act, 1972. On the strength of decree dated 25.10.1978, the plaintiff and defendant No.1 were entitled to exemption and, therefore, a family settlement was arrived at between them whereby defendant No.1 gave up the suit land in favour of the plaintiff and as such the plaintiff became owner of Khasra No. 200/65, measuring 100-16 bighas. A memorandum was executed in this respect in between plaintiff and defendant No.1, which was given to defendant No.1 for attestation of mutation.

4. The plaintiff averred that in the year 1965, Khasra No. 200/65/1, measuring 26-4 bighas remained in the tenancy of Munshi Khan, who used to manage the other property of Shri Harpal Singh. Munshi Khan, proforma defendant No.4, constructed a house, cow shed on this land and also cultivated the same, but name of Munshi Khan could not be recored as non-occupancy tenant. On 01.09.2000, plaintiff consulted Patwari and came to know that name of defendant No.1 is continuing and names of defendants No.2 and 3 have also been incorporated in the revenue record pertaining to the suit land. It was also averred that defendant No.1 has committed fraud with plaintiff and no title has passed to defendants No.2 and 3. Hence, the plaintiff filed a suit for declaration and in the alternative for possession.

5. Defendant No.1 contested the suit by filing written statement and took objections qua maintainability and limitation. On merits, he averred that being owner in possession, he executed an agreement for sale of the suit land in favour of Krishan Dutt for a sum of Rs.64,000/-, but Krishan Dutt could not get the sale deed executed in his favour being non-agriculturist in Himachal Pradesh and on his instructions, sale deed was executed in favour of defendants No.2 and 3. He denied having any family settlement in which his half share was given to the plaintiff and denied the execution of any document in this regard.

6. Defendants No.2 and 3 filed joint written statement wherein objections qua cause of action, locus-standi and limitation were taken. The plea of collusion of plaintiff and defendant No.1 has also been taken by defendants No.2 and 3 in their written statement. Defendants No.2 and 3 averred that defendant No.1 had sold the suit land through registered sale deeds dated 02.07.1987 and 03.07.1987 for a sum of Rs.64,000/- and they were delivered possession and as such they are owners in possession of the suit land. They denied the tenancy of Munshi Khan or his possession on any part of the suit land. It was averred by defendants No.2 and 3 that pre-emption suit of Narinder Singh was decreed and on payment of pre-emption money, the title passed over to Narinder Singh, who became

absolute owner of the land which he got pre-empted. Narinder Singh got the joint land partitioned and separated from his uncle Jai Pal Singh and mutation to this effect was attested. Defendant No.1 was the absolute owner and no title passed to plaintiff. The Civil Suit No.104/1 of 1975 titled as 'Surinder Singh versus Narinder' was collusive and there existed no pre-existing right, title and interest and decree in that suit was not registered, therefore, no title came to the plaintiff through that decree.

7. Defendants No.2 and 3 also averred that earlier Gulam Deen had instituted a suit claiming tenancy over the suit land which was dismissed on 31.12.1990. Gulam Deen started interfering and in these circumstances defendants No.2 and 3 had to file a suit against him which was decreed.

8. Proforma defendant No.4 filed written statement and took the plea that his predecessor-in-interest was a tenant and entry of his tenancy was got deleted by the father of the plaintiff and defendant No.1. It was averred that earlier Rahimudeen was the tenant and after his death, father of Munshi Khan came in possession and on his death, he came in possession of land measuring 26.4 bighas. Munshi Khan also put up counter-claim by taking the plea that Rahimudeen was tenant on Khasra No. 200/65/1, measuring 26.4 bighas under Harpal Singh and an entry to this effect was made in the revenue record, but it was got deleted. According to Munshi Khan, he succeeded to the tenancy rights of Rahimudeen and he came to know about the wrong entry on 15.10.2000 and in these circumstances he put up the counter claim for declaration. It was also averred that no written statement to the counter claim was filed either by the plaintiff or any other defendants. The learned Sub Judge dismissed the suit and counter claim vide common judgment and decree dated 21.03.2003 against which plaintiff filed Civil Appeal No.29-CA/13 of 2003 and he filed Civil Appeal No.28-CA/13 of 2003 and both the appeals were dismissed vide common judgment passed by the learned District Judge, Sirmaur District at Nahan, on 08.03.2004.

9. The learned trial Court framed the following issues on 08.01.2002:-

"1. Whether plaintiff is exclusive owner over the suit property i.e. Khasra No.200/65/1 measuring 74-12 bighas? OPP.

2. Whether defendant No.4 Munshi Khan is a tenant over Khasra No.200/65/1 measuring 26-4 bighas under plaintiff. If so, its effect? OPP.

3. Whether entries showing defendants No.2 and 3 as co-owners in the suit land are illegal. If so its effect? OPP.

4. Whether plaintiff is entitled to the relief of possession. If not found in possession over Khasra No. 200/65/2, measuring 74-12 bighas? OPP.

5. Whether there was family arrangement between the plaintiff and defendant No.1? OPP.

6. Whether defendants No.2 and 3 are owners by way of sale deed dated 2-7-87 and 3-7-87? OPD.

7. Whether decree in civil suit No.104/1 of 1975 titled Surinder Singh v. Narinder Singh was collusive. If so, its effect? OPD.

8. Whether decree in civil suit No. 104/1 of 1975 did not confer title due to non-registration, if so, its effect? OPD.

9. Whether Narinder Singh was absolute owner in possession and on partition, suit land fell to the share of defendant No.1. If so, its effect? OPD.

10. Whether defendant No.4 is entitled to the decree of declaration that he is a tenant over 26-4 bighas under Harpal Singh, if so, its effect? OPD.

11. Relief."

10. After recording evidence and evaluating the same, the learned trial Court dismissed the suit as well as counter-claim on 21.03.2003 and the appeals filed against the aforesaid judgment and decree passed by the learned trial Court, also came to be dismissed by the learned first appellate Court vide judgment and decree dated 08.03.2004.

11. Aggrieved by the judgments and decrees passed concurrently by the learned Courts below, the plaintiff has filed the instant appeal.

12. On 09.07.2004, this Court admitted the appeal on the following substantial question of law:-

> "Whether judgment Ex.P-4, decree Ex.P-5 in Civil Suit No.104/1 of 1975 on 25.10.1978 are inadmissible in evidence for want of registration?"

13. In ***Bhoop Singh*** *versus* ***Ram Singh Major***, ***(1995) 5 SCC 709***, the question before the Hon'ble Supreme Court was whether a compromise decree is compulsorily registrable. In that case, there was no pre-existing right to the properties between the parties, but a right was sought to be created for the first time under the compromise. The High Court had taken the view that it was not a compulsorily registrable instrument under Section 17 of the Act. The Hon'ble Supreme Court considered elaborately the circumstances in which clause(vi) of sub-section (2) of Section 17 of the Registration Act would come into play and stated in paragraph 18 thus:-

> *"The legal position qua clause (vi) can, on the basis of the aforesaid discussion, be summarised as below:*
>
> *(1) Compromise decree if bona fide, in the sense that the compromise is not a device to obviate payment of stamp duty and frustrate the law relating to registration, would not require registration. In a converse situation, it would require registration.*
>
> *(2) If the compromise decree were to create for the first time right, title or interest in immovable property of the vlaue of Rs.100 or upwards in favour of any party to the suit the decree or order would require registration.*
>
> *(3) If the decree were not to attract any of the clauses of sub-section(1) of Section 17, as was the position in the aforesaid Privy Council and this Court's cases, it is apparent that the decree would not require registration.*
>
> *(4) If the decree were not to embody the terms of compromise, as was the position in Fazal Rasul Khan v. Mohd-ul-Nisa, AIR 1944 Lah 394, benefit from the terms of compromise cannot be derived, even if a suit were to be disposed of because of the compromise in question.*
>
> *(5) If the property dealt with by the decree be not the 'subject-matter of the suit or proceeding', clause (vi) of sub-section (2) would not operate, because of the amendment of this clause by Act 21 of 1929, which has its origin in the aforesaid decision of the Privy Council, according to which the original clause would have been attracted, even if it were to encompass property not litigated."*

14. Similar, reiteration of law can be found in ***S. Noordeen*** *versus* ***V.S. Thiru Venkita Reddiar and others***, ***(1996) 3 SCC 289***.

15. In ***Som Dev and others*** *versus* ***Rati Ram and another***, ***(2006) 10 SCC 788***, the question before the Hon'ble Supreme Court was whether a decree based on admission recognising pre-existing right under a family settlement required registration. It was held that once a decree did not create any right in immovable property and merely

recognized the right put forth by the plaintiff in that suit based on an earlier family arrangement or relinquishment by the defendant in that suit and on the basis that the defendant in the suit admitted such an arrangement or relinquishment, then the decree could not be held to be admissible and could not be treated as evidencing the recognition of the rights of the present plaintiff and his brothers as co-owners for want of registration.

16. However, when similar issue came up for consideration before the Hon'ble Supreme Court in ***Phool Patti and another*** *versus* ***Ram Singh(dead) through LRS and another, (2009) 13 SCC 22*** with regard to the proposition as to whether a consent/compromise decree pertaining to the immovable property requires registration, a two Judge Bench of the Hon'ble Supreme Court made a reference to a Larger Bench observing inconsistency in the decision of the Hon'ble Supreme Court in ***Bhoop Singh's case (supra)*** and another decision in case titled ***K. Raghunandan*** *versus* ***Ali Hussain Sabir (2008) 13 SCC 102***, with the following observations:-

> *"6. Since the consent decree dated 24.11.1980 had been held by the First Appellate Court to be not collusive, the High Court in our opinion rightly refused to interfere with that findings of fact.*
>
> ***7. It was then urged by the learned counsel for the appellant that there was violation of the Section 17 of the Registration Act, 1908. 11. In this connection, it may be noted that Section 17(2)(vi) of the Registration Act states that:***
>
> ***"17.(2) Nothing in clauses (b) and (c) of sub-section(1) of Section 17 applies to :-***
>
> * * *
>
> *"(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject- matter of the suit or proceeding." (emphasis supplied)*
>
> *In our opinion the exception mentioned in Section 17(2)(vi) means that if a suit is filed by the plaintiff in respect of property A, then a decree in that suit in respect of immovable property B (which was not the subject-matter of the suit at all) will require registration. This is the view taken by this Court in K. Raghunandan & Ors. vs. Ali Hussain Sabir & Ors. 2008(9) Scale 215. 13. However, a different view was taken by this Court in Bhoop Singh vs. Ram Singh Major 1995(5) SCC 709 in which it is stated that : (SCC p. 715, para 16)*
>
> *"16.....We would think that the exception engrafted is meant to cover that decree or order of a court, including a decree or order expressed to be made on a compromise, which declares the pre-existing right and does not by itself create new right, title or interest in praesenti in immovable property of the value of Rs.100 or upwards." (emphasis supplied)*
>
> *8. In our opinion there seems to be inconsistency between the decisions of this Court in Bhoop Singh's case (supra) and K. Raghunandan's case (supra) in so far as the interpretation to the exception in clause (vi) of Section 17(2) of the Registration Act is concerned. Prima facie it seems to us that the decision in Bhoop Singh's case (supra) does not lay down the correct law since Section 17(2)(vi) on its plain reading has nothing to*

*do with any pre existing right. All that seems to have been stated therein is that if a decree is passed regarding some immovable property which is not a subject-matter of the suit then it will require registration. As already explained above, if a suit is filed in respect of property A but the decree is in respect of immovable property B, then the decree so far as it relates to immovable property B will require registration. This seems to be the plain meaning of clause (vi) of Section 17(2) of the Registration Act.*

*9. It is a well settled principle of interpretation that the Court cannot add words to the statute or change its language, particularly when on a plain reading the meaning seems to be clear. Since there is no mention of any pre-existing right in the exception in clause (vi) we have found it difficult to accept the views in Bhoop Singh's case (supra). It seems that there is inconsistency in the decisions of this Court in Bhoop Singh's case (supra) and K. Raghunandan's case (supra), and since we are finding it difficult to agree with the decision of this Court in Bhoop Singh's case (supra), the matter should be considered by a larger Bench of this Court."*

17. On reference, three Judges' Bench of the Hon'ble Supreme Court in ***Phool Patti and another*** *versus* ***Ram Singh (dead) through LRs and another, (2015) 3 SCC 465*** observed that there was no inconsistency between the above two judgments and it was held that transfer of land in family settlement by consent decree which was not registered was held to be valid.

18. Thus, what can now be taken to be well settled principle of law is that an exception in clause (vi) of sub-section(2) of Section 17 of the Act is meant to cover that decree or order of a Court including the decree or order expressed to be made on a compromise which declares the pre-existing right and does not by itself create new right, title or interest in praesenti in immovable property of the value of Rs.100/- or upwards. Any other view would find the mischief of avoidance or registration which requires payment of stamp duty embedded in the decree or order. It would, therefore, be the duty of the Court to examine in each case whether the parties had pre-existing right to immovable property or whether under the order or decree of the Court, one party having right, title or interest therein agreed or suffered to extinguish the same and created a right in praesenti in immovable property of the value of Rs.100/- or upwards in favour of the other party for the first time either by compromise or pretended consent. If latter be the position, the document is compulsorily registrable.

19. Adverting to the facts, it would be noticed that the admitted case of the parties was that earlier to the present suit, one Nathu Ram, who is maternal grand uncle of the parties, had filed a suit for pre-emption which was decreed on 03.08.1970 in favour of defendant No.1. The plaintiff had not been impleaded as co-plaintiff in that suit. Since, the name of the plaintiff had not been impleaded in that case, therefore, he filed a separate suit claiming his share in the property and the suit came to be compromised and a compromise decree was passed in favour of the plaintiff vide judgment and decree Ex.P-4 and P-5.

20. Now, the moot question whether the compromise decree was compulsorily registrable. The answer to the question is obviously in the negative for the simple reason that it was only on account of the plaintiff having pre-existing right in the property in the similar manner to the one possessed by the defendant Narinder Singh, who is none other than the real brother of the plaintiff that the suit as filed by the plaintiff eventually came to be compromised and this is clearly evident from the judgment so passed on 25.10.1978 and reads thus:-

*"IN THE COURT OF SENIOR SUB JUDGE DISTRICT SIRMAUR, NAHAN, (H.P.)*

*Surinder Singh S/o Sh. Chowdhry Harpaul Singh, R/o Khajuri Tehsil Thanesher, District Thanesher. .....Plaintiff.*

*Versus*

*Chowdhry Narinder Singh, S/o Sh. Harpaul Singh, R/o Palhori, Tehsil Paonta, District Sirmaur, Himachal Pradesh. .....Defendant.*

*C. Suit No.104/1 of 75.*

*Instituted on 12.12.75.*

*Decided on : 25.10.78.*

*Suit for Declaration.*

*JUDGEMENT:*

*Sh. Surinder Singh S/O Chowdhry Harpal Singh R/O Khajuri (Plaintiff) has brought this suit against Chowdhry Narinder Singh, his brother (Defendant) for declaration that the decree No. 313/1 passed by the Court of Senior Sub-Judge, Nahan on 3.8.70 in respect of the land in Khewat No.27/9091, Khasra No.77, 78, 75, Kittta 3, measuring 12 Bighas 11 Biswas and the land measuring 308 Bighas 19 Biswas, land 617 Bighas 19 Biswas, Khata No.28/92 measuring 108 Bighas in Village Palhori, Tehsil Paonta. That the plaintiff as a member of the joint Hindu family is entitled to half share as owner and is entitled possession thereof. He has also appeared for any other relief. The defendant has filed his written statement and also made statement in court whereby the parties have compounded this suit. Consequently a compromise decree under Order 23 Rule 3 of C.P.C. is passed in favour of the plaintiff and against the defendant. The terms of the compromise as stated in the written statement and the statement made in the court be incorporated in the decree-sheet. Necessary instructions be also issued to the Revenue Officer for doing the needful as per terms of the decree.*

*The case file be consigned to the Record-Room.*

*Announced in the open Court.*

*Dated : 25.10.1978.*

*Sd/-*

*(Raja Ram)*

*Senior Sub Judge."*

21. Thus, once it is established that the compromise only declared the pre-existing right of the plaintiff and did not by itself create any new right, title or interest in praesenti in immovable property of the value of Rs.100/- or upwards, the same was not required to be compulsorily registered.

22. Therefore, the contrary findings to this effect recorded by the learned Courts below are ordered to be set aside. The learned trial Court failed to realize that both the brothers Surinder Singh and Narinder Singh as regards the property in the earlier litigation were similarly situated and placed and if the defendant Narinder Singh had pre-existing right in the property, then even the plaintiff Surinder Singh had the same right. The first appellate Court has not dealt with this issue very specifically, but nonetheless, has affirmed

the judgment and decree passed by the learned trial Court. Therefore, the substantial question of law is answered in favour of the plaintiff/appellant and against the defendants/respondents.

23. Having answered the substantial question of law in favour of the plaintiff, yet suit filed by him cannot be decreed in his favour on merits, as the learned trial Court has categorically found him not to be the owner of the suit land on the basis of the family settlement as set up by the plaintiff. However, it would be noticed that at the time of arguments of the appeal, the plaintiff/appellant had raised various questions of facts and law as noted by the learned first appellate Court in paragraphs 14 to 16 including the adverse findings regarding the family settlement. Similarly, the defendants/respondents had also raised various contentions of facts and law, as is evident from paragraphs 17 to 20 of the judgment. But, none of these contentions was seriously considered by the learned first appellate Court, who wrapped its findings by making the observations in paragraph-21 of the judgment which read thus:

> "*21. From the perusal of the entire oral as well as documentary evidence, the plaintiff has failed to prove his ownership and possession over the suit property comprised in Kh. No.200/65/1 measuring 100 Bighas 16 Biswas. Even defendant No.1 who is his real brother has also denied the acquisition of right by plaintiff in the suit property. The defendant No.1 has pleaded and even proved that he had sold the entire 100 Bighas 16 Biswas of land to defendants No.2 and 3 through valid sale deed copy of which is Ext. DA and DB dated 2-7-1987 and 3-7-1989 respectively. As the plaintiff has failed to prove any ownership or possession of the suit property, he is not entitled for any relief. Shri Munshi Khan, proforma defendant has also failed to plead or prove the tenancy over the suit land, he is also not entitled for any relief from the Court. Point No.1 is answered accordingly."*

24. On the basis of the aforesaid reasoning, the learned first appellate Court proceeded to dismiss the appeal filed by the plaintiff.

25. It is settled principle of law that right to file first appeal against the decree under Section 96 of the Code of Civil Procedure is a valuable legal right of the litigant. The jurisdiction of the first appellate Court while hearing the first appeal is very wide like that of learned trial Court and it is open to the appellant to attack all findings of fact or/and of law in the first appeal. It is duty of the first appellate Court to appreciate the entire evidence and may come to a different conclusion from that of the trial Court. While doing so, the judgment of the appellate Court must reflect its conscious application of mind and record findings supported by reasons, on all issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. While reversing a finding of fact, the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate Court had discharged the duty expected of it.

26. The scope, ambit and power of the first Appellate Court while deciding the first appeal have been subject matter of various judicial pronouncements and I may refer to the pronouncement of the Hon'ble Supreme Court in ***Laliteshwar Prasad Singh & Ors***. versus ***S.P. Srivastava (dead) through legal representatives*** (***2017) 2 SCC 415***, wherein it was held as under:-

> ***"13****. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the*

*first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in Vinod Kumar v. Gangadhar (2015) 1 SCC 391, it was held as under:- (SCC pp. 394-96, paras 12-15)*

> *"12. In Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)*
>
> > *"15. … The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. … while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."*
>
> *The above view has been followed by a three-Judge Bench decision of this Court in Madhukar v. Sangram (2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.*
>
> *13. In H.K.N. Swami v. Irshad Basith (2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3)*
>
> > *"3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."*
>
> *14. Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court observed as follows: (SCC p. 303, para 2)*
>
> > *'2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion.'*
>
> *15. Again in B.V. Nagesh v. H.V. Sreenivasa Murthy (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)*
>
> > *'3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:*

*(a) the points for determination;*

*(b) the decision thereon;*

*(c) the reasons for the decision; and*

*(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.*

*4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, SCC p. 188, para 15 and Madhukar v. Sangram (2001) 4 SCC 756, SCC p. 758, para 5.)*

*5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law.' "*

27. In view of the aforesaid exposition of law, the matter is remanded back to the learned first appellate Court with a direction to render complete findings on the rival contentions raised by the parties as noted in paragraphs 14 to 16 and 17 to 20 of the judgment so passed by it.

28. The appeal is disposed of in the aforesaid terms, so also the pending application, if any, leaving the parties to bear their own costs.

29. The parties, through their learned counsel(s), are directed to appear before the learned First Appellate Court on 17.12.2018.

30. Since the suit was filed more than 18 years back i.e. on 5.10.2000, the learned first appellate Court is requested to decide the same as expeditiously as possible and in no event later than **30th June, 2019.**

**********

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

Bhagat Ram (deceased through LR Vinod Kumar) .....Appellant.
Versus
Roop Lal and anr. .....Respondents.

RSA No.444 of 2002.
Decided on: 30.10.2018.

**Indian Succession Act,1925** - Section 63 – Will – Proof – Suspicious circumstances – Trial Court decreeing suit of plaintiffs and holding them owners in possession of suit property on basis of will executed by father – Also holding subsequent will in favour of defendant suspicious – District Judge, affirming decree in appeal – Regular Second Appeal – On facts, scribe/document writer of will relied upon by defendant not producing his register, testator dying few days after execution of said will, testator not opting to register subsequent will though office of Sub - Registrar located few meters away from his house and when earlier will was registered one, mutation in favour of plaintiffs on basis of earlier will, attested in presence of defendant, defendant not producing subsequent will at time of attestation of mutation, no provision for maintenance of wife in subsequent will, writing in will squeezing towards end indicative of attempt to adjust words in given space, judicial papers used for scribing will being of different series- Held, will relied upon by defendant shrouded by suspicious circumstances – Decree upheld. Regular Second Appeal dismissed. (Paras 14 to 18).

***Cases referred:***
M.B. Ramesh (dead) by LRs vs. K.M. Veeraje URs (dead) by LRs. & ors., (2013) 7 SCC 490
Mahesh Kumar (dead) by LRs vs. Vinod Kumar & ors., (2012) 4 SCC 387
Pentakota Satyanarayana & ors. Vs. Pentakota Seetharatnam & ors., (2005) 8 SCC 67

For the petitioner: Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. Dalip K Sharma, Advocate.

The following judgment of the Court was delivered:

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

Deceased appellant Bhagat Ram was defendant in this case. Aggrieved by the judgment and decree dated 29.6.2002 passed by learned District Judge, Kangra at Dharamshala in Civil Appeal No. 83-P/XIII/2000, he is in second appeal before this Court. As a matter of fact, learned trial Court vide judgment and decree dated 4.4.2000 passed in Civil Suit No. 33/96 has decreed the suit filed by the respondents herein, plaintiffs in the trial Court. They were declared as owners-in-possession in equal share of the land comprising Khata No. 55, Khatauni No. 85-86, Kh. Kita 11, measuring 0-51-55 hectares situated in Mohal Tanda, Mouja Ghuggar, Tehsil Palampur and to the extent of 2/3rd share (1/3 each) qua the property entered in Khata No. 128, Khatauni Nos. 356 to 358, Kh. Kita 3, measuring 144-05 square meters, situated at Mohal Palampur Khas, Tehsil Palampur, Distt. Kangra, H.P. (hereinafter referred to as the "suit property") on the basis of last **"Will" Ext. PA** executed by late Sh. Ishwar Dass, their predecessor-in-interest on 5.8.1985. The

**"Will" Ext. DW-2/A** dated 30.12.1992 set up by the defendant was declared illegal, null and void, hence set aside. The defendant, by way of decree of permanent prohibitory injunction, was restrained from causing any interference in the suit property.

2. The plaintiffs' case, in a nut shell" is that they alongwith defendant are real brothers. Their father late Sh. Ishwar Dass had executed the "Will" Ext. PA on 5.8.1985 and thereby bequeathed the suit property exclusively in their favour whereas his other property situated at Jogindernagar in favour of the defendant. On the basis thereof, mutation Nos. 292 and 406 Exts. PC and PD, respectively, were sanctioned and attested in the presence of defendant. The defendant neither objected to the attestation of the mutation nor ever preferred any appeal against it before the competent authority. The plaintiffs, therefore, became owners-in-possession of the suit property to the extent of ½ share each and 2/3 share (1/3 each). The defendant who never objected to the attestation of the mutation of the suit property in their name in his presence on 2.6.1994 set up a forged and fictitious Will dated 30.12.1992 Ext. DW-2/A after the death of late Sh. Ishwar Dass, the testator by producing the same before Sub Registrar, Palampur for registration under Section(s) 40/41 of the Indian Registration Act. He knowing fully well that the mutation of the suit property was already attested and sanctioned in favour of the plaintiffs pursuant to the "Will" Ext. PA has not impleaded them parties in such proceedings and to the contrary it is only the general public added as respondent. On the basis of "Will" Ext. DW-2/A dated 30.12.1992, the defendant started proclaiming that the suit property should have devolved upon both the parties in equal shares on the death of the testator late Sh. Ishwar Dass. Subsequently, he even started causing interference also in the suit property and also initiated the proceedings to review the order of mutation already passed in their favour in his presence. The plaintiffs, therefore, had filed the suit for declaration to the effect that they are owners-in-possession in equal share of the suit property and "Will" Ext. DW-2/A dated 30.12.1992 being forged and fictitious document is not binding on them. The same, as such, was sought to be declared as null and void being the outcome of fraud and forgery. The review order, if any, of the mutation numbers 292 and 406 already attested in favour of the plaintiffs was also sought to be declared illegal, null and void. Additionally, by way of decree of permanent prohibitory injunction, the defendant was sought to be restrained from causing any interference in any manner, whatsoever, in the suit property.

3. The defendant, when put to notice, has resisted and contested the suit. In preliminary, he raised the issues so as to maintainability of the suit, estoppel, cause of action, *locus standi* to file the suit and the same being not valued properly for the purposes of court-fee and jurisdiction.

4. On merits, it has been pleaded that late Sh. Ishwar Dass has executed a valid Will in favour of both the parties on 30.12.1992. The same was duly registered on 22.11.1994. While admitting that late Sh. Ishwar Dass had executed the gift deed in his favour qua the property situated at Jogindernagar, Distt. Mandi, it was further pleaded that Will dated 30.12.1992 is his last and final Will. Therefore, the earlier "Will" Ext. PA dated 5.8.1985 stood automatically cancelled on the execution of the last and final Will dated 30.12.1992 Ext. DW-2/A. It is denied that "Will" Ext. DW-2/A is forged and fictitious document and executed by him in connivance with the scribe and marginal witnesses. It is also pleaded that since the Will dated 30.12.1992 remained lying with him at Jogindernagar, therefore, could not be produced earlier to 22.11.1994. Also that, the plaintiffs under the garb of the "Will" Ext. PA wants to grab the entire property at Ghuggar, Tanda and Palampur Khas and to deprive him therefrom.

5. The replication was also filed.

6. On the pleadings of the parties, following issues were framed:

"1). Whether property in dispute was owned and possessed by Ishwar Dass, prior to his death, as alleged? OPP.

2). Whether deceased Ishwar Dass has gifted the suit property of Tehsil Jogindernagar in favour of defendant vide gift deed dated 30.07.1985 and had bequeathed his property situated in Mohal Tanda Ghuggar and Mohal Palampur Khas, in favour of the plaintiff vide his will dated 05.08.1985, as alleged? OPP.

3). If issue No.2, is proved in affirmative, whether the plaintiffs are owners in possession of the suit property situated in Mohal Tanda Ghuggar and Mohal Palampur Khas,, as alleged? OPP.

4). Whether the will dated 30.12.1992, is forged and fraudulent alleged to be executed by the defendant after the death of his father Ishwar Dass in collusion with scribe and marginal witness as alleged, if so its effect? OPP.

5) Whether the plaintiffs are entitled to relief of injunction, as prayed for? OPP.

6). Whether the suit is not maintainable as alleged? OPD.

7). Whether the act and conduct of the plaintiff are bar to the present suit? OPD.

8). Whether the plaintiff has no locus standi and cause of action? OPD.

9). Whether the suit is not properly valued for the purpose of Court Fee and jurisdiction?" OPD.

10). Whether deceased Ishwer Dass executed valid will dated 30.12.1992, as alleged? OPD.

11). Relief."

7. Learned trail Court after holding full trial and affording the parties on both sides an opportunity of being heard, has decided issues No. 1 to 3 and 5 in favour of the plaintiffs. Issue No. 4, as is apparent from the perusal of the findings recorded thereon, has been answered in favour of the plaintiffs, however, below heading **Reasons for findings** "No." came to be recorded inadvertently and on account of inadvertent mistake because the answer in view of the findings recorded on this issue should have also been in affirmative i.e. "Yes". While issues No. 6 to 9 were not pressed, issue No. 10 was decided against the defendant. As a cumulative effect of the findings so recorded on all the issues, the suit has been decreed by learned trial Court as pointed out in this judgment at the very outset. The appeal preferred by the defendant has also been dismissed by the learned lower appellate Court vide judgment and decree under challenge in the present appeal.

8. The legality and validity of the impugned judgment and decree has been assailed on the grounds inter alia that the "Will" Ext. DW-2/A having been duly proved by way of oral as well as documentary evidence and also as per the provisions contained under the Indian Succession Act and Indian Registration Act has erroneously been discarded by both the Courts below. The provisions contained under the Indian Succession Act and also the Indian Evidence Act as well as Indian Registration Act have been misconstrued, misinterpreted and mis-appreciated. The evidence as has come on record by way of testimony of PW-1 Roop Lal, DW-1 Bhagat Ram, DW-2 Shamsher Chand and DW-3 Bhagat Ram as well as documentary evidence Ext. PA and Ext. DW-2/A has also been misread, misconstrued and not appreciated in its right perspective. This, according to the defendant

has resulted in miscarriage of justice to him. The impugned judgment, as such, has been sought to be quashed and set aside.

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

> "1. Whether on the proper construction and interpretation of the documents Ex. DW2/A the registered sale deed the presumption of validity executed Will revoking the previous will could be raised and whether the findings of the learned courts below are contrary to the facts and law?
>
> 2. Whether the learned courts below has misread and misconstrued the oral and documentary evidence, especially the statements of PW-1, DW-1, DW-2 and DW-3, Ext. PA registered Will dated 30.12.1992?"

10. The execution of the "Will" Ext. PA dated 5.8.1985 is not in any controversy because the defendant has also admitted the same having been executed by his father late Sh. Ishwar Dass. However, as per the case he set out, the same stood revoked automatically on execution of the last and final "Will" Ext. DW-2/A on 30.12.1992. The plaintiffs, however, have denied the execution of the same by the testator late Sh. Ishwar Dass and according to them, the same rather is result of fraud and forgery.

11. While Mr. Sanjeev Kuthiala, Advocate representing the appellant-defendant has made an effort to persuade this Court to take the view of the matter that the "Will" Ext. DW-2/A is a genuine document and executed by the testator late Sh. Ishwar Dass and also that the execution of the Will in accordance with law is duly proved on record, Mr. Dalip K. Sharma, learned counsel representing the plaintiffs has urged that the same is shrouded by suspicious circumstances, hence, cannot be treated to be the last and final Will of late Sh. Ishwar Dass. Mr. Kuthiala, Advocate has placed reliance on the judgments of the Apex Court in ***Pentakota Satyanarayana & ors. Vs. Pentakota Seetharatnam & ors.,*** (2005) 8 SCC 67***, Mahesh Kumar (dead) by LRs vs. Vinod Kumar & ors.,*** (2012) 4 SCC 387 and ***M.B. Ramesh (dead) by LRs vs. K.M. Veeraje URs (dead) by LRs. & ors.,*** (2013) 7 SCC 490.

12. In view of the claims and counter-claims, as laid on both sides, the suspicious circumstances by which "Will" Ext. DW-2/A is stated to be shrouded reads as follows:

> "i) When late Sh. Ishwar Dass, the testator has executed a legal and valid "Will" Ext. PA on 5.8.1985 without there being any reason in the "Will" Ext. DW-2/A qua revocation thereof, the subsequent Will is not genuine and rather forged and fictitious.
>
> ii) In the disputed Will Ext. DW-2/A, the date of the Will revoked thereby does not find mention hence, the Will Ext. PA is in force.
>
> iii) The scribe DW-2 Shamsher Chand has not produced the register to prove that the entries qua the execution of the "Will" Ext. DW-2/A were made therein after its execution.
>
> iv) The non-production of the register and the entries qua execution of the "Will" Ext. DW-2/A therein show that the same was engineered and fabricated after the death of late Sh. Ishwar Dass, the scribe on 27.1.1993.
>
> v) The date of the disputed "Will" Ext. DW-2/A as 30.12.1992 whereas that of death of the testator 27.1.1993 shows that he was not in sound

disposing mind having been expired after few days of the execution of the said Will.

vi) The failure of the defendant to produce the "Will" Ext. DW-2/A on 2.6.1994 when the mutation was sanctioned and attested on the basis of the Will Ext. PA qua the suit property in his presence.

vii) The non-production of the disputed "Will" Ext. DW-2/A for a long period i.e. after 27.1.1993, the date of death of the testator till 2.6.1994 when produced for registration.

viii) When the earlier "Will" Ext. PA was a registered document why the testator late Sh. Ishwar Dass had not opted for getting the subsequent "Will" Ext. DW-2/A also registered when as per the evidence available on record the Tehsil Office situated at a distance of was 60 yards away from the place where it was scribed.

ix) The testator has not made any provision in the Will Ext. DW-2/A for the benefit of his wife except for that if not maintained by his sons she could file a suit for maintenance against them also, makes the Will suspicious as no husband would prefer such type of arrangement for his wife after his death.

13. The substantial question of law at Sr. No. 2 hereinabove has now to be considered in the light of the above suspicious circumstances by which the disputed "Will" Ext. DW-2/A is shrouded.

14. Both the Courts below have not only appreciated the facts of the case and the evidence available on record but also the law applicable in such a situation. It is well settled at this stage that the Will is a most solemn document as the same speaks only after the death of the testator and that too if produced in the Court, hence, the degree of proof should be high to prove the same. It is for the propounder of the Will to have removed all doubts and suspicious circumstances, if any. The defendant in order to prove "Will" Ext. DW-2/A has himself stepped into the witness-box as DW-1 and examined its scribe DW-2 Shamsher Chand whereas the attesting witness DW-3 Bhagat Ram. The non-production of the register by DW-2 Shamsher Chand who is a Petition/Document Writer and the entries qua execution of the "Will" Ext. DW-2/A made therein has rendered the execution of the Will highly doubtful. DW-2 Shamsher Chand who is working as Petition/Document Writer since 1996 would have been in the knowledge of production of such record in the Court to remove all doubts qua execution of a legal and valid Will. The Register being maintained by DW-2 Shamsher Chand was a material piece of evidence and since the same has not been proved, therefore, it can reasonably be believed that the Will was not scribed by him during the lifetime of the testator late Sh. Ishwar Dass. The defendant-appellant has not disputed the factum of his father Ishwar Dass having property at Jogindernagar and Palampur. He has also not disputed the gift of the property situated at Jogindernagar executed by said Ishwar Dass in his favour. He has also not disputed the execution of the Will Ext. PA on 5.8.1985 qua the suit property by late Sh. Ishwar Dass in favour of the plaintiffs. How, on the basis of "Will" Ext. DW-2/A, it can be said that the "Will" Ext. PA stood revoked automatically is not understandable, that too when the disputed "Will" Ext. DW-2/A was allegedly executed on 30.12.1992 and the testator late Sh. Ishwar Dass died few days thereafter i.e. on 27.1.1993. When the previous "Will" Ext. PA was got registered by him in the office of Sub Registrar, it is not understandable as to why he opted for not getting the disputed Will Ext. PWQ-2/A also registered as the office of Sub Registrar was situated at a distance of 60 yards from the place where it was scribed.

15. Interestingly enough, mutation Nos. 292 and 406 in favour of the plaintiffs was attested on the basis of "Will" Ext. PA in the presence of the defendant. He neither raised any objection nor preferred appeal against the order of mutation. Not only this but had the disputed Will been executed on 20.12.1992 by late Sh. Ishwar Dass, he would have produced the same before the revenue authorities which had attested the mutation and objected to the sanction and attestation of the mutation on the basis of the Will Ext. PA. Admittedly, he, however, opted for not doing so and the explanation that the disputed Will was lying in his house at Jogindernagar is neither plausible nor reasonable. It is also not understandable as to why the Will was not produced before 2.6.1994 before the Sub Registrar for registration. It is surprising to note that a husband (late Ishwar Dass) would have not left his wife after his death at the mercy of his sons and rather should have made suitable provision qua her maintenance while executing the Will Ext. DW-2/A. It is, therefore, a suspicious circumstance that she was left in lurch to sue her sons in the event of they at some later stage failed to maintain her.

16. The trend of writing of the Will Ext. DW-2/A also makes it doubtful because on the first page and in the starting of second page, the spacing is wide whereas the same went on squeezing towards the end. Even the signatures of the attesting witnesses Ext. DW-3/A are on the margin of the second page. Had the Will been written during the lifetime of the testator, it should have been properly scribed by leaving proper space. While number of the first judicial paper used is 004317, it is 004293 of the second page. Both the papers, as such, are of different series. As a matter of fact, in the natural course both judicial papers of same series and continuity in number should have been used. This also is a suspicious circumstance as was rightly noted in its judgment by learned trial Court.

17. For all the reasons hereinabove, this Court is satisfied that both the courts below have appreciated the oral as well as documentary evidence available on record in its right perspective. Substantial question of law at Sr. No. 2 stands answered accordingly.

18. Now, if coming to the substantial question of law at Sr. No. 1, in view of the findings recorded hereinabove, since the "Will" Ext. DW-2/A has been held to be shrouded by suspicious circumstances, therefore, the same is not a genuine document nor the same can be believed to be last and final Will of the testator late Sh. Ishwar Dass by any stretch of imagination. Therefore, the same cannot be taken to believe that on its execution the previous Will Ext. PA stood revoked automatically. Both the Courts below have not committed any illegality or irregularity while arriving at a conclusion that the Will Ext. PA alone is the last and final Will of the testator. The substantial question of law at Sr. No. 1 is also answered accordingly.

For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. Consequently, the impugned judgment and decree is upheld, however, no orders as to costs.

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

Ganesh Kumar and another ....Petitioners.

Versus

Pradeep Kumar and another .....Respondents.

Civil Revision No.: 187 of 2017

Date of Decision: 03.10.2018

**Code of Civil Procedure, 1908 -** Section 10 – Stay of suit – Object – Held, object of section 10 of Code is to prevent Court of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two suits in respect of same subject matter between same parties to avoid conflicting decisions being rendered by different courts. (Para. 9).

**Code of Civil Procedure, 1908 -** Section 10 – Stay of suit – Applicability – G filing suit against P and challenging gift deed purportedly executed by him in favour of P – P filing subsequent suit for declaration of title and injection against G and others on basis of gift deed – Trial Court dismissing application of G for stay of suit filed by P – Revision – Held, matter in subsequent suit filed by P directly and substantially same – Suit liable to stayed till adjudication of suit filed by G – Order of Trial Court set aside – Petition allowed. (Para 10).

For the petitioners: Mr. N.K. Thakur, Senior Advocate,
with Mr. Divya Raj Singh, Advocate.

For the respondents: Mr. Devender K. Sharma, Advocate, for respondent No. 1.
Respondent No. 2 *ex parte.*

The following judgment of the Court was delivered:

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

By way of this petition, the petitioners have prayed for setting aside order, dated 31.05.2017, passed by the Court of learned Civil Judge, Court No. III, Amb, whereby an application filed by the present petitioners under Section 10 of the Code of Civil Procedure stands rejected by the learned Court below.

2. Brief facts necessary for the adjudication of the present case are as under:

One Shri Gurbax Singh filed Suit No. 190/2009 against present respondent No. 1-Pradeep Kumar for declaration that Gurbax Singh was owner in possession of land measuring 0-39-02 hects., Khewat No. 337, Khatoni No. 538, Khasra Nos. 2023,2024,2025 and 2026, as entered in Nakal Jamabandi for the year 2003-2004 and defendant, i.e, Pradeep Kumar had no right, title and interest over the same and gift deed, dated 15.06.2009, was false, illegal, null and void being result of fraud and mis-representation and the same had no effect on the right, title and interest of the plaintiff, as he was owner in possession of the suit land. A consequential relief of permanent injunction for restraining the defendant from interfering in any manner the suit land was also prayed for. As per the plaintiff, he was an old aged rustic villager and defendant Pradeep Kumar, who was his relative, being son of his cousin brother, on 13.03.2009, took the plaintiff to Amb for executing a Will, which plaintiff intended to execute in favour of his real sister and defendant.

3. On 15.06.2009, defendant approached the plaintiff and told him that the Will so executed by the plaintiff, was required to be amended and on his request, plaintiff again accompanied him to Amb, where defendant in connivance with Deed Writer and marginal witnesses got manufactured a gift deed in his favour. On the strength of the said gift deed, which was a result of mis-representation, mutations were also got attested in his favour by the defendant and it was in this background that the suit was filed by plaintiff Gurbax Singh for the reliefs already mentioned above.

4. Thereafter, another suit was instituted by the present respondent Pradeep Kumar against the present petitioners, namely Ganesh Kumar and Manjeet Kumar, as also proforma respondent Sh. Kabul Singh praying for the following reliefs:

> *"That it is therefore prayed that decree for declaration to the effect that the plaintiff is owner in possession of land measuring 0-39-02 hects bearing Khewat No. 337, Khatoni No. 538, Khasra Nos. 2023,2024,2025 and 2026 as entered in the Jamabandi for the year 2003-2004, situated in village Mawa Sindian, Tehsil Amb, District Una (H.P.) and the Sale Deed executed by defendant No. 3 in favour of defendant Nos. 1 and 2 the alleged Power of attorney of Gurbaksh Singh now deceased is wrong, incorrect, illegal, void and without any right, titled, interest and authority and has no binding effect on the right title interest of the plaintiff as owner in possession of the Suit land and for issuance of permanent injunction by way of consequential relief restraining the defendants from interfering in any manner taking forcible possession, cutting and removing the trees, raising any sort of construction and denying and disputing the right, title and interest of the plaintiff and alienating in any manner by way of Sale Gift or encumbering the suit land may please be passed in favour of plaintiff and against the defendants or any other such further relief may also be granted to the plaintiff as this Hon'ble Court may deem fit and proper as according to the circumstances of the case."*

As per the plaintiff (Pardeep Kumar), he was owner in possession of the suit land, which was previously owned by Gurbax Singh and who had executed a gift deed in his favour. It was further mentioned in the plaint that defendants in the said suit threatened to forcibly dispossess the plaintiff on the ground that on the basis of a Power of Attorney executed by Gurbax Singh in favour of defendant No. 3, he had executed a sale deed in favour of defendants No. 1 and 2, (i.e., petitioners No. 1 and 2 in the present case). As per the averments made in the said plaint, deceased Gurbax Singh (i.e., plaintiff in the first Civil Suit) had no right, title and interest over the suit land post execution of the gift deed and on these basis, the said suit was filed.

5. In this background, present petitioners filed an application under Section 10 of the Code of Civil Procedure in the subsequent suit filed by Pradeep Kumar praying that in view of the earlier suit pertaining to same suit land filed by late Gurbax Singh, proceedings in the subsequent suit be stayed.

6. This application stands dismissed by the Court of learned Civil Judge, Court No. III, Amb vide impugned order dated 31.05.2017, which stands assailed in this petition. Vide impugned order, learned Court below has rejected the application on the ground that though the suit property is common, yet one suit was instituted by Pardeep Kumar in his capacity as donee on the basis of a registered gift deed against Ganesh Kumar and others seeking declaration that Power of Attorney executed in favour of Kabul Singh by Gurbax Singh and thereafter by Kabul Singh in favour of Ganesh Kumar and Manjeet were wrong and illegal, whereas earlier suit was instituted by Gurbax Singh (now deceased) against Pardeep Kumar seeking declaration that gift deed dated 15.06.2009 purportedly executed by Gurbax Singh in favour of Pardeep Kumar was false and illegal and it was Gurbax Singh who was owner in possession of the suit land. Learned Court below also held that besides this, the parties to the *lis* were different and therefore, the application was devoid of merit.

7. I have heard learned counsel for the parties and have also gone through the documents appended with the petition including both the plaints as also the impugned order.

8. In my considered view, the order under challenge vide which learned Court below has rejected the application filed under Section 10 of the Code of Civil Procedure is perverse and not sustainable in law. Learned Court below has erred in not appreciating the essence behind the provision of Section 10 so incorporated in the Code of Civil Procedure and dismissed the application by applying hypertechnical yardsticks. Section 10 of the Code of Civil Procedure envisages that no Court shall proceed with trial of a suit in which matter in issue is directly or substantially in issue in a previous suit instituted between the parties **"or between parties under whom they or any of them claim litigation"** under same title where such suit is pending in same or other Court in India having jurisdiction to grant the relief.

9. The intent of Section 10 is to avoid multiplicity of litigation. Its object is to prevent Court of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two suits in respect of same subject matter between the same parties to avoid conflicting decisions being rendered by different Courts. One of the most essential ingredients of Section 10 is that the matter in issue in the subsequent suit, which is sought to be stayed must be directly and substantially in issue in the earlier suit, which is pending in the same or any other Court.

10. Coming to the facts of this petition, the first suit was filed by Gurbax Singh seeking declaration that the suit property was owned and possessed by him and that defendant Pardeep Kumar had no title or interest over the same and gift deed dated 15.06.2009 allegedly executed by Gurbax in favour of Pardeep was false, frivolous, illegal and thus null and void. It is not in dispute that this suit is still pending adjudication, though Gurbax Singh has died. The second suit pertaining to the same suit property has been filed by Pardeep Kumar, i.e., defendant in the first suit against Ganesh, Manjeet and Kabul seeking a declaration that he is owner in possession of the suit land and gift deed executed by Kabul Singh in favour of Ganesh and Manjeet, as also power of attorney executed by Gurbax in favour of Kabul Singh were wrong, illegal and void.

11. A perusal of the latter suit demonstrates that the genesis of the pleadings is the gift deed executed by Gurbax Singh in favour of Pardeep Kumar, which gift deed is under challenge in the first suit. In other words, the claim of Pardeep Kumar over the suit land is solely based on a purported gift deed executed by Gurbax Singh in his favour which in his lifetime stood assailed by Gurbax Singh in the earlier Civil Suit. Thus, both these suits pertain to the same suit land. Issues involved in the same are directly and substantially the same and are also between the parties under whom they or any of them claim litigation. This very important aspect of the matter has not been taken into consideration by the learned Trial Court. It has in fact dealt with the matter in a mechanical and hypertechnical manner without taking into consideration the pleadings of the suits in issue or the issues involved therein.

12. Accordingly, this petition is allowed. Impugned order dated 31.05.2017, passed by the Court of learned Civil Judge, Court No. III, Amb is quashed and set aside, as learned Court below has exercised jurisdiction vested in it with material irregularity resulting in gross injustice to the petitioners. It is further directed that the subsequent suit, i.e., Civil Suit No. 605/14/09, titled as *Pradeep Kumar* Vs. *Ganesh Kumar and others* shall remain stayed during adjudication of the earlier suit, i.e., Civil Suit No. 190/2009, titled as *Gurbax Singh* Vs. *Pardeep Kumar.* The petition stands disposed of, so also miscellaneous application(s), if any.

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**BEFORE HON'BLE MR. JUSTICE SURYA KANT, CJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.**

State of Himachal Pradesh ....Appellant.
Versus
Abdul Latif and another .....Respondents.

Criminal Appeal No. 159 of 2012.
Reserved on 14.11.2018
Decided on: 29.11.2018

**Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 8 and 20 – Recovery of Charas – Proof - Police claiming to have recovered huge quantity of Charas from bags thrown by accused on seeing them having laid Nakka at road – Trial Court acquitting accused by extending benefit of doubt – Appeal by State - On evidence, (i) patrol by Police party in private vehicle without claiming travelling allowance and setting up Nakka at that place highly improbable (ii) Independent persons easily available but not joined investigation (iii) statements of Police witnesses contradictory as to place where Nakka laid and manner in which accused apprehended (iv) de-facto complainant doing entire investigation (v) enmity between police officer and one of accused on account of dispute (vi) accused 'T' convicted on confession of co-accused without corroboration – Held, case of prosecution doubtful – Appeal dismissed. ( Paras 13 to 20).

***Cases referred:***
Krishan Chand vs. State of Himachal Pradesh, (2018) 1 SCC 222
Mohan Lal vs. State of Punjab [Crl. Appeal No.1880 of 2011 decided on August 16, 2018] 2018 (9) Scale 663
State of Himachal Pradesh vs. Atul Sharma, (2015) 2 Shim. LC 693

For the appellant: Mr.Ashok Sharma, Advocate General with M/s Ranjan Sharma, Ashwani Sharma, and Nand Lal Thakur, Additional Advocate Generals.
For the respondents: Mr. Anoop Chitkara, Advocate with Ms. Shreya Chauhan, Advocate, for respondent No.1.
Mr. Ajay Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

**Surya Kant, Chief Justice.**

This Criminal Appeal has been preferred by the State of Himachal Pradesh assailing the order dated 21.12.2011 passed by learned Special Judge, Chamba whereby the respondents have been acquitted in a case registered under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act'), arising out of FIR No.166/10 dated 26.06.2010 Police Station Sadar Chamba, Himachal Pradesh.

2. The brief facts of the case are that the raiding party comprising HC Kartar Singh, HC Varinder Singh, HHC Surinder Kumar and Constable Mohammad Aslam headed by ASI Naseeb Singh left for *Nakabandi* towards Koti and Kandla from the Special Investigation Unit on 26.06.2010 in a private vehicle and a private motor cycle vide *Rapat*

No. 5 Ext.PW6/A and laid *naka* on the road, one and a half kilometers before Kandla. At about 3.30 pm, three persons were seen walking over a *pagdandi* crossing the *Baira-Siul* river. On seeing the police party, they turned back and started running on the *pagdandi* following each other and were chased by the police party. ASI Naseeb Singh and HC Kartar Singh could overpower respondent No.1 (Abdul Latif) along with his *khaki* coloured bag which he was carrying on his back but the other two persons managed to flee towards the river side after throwing their bags on the way. They were chased by HC Varinder Singh, HHC Surinder Kumar and Constable Mohammad Aslam but could not be apprehended. The blue and khaki coloured bags thrown by those two persons were, however, taken into possession. The first respondent (Abdul Latif) disclosed that the blue coloured bag and the khaki coloured bags were left behind by Tek Chand (respondent No.2) and Kumar Singh respectively.

3. Suspecting that the bags might be containing some narcotic substance, ASI Naseeb Singh informed the first respondent that he had a legal right to be searched before the Magistrate or a Gazetted Officer but the latter, vide his own writing Ext.PW1/A consented to be searched by the Police at the spot. The police party checked all the three bags and found two polythene envelopes in the bag of respondent No.1, having black coloured hard substance in the shape of sticks, which on examination viz. smelling, burning and experience was found to be *charas* and weighed 6 kilo 500 grams. The recovered *charas* was put back in the same envelopes, same bag and parceled in a piece of cloth and sealed with four seals of seal impression 'V' and taken into possession vide memo Ext.PW1/C.

4. The same procedure was followed for checking the *blue* and *khaki* coloured bags thrown by respondent No.2 (Tek Chand) and one Kumar Singh and it was found that their bags too contained *charas* weighing 6 kilo & 500 grams and 2 kilo & 800 grams, respectively. The substance recovered from these two bags was also sealed, following exactly the same procedure as was in the case of the substance recovered from respondent No.1 and the sealed bags were taken into possession vide memos Ext.PW1/D and Ext.PW10/A, respectively.

5. ASI Naseeb Singh thereafter filled NCB forms in triplicate *qua* recovery of *charas* belonging to all the accused, took specimen of seal 'V' on a piece of cloth and handed over seal 'V', after its use, to HC Varinder Singh. A copy of the seizure memo *qua* the *charas* recovered from him was given to respondent No.1. *Ruqa* Ext.PW10/B was prepared and sent through Constable Mohammad Aslam to Police Station, Chamba for registration of the case. Its copy was sent to Superintendent of Police, Chamba also through the same constable; the spot was inspected and site plan Ext.PW10/C was prepared. The statements of witnesses at the spot were also recorded. Respondent No.1 was arrested and reasons for arrest were communicated to him. After completing other statutory formalities, the raiding police party reached Police Station Sadar, Chamba at 9.00 pm where all the three parcels along with NCB forms etc. were produced before SHO-ASI Joginder Singh, who deposited the parcels and other documents with MHC.

6. Accused Kumar Singh @ Ghindro remained absconder till completion of investigation, hence respondent Nos.1 & 2 were sent to face the trial. Since a *prima facie* case for the offence punishable under Section 20 of the NDPS Act was made out, charges were framed to which the respondents pleaded not guilty and claimed trial.

7. The prosecution examined as many as 11 witnesses, all comprising members of the raiding police party, including ASI Naseeb Singh (PW10) as well as other official witnesses. No independent witness was cited or examined by the prosecution.

8. The respondents in their statements under Section 313 of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C) alleged their false implication at the instance of HC Kartar Singh, who was statedly inimical to them and had a property dispute with respondent No.2. The respondents also examined 4 witnesses in defence.

9. The learned Special Judge thus was required to find out as to whether it was proved beyond any reasonable doubt that on 26.06.2010 at about 3.30 pm both the respondents-accused were found in conscious possession of 6 kilo and 500 grams of *charas* each near Kandla without any permit or licence?

10. Learned Special Judge vide judgment under appeal dated 21.12.2011 found various material lacunas in the prosecution case and has come to a firm conclusion that the respondents were entitled to the benefit of doubt for the reasons including (i) all the witnesses examined by the prosecution are police officials and no effort was made to associate any independent witness despite the fact that the police had sufficient time to do so; (ii) the raiding police party had apparently prior information that is why it went to the spot and laid a *naka* therefore, also it could conveniently associate some independent witnesses; (iii) there were material contradictions in the testimonies of eye witnesses HC Varinder Singh (PW1), HHC Surinder Kumar (PW2) and Constable Mohammad Aslam (PW4); (iv) the place of occurrence is near Village Kandla where admittedly there are a number of shops. Similarly, the police party has admitted that they took tea at Pukhri which is also very close to the place of occurrence and there are shops in Pukhri as well and hence some independent witness could have been easily associated; (v) the entire recovery and other proceedings regarding search and seizure were conducted by ASI Naseeb Singh (PW10). He was the principal complainant and also the Investigating Officer who recorded statements under Section 161 of the Cr.P.C and carried the investigation till the end; (vi) ASI Joginder Singh (PW8) has not deposed that before re-sealing the case property he had properly verified the same; (vii) there is also no evidence that ASI Joginder Singh was officiating as SHO on that day because admittedly Kailash Walia was the SHO; (viii) respondent No.2 (Tek Chand) has been concededly implicated on the basis of confessional statement made by respondent No.1 (Abdul Latif) and in the absence of any corroborating evidence, such confession cannot be relied upon; and (ix) the defence evidence led by the respondents carries some weightage as it establishes that neither respondent No.1 (Abdul Latif) was apprehended at the spot nor any *naka* was laid by the police. The defence evidence thus causes serious dent in the prosecution case.

11. It was vehemently urged on behalf of the appellant-State that the learned Special Court has taken a hyper-technical view to brush aside the prosecution version since the law does not discard an eye witness account merely because the witnesses were police officials. It was urged that the police party made its best efforts to associate independent witnesses but no one came forward, therefore the testimony of prosecution witnesses ought not to have been disbelieved. It was then argued that in the absence of any proof of enmity between H.C. Kartar Singh and respondent No.2, the learned Special Judge should not have placed too much reliance on the defence evidence. Statement of PW10 ASI Naseeb Singh having been duly corroborated by the statements of PW1, PW2 and PW4, there was no rhyme or reason for the learned Special Judge not to hold the respondents guilty. It was then contended that the recovery of such a heavy quantity of narcotic substance from the respondents or their co-accused outrightly belies the very plea of their false implication. It was then contended that some infirmities in the statements of the eye witnesses ought not to have weighed heavily in the mind of learned Trial Court, as the witnesses are not expected to depose a tutored version and that too after a gap of considerable long period. Lastly, it

was contended that Section 55 of the NDPS Act is directory in nature and not mandatory therefore also, its non-compliance *per se* is not a valid ground to acquit the respondents.

12. Contrarily, learned counsel for the respondents laid much emphasis on the point that there are material contradictions in the prosecution account as there is no satisfactory explanation as to why an independent witness could not be associated. While PW1 HC Varinder Singh has deposed that *"no vehicle had passed through the road till we laid the naka"*, ASI Naseeb Singh (PW10) had claimed that *".... the road on which we laid naka there is heavy rush of vehicles. We remained at the spot for 10-15 minutes. During this period, no person or vehicle was checked"*. It was pointed out that there is serious inconsistency in the deposition of ASI Naseeb Singh (PW10) as to when were the accused seen after setting up the *naka*, for HC Varinder Singh (PW1) has deposed that the accused reached at the road as soon as the *naka* was laid whereas the other two witnesses have deposed that they reached at the spot after 10-15 minutes after laying the *naka*. Learned counsel also urged that the spot of occurrence is totally imaginary inasmuch as it was a very narrow *pagdandi* and had the accused persons actually been chased there, they would have thrown the bags downhill into the river and even if they had thrown the bags on the *pagdandi*, still the bags would have gone down the hill. It was argued that as the Investigating Agency wanted to foist a false case, it neither associated any independent witness nor made any attempt to do so. A detailed reference to the statements of ASI Naseeb Singh and his police associates was made to substantiate this plea. Learned counsel urged that the seal was not produced in Court and unless prosecution proves the fact of the seal being handed over to someone from whom it could not be obtained, it is unsafe to presume that the sealed case property reached the FSL untampered. It was also argued that as and when the police party was to proceed to conduct an official act, they were expected to use official vehicles or claim travelling expenditure from the public exchequer. In this case, it has come on record that the personal Car of HC Kartar Singh (with whom respondent No.2 had a property dispute, they being neighbours) and Motor Cycle of one Constable Mohammad Aslam were used. No evidence was led by prosecution to prove that they were permitted to take private vehicles in a routine check up . It was vehemently argued that the complainant, ASI Naseeb Singh himself investigated the case thereby causing serious prejudice to the accused.

13. Having heard learned counsel for the parties and after going through the record, we do not find any merit in this appeal. We say so for the reasons that the explanation given by prosecution for not associating any independent witness at the time of search and seizure of the accused does not inspire the desired confidence. There is overwhelming evidence to suggest that the *naka* was not laid at an isolated place. There were several shops in *Kandla* as well as in village *Pukhri* which are close to the place of *naka*. It has also been admitted by PW1, PW4 and PW10 that the road where *naka* was laid, was busy with vehicular traffic. The police party thus had ample opportunity to associate an independent witness but it failed to do so. It is true that testimony of official witnesses is not to be rejected only on the ground of non-corroboration by independent evidence but here is the case where the testimony of official witnesses is full of material contradictions in respect of (i) whether vehicles crossed from the spot where *naka* was laid or was it an isolated place?; (ii) whether the accused were nabbed immediately after laying the *naka* or they came after 10-15 minutes?; (iii) what was the distance from one to another while the accused were walking?; and (iv) why the seal impression 'V' was not produced in court? etc. etc.

14. Secondly, when the complainant a police official himself assumed the role of investigator, there is every likelihood of causing serious prejudice to the accused. Such an

Investigating Officer obviously would, even if no case is made out, never submit a cancellation report and will make all out efforts to incriminate the suspects in his report under Section 173 of the Cr.P.C.

15. The principles enunciated by Hon'ble Supreme Court in a recent decision rendered in ***Mohan Lal vs. State of Punjab [Crl. Appeal No.1880 of 2011 decided on August 16, 2018]*** reported in ***2018 (9) Scale 663*** are squarely applicable to the facts and circumstances of the case in hand. In the cited decision, the Supreme Court approved the view of this Court taken in ***State of Himachal Pradesh vs. Atul Sharma*** reported in ***(2015) 2 Shim. LC 693***, and has held as follows:

> *"14. In a criminal prosecution, there is an obligation cast on the investigator not only to be fair, judicious and just during investigation, but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused and not mere fanciful, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to presume and contrary to normal human conduct, that he would himself at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation would therefore be a foregone conclusion."*

16. Thirdly, and as noticed earlier, the prosecution version falls short of inspiring confidence especially when, in a case of such a heavy recovery of contraband also, it did not associate any independent witness regardless of the fact that the availability of such witnesses is undisputable. In a case originating from this Court in ***Krishan Chand vs. State of Himachal Pradesh*** reported in ***(2018) 1 SCC 222,*** rendered in a somewhat similar fact situation, Hon'ble Supreme Court has opined that:

> *"15. From the evidence which has come on record, it is quite clear that the place, where the accused is alleged to have been apprehended, cannot be said to be an isolated one as the house of Govind Singh DW-2 is situated on the edge of Patarna bridge. Thus the version of the complainant PW-6 that independent witnesses could not be associated as it was an isolated place does not inspire confidence. Moreover, from the evidence of Govind Singh PW-2 the case of the prosecution regarding apprehension of the accused, at Patarna bridge, while being in possession of bag containing 7 kgs of charas, becomes highly doubtful because had he been so apprehended, by the police, this fact was to come to his notice, for the reason, that his house is situated at the edge of the bridge in which he resides, along with his family."*

17. There is thus credence in the defence version to the limited extent that respondent No.2 (Tek Chand) had some dispute with HC Kartar Singh, who is his immediate neighbour. The respondents, in the very first opportunity as well as through defence evidence, have been able to suggest that there existed some dispute, referred to above. The fact that the private vehicle of HC Kartar Singh was statedly used by the raiding party also raises strong suspicion on the credibility of prosecution story.

18. Still further, respondent No.2 (Tek Chand) has been implicated only on the basis of confessional statement of respondent No.1 (Abdul Latif). The prosecution evidence nowhere suggests that at the time when police party made unsuccessful attempt to apprehend respondent No.2, his face and features were seen by the alleged eye witnesses so as to believe their deposition that he is one of the same persons who ran away from the spot.

19. Taking into consideration the totality of the circumstances, it would be unsafe to hold the respondents guilty of committing the offence attributed to them.

20. Resultantly, the appeal fails and is accordingly dismissed. Bail bonds furnished by the respondents, if any, stand discharged, if they are not required in any other criminal case. Send down the records forthwith.

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

Lok Bahadur ..... Appellant.
Versus
State of Himachal Pradesh. ..... Respondent.

Cr. Appeal No. 05 of 2017
Reserved on: 13.11.2018
Decided on: 29.11.2018

**Indian Evidence Act, 1872-** Section 9 **–** "Last seen together" principle – Applicability – Held, last seen together theory comes into play when gap between point of time when accused and deceased were last seen together alive and when deceased found dead is so small that possibility of any person other than accused being author of crime becomes impossible – Court should also look for corroborative evidence – Witness merely seeing accused moving towards Bazar and one person lying dead on road, insufficient to draw last seen theory. (Para 33).

**Indian Evidence Act, 1872-** Section 8 **-** Conduct of Accused - Relevancy – Held, in case based on circumstantial evidence, post – crime conduct of accused is relevant – Person committing murder would try to escape – Roaming of accused in Bazar immediately after alleged murder inconsistent with his guilt – Prosecution case doubtful. (Para 33).

**Indian Evidence Act, 1872-** Section 8**-** Conduct of accused – In case based on circumstantial evidence motive to commit crime becomes relevant – Absence of motive or failure to prove alleged motive makes prosecution doubtful. (Para 36).

***Cases referred:***

Khekh Ram vs. State of Himachal Pradesh, (2018) 1 SCC 202
Krishan Chand vs. State of Himachal Pradesh, (2018) 1 SCC 222
Padala Veera Reddy vs. State of Andhra Pradesh and others, AIR 1990 SC 79
R. Shaji Vs. State of Kerala (2013) 14 SCC 266
Rajdev alias Raju & another vs. State of H.P., I L R 2016 (III) HP 1319
Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 SC 1622
State of Andhra Pradesh vs. Pullagulli Casi Reddy Krishna Reddy alias Rama Krishna Reddy and others, (2018) 7 SCC 623

State of H.P. vs. Sunil Kumar, I L R 2017 (III) HP 763 (D.B.)
State of Maharashtra vs. Suresh, (2000) 1 SCC 471
State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 SCC 551

| | |
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| For the appellant: | Mr. Y.P.S. Dhaulta, Advocate, Legal Aid counsel. |
| For respondent: | Mrs. Ritta Goswami and Mr. Narender Guleria, Additional Advocates General with Ms. Svaneel Jaswal, Deputy Advocate General. |

The following judgment of the Court was delivered:

**Chander Bhusan Barowalia, Judge.**

The present appeal has been preferred by the appellant/accused/convict (hereinafter referred to as "the accused") laying challenge to judgment dated 18.10.2016, rendered by learned Additional Sessions Judge (CBI), Shimla, Camp at Theog, in Trial No. 35-T/7 of 2013, whereby the accused was convicted and sentenced for the offence punishable under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. Leaving fiddling little details, the facts of the case can tersely be summarized as under:-

On 17.5.2013, at about 05.30 p.m., Smt. Supna Devi (complainant), got her statement recorded in Police Station Theog. The relevant excerpts of her statement are that on 17.5.2013, around 03.00 p.m., when she was present in her home, two *Nepalis* came from Mohri, bazaar and they were quarrelling with each other. The complainant has further stated that one *Nepali* was lying on the ground and blood was oozing from his ear. She separated both of them and afterwards they went towards Mohri *nallah*. Around 04.30 p.m., the complainant saw them proceedings towards Sharmala, in a private bus. Subsequently, someone called that in between Mohri to Matiana two *Nepalis* were fighting. On this she rushed to the road and found a *nepali* person lying on the road, who had sustained injuries and another *nepali* person hurriedly went towards Mohri bazaar. Thereafter, she went to Mohri bazaar and when she returned, she saw *nepali* person, who killed other *nepali* sitting in the shop of Chander Prakash. She identified the accused and narrated this to other persons, who caught hold of him (accused). The deceased was found dead on the road and later on it was unearthed that his name was Harka Bahadur. It was also unearthed that accused and the deceased were engaged as labourers by Shri Madan Lal, Pradhan Gram Panchayat Sharmala. On the anvil of the statement, so made by the complainant, FIR was registered and investigation ensued. Police prepared the spot map and at the instance of the accused the spot was identified, wherefrom two disposable glasses were recovered. The spot was got demarcated from Patwari *Halqa* and a copy of *jamabandi* was also procured. The accused was medically examined. Police took into possession pieces of meat, potatoes and green chilly and the splinters of broken pieces of bottle were collected in a plastic jar, sealed and taken into possession. Police also took into possession match box, scalp hair, mud, gold stake case and grass. The corpse of the deceased was sent for postmortem examination and photographs of the spot were also clicked. Police also took into possession a pair of socks, a green T-shirt, a multi-colour shirt and a blue jean pants. Police also seized white vests, grey long sleeves jacket and a brown underwear. Statements of the witnesses were recorded in a CD/DVD. After conclusion of the investigation police presented the *challan* in the learned Trial Court.

3. In order to prove its case, the prosecution examined as many as twenty one witnesses. The statement of the accused, under Section 313 Cr.P.C., was recorded and he claimed innocence. No defence witness was produced by the accused.

4. The learned Trial Court, vide impugned judgment convicted the accused for the offence punishable under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life and to pay fine of `50,000/- (rupees fifty thousand) and in default of payment of fine he was further ordered to undergo simple imprisonment for a period of one year, hence the present appeal preferred by the accused-convict.

5. We have heard Mr. Y.P.S. Dhaulta, Advocate, learned Legal Aid Counsel for the appellant/accused and Ms. Ritta Goswami, learned Additional Advocate General, for the respondent/State.

6. The learned Legal Aid Counsel for the accused has argued that the accused has been convicted by the learned Trial Court on the basis of surmises and conjectures. He has further argued that the prosecution has failed to conclusively establish the guilt of the accused. He has argued that the coherent connection *inter se* the happening of the events, as portrayed by the prosecution, and the role of the accused, has not been cogently and conclusively established by the prosecution, which, in turn, is fatal to the prosecution case. He has further argued that there is nothing on record which connects the accused with a commission of the offence, so the appeal be allowed and the accused be acquitted by setting a side the judgment of the learned Trial Court. The learned counsel for the accused, in order to get lateral support to his arguments has placed reliance on following decisions rendered by Hon'ble Supreme Court:

1. *Khekh Ram vs. State of Himachal Pradesh, (2018) 1 Supreme Court Cases 202; &*
2. *Krishan Chand vs. State of Himachal Pradesh, (2018) 1 Supreme Court Cases 222.*

He has argued that grievous the offence, more stricter proof is required to establish it, but in the instant case there is no evidence which connects the accused with the offence. Conversely, Ms. Ritta Goswami, learned Additional Advocate General, has argued that the prosecution has cogently and convincingly proved the guilt of the accused beyond the shadow of reasonable doubt. She has further argued that minor discrepancies do not create any doubt about the veracity of the prosecution story. She has further argued that the learned Trial Court has properly appreciated the facts and law and the evidence led by the prosecution is not marred by lacunae, of which the accused can reap the benefit of doubt. She has argued that the judgment rendered by learned Trial Court is not required to be interfered with and the same be upheld. She has relied upon the following judicial pronouncements:

1. *State of Andhra Pradesh vs. Pullagulli Casi Reddy Krishna Reddy alias Rama Krishna Reddy and others, (2018) 7 Supreme Court Cases 623;*
2. *State of Maharashtra vs. Suresh, (2000) 1 Supreme Court Cases 471.*

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

8. The edifice of the prosecution story rests upon circumstantial evidence and the Hon'ble Apex Courts, as also this Court in catena of judgments settled the law qua the

circumstantial evidence. In nitty-gritty, the law with respect to circumstantial evidence is that each and every circumstance is required to be proved by the prosecution and the circumstances, as a whole, have to make out a chain in a manner that the only conclusion is that the accused has committed the offence, as alleged by the prosecution. The law on the point of circumstantial evidence is considered and settled by the Hon'ble Courts in the following judgments:

1. *State of H.P. vs. Sunil Kumar, Criminal Appeal No. 326 of 2011, decided on 15.06.2017;*
2. *Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 Supreme Court 1622;*
3. Padala Veera Reddy vs. *State of Andhra Pradesh and others, AIR 1990 Supreme Court 79;*
4. *State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 Supreme Court Cases 551, &*
5. *Rajdev aliasRaju & another vs. Stae of H.P., Criminal Appeal No. 288 of 2015.*

9. In ***State of H.P. vs. Sunil Kumar, Criminal Appeal No. 326 of 2011, decided on 15.06.2017,*** this Court has held as under:

> *"13. It is more than settled that in case of circumstantial evidence, the circumstances from which interference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and there be a complete chain of evidence consistent only that the hypothesis of guilt of the accused and totally inconsistent with his innocence and in such a case if the evidence relied upon is capable of two inferences then one which is in favour of the accused must be accepted. It is clearly settled that when a case rests on circumstantial evidence such evidence must satisfy three tests:*
>
> a) *The circumstance from which an inference of guilt is sought to be drawn must cogently and firmly established.*
>
> b) *Those circumstances should be of a definite tendency un-erringly pointing out towards the guilt of the accused.*
>
> *iii) The circumstances taken cumulatively, should form a complete chain so that to come to the conclusion that the crime was committed by the accused.*
>
> *14. Equally well settled is the proposition that where the entire prosecution case hinges on circumstantial evidence the Court should adopt cautious approach for basing the conviction on circumstantial evidence and unless the prosecution evidence point irresistible to the guilt of the accused, it would not be sound and safe to base the conviction of accused person.*
>
> *15. In case of circumstantial evidence, each circumstances must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypothesis and should be consistent that only the guilt of the accused*

*(See: Lakhbir Singh vs. State of Punjab, 1994 Suppl. (1) SCC 173)."*

10. The Hon'ble Supreme Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 Supreme Court 1622,*** has held as under:

*"48. Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it.*

*... ... ... ... ... ...*

*150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.*

*... ... ... ... ... ...*

*158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:*

*(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.*

*(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and*

*(3) the circumstance is in proximity to the time and situation.*

*159. If these conditions are fulfilled only then a Court can use a false explanation or a false defence as an additional link to lend an assurance to the Court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in* Shankarlal's case (AIR 1981 SC 765) (supra) where this Court observed thus:

*"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."*

*160. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case (supra). Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General."*

11. The Hon'ble Supreme Court in ***Padala Veera Reddy vs. State of Andhra Pradesh and others, AIR 1990 Supreme Court 79,*** has held as under:

*"12. There are certain salient and material features in the present case which are not controverted; they being that A-1 to A-3 and the deceased lived under a common roof, that the deceased had instituted a civil suit against her father, PW-8 and brother PW-9 claiming exclusive possession of the disputed land, that the deceased was found dead on the morning of 7.9.85 and that there were certain visible injuries such as abrasions, nail marks and contusions on the part of the nose, upper lip, chin and neck etc. as noted by the Medical Officers (PWs 5 and 6) in the post-mortem report Ex. P. 9. The appellate Court on the strength of the opinion given by the Medical Officers (PWs 5 and 6) has agreed with the view of the Trial Court that the death of the deceased was of homicidal one and not suicidal and held "therefore suicidal is ruled out." We also very carefully went through the evidence of the Medical Officers and found that the prosecution has*

*convincingly established that the death of the deceased was due to forcible administration of poison and smothering. Hence we are in full agreement with the concurrent findings of the Courts below that it is a clear case of murder.*

*… … … … … …*

15. *While considering the above circumstances, the appellate Court has expressed its view that the explanation given by the accused that they were at the marriage house of PW-1 throughout the night is nothing but a false explanation and that the culprits who ever they might have been should have administered the poison to the victim and thereby caused her death and that there is very strong suspicion against the accused persons but the prosecution cannot be said to have established the guilt of the accused decisively since the suspicion cannot take the place of legal proof. The relevant portion of the final conclusion of the appellate Court reads thus:*

> *"There is no evidence whatsoever either from the neighbours or from others to show that the accused at any time ill-treated the deceased or treated her cruelly. In these circumstances, it is not possible to hold that the prosecution has established the guilt on the part of A. 1 to A. 3. Thus, there is no conclusive evidence that the accused committed the offence of murder. It is an unfortunate case where cold-blooded murder has been committed and it is difficult to believe that no inmate of the house had any hand in the offence of murder. But that will be only a suspicion which cannot take the place of proof."*

16. *We, in evaluating the circumstantial evidence available on record on different aspects of the case, shall at the foremost watchfully examine whether the accused 1 to 3 had developed bad-blood against the deceased to the extent of silencing her for ever, that too in a very inhuman and horrendous manner. The appellant wants us to infer that the deceased should have been subjected to all kinds of pressures and harassments and compelled to institute the suit against her father and brother claiming exclusive right over the landed property in order to grab the said property, that this conduct of the accused should have been resented by the deceased and that on that score the accused should have decided to put an end to her life. In our view, this submission has no merit because there is no acceptable evidence showing that there was any quarrel in the family and that the deceased was ill-treated either by her husband or in-laws. The appellate Court while dealing with this aspect of the case has observed that there is no evidence that the accused ill-treated the deceased, which observation we have extracted above. Hence, we hold that there is no sufficient material to warrant a conclusion that the accused had any motive to snatch away the life threat of the deceased. There is no denying the fact that the deceased did not*

*accompany her husband and in-laws to attend the marriage celebrated in the house of PW-1 and remained in the scene house and that she has been done away with on the intervening night of 6th/7th September, 1985. From this circumstance, the Court will not be justified in drawing any conclusion that the deceased was not leading a happy marital life. As observed by the appellate Court, the explanation offered by accused 1 to 3 that they remained in the house of PW 1 throughout the night is too big a pill to be swallowed. But at the same time, in our view, this unacceptable explanation would not lead to any irrestible inference that the accused alone should have committed this murder and have come forward with this false explanation. We have no hesitation in coming to the conclusion that it is a case of murder but not a suicide as we have pointed out supra. The placing of the tin container with the inscription 'Democran, by the side of the dead body is nothing but a planted one so as to give a misleading impression that the deceased had consumed poison and committed suicide. But there is no evidence as to who had placed the tin container by the side of the dead body. Even if we hold that the perpetrators of the crime whoever might have been had placed the tin, that in the absence of any satisfactory evidence against the accused would not lead to any inference that these accused or any of them should have done it. It is the admitted case that the first accused handed over three letters Ex. P. 6 to P. 8 alleged to have been written by the deceased to the Investigating Officer. The sum and substance of these letters are to the effect that the deceased had some grouse against her parents and that the accused were not responsible for her death. The explanation given by accused No. 1 in this written statement is that by about the time of the arrival of the police, one Sathi Prasad Reddy handed over these letters to him saying that he (Reddy) found them near the place where the dead body was laid and that he (A-1) in turn handed over them to the police. PWs 8 and 9 have deposed that these letters are not under the hand writing of the deceased. But the prosecution has not taken any effort to send the letters to any hand-writing export for comparison with the admitted writings of the deceased with the writings found in Ex. P. 6 to P. 8. Under these circumstances, no adverse inference can be drawn against accused No. 1 on his conduct in handing over these letters.*

17. *No doubt, this murder is diabolical in conception and cruel in execution but the real and pivotal issue is whether the totality of the circumstances unerringly establish that all the accused or any of them are the real culprits. The circumstances indicated by the learned Counsel undoubtedly create a suspicion against the accused. But would these circumstances be sufficient to hold that the respondents 2 to 4 (accused 1 to 3) had committed this heinous crime. In our view, they are not.*

*… … … … … …*

*22. We are of the firm view that the circumstances appearing in this case when examined in the light of the above principle enunciated by this Court do not lead to any decisive conclusion that either all these accused or any of them committed the murder of the deceased, Vijaya punishable under Section 302 read with Section 34 of I.P.C. or the offence of cruelty within the mischief of Section 498-A I.P.C. Hence, viewed from any angle, the judgment of the appellate Court does not call for interference."*

12. The Hon'ble Supreme Court in ***State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 Supreme Court Cases 551,*** has held as under:

*"12. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this Court. In State of U.P. v. Satish, it was noted as follows:*

*"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."*

*13. In Ramreddy Rajesh Khanna Reddy v. State of A.P., it was noted as follows:*

*"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration."*

*(See also Bodhraj v. State of J&K, (2002) 8 SCC 45)*

*14. A similar view was also taken in Jaswant Gir v. State of Punjab, 2005 12 SCC 438. Factual position in the present case is almost similar, so far as time gap is concerned.*

*15. Out of the circumstances highlighted above really none is of any significance. Learned Counsel for the appellant-State highlighted that the extra judicial confession itself was sufficient to record the conviction. On a reading of the evidence of CW-1 it is noticed that accused Ram Balak did not a say a word about his own involvement. On the contrary he said that*

*he did not do anything and made some statements about the alleged act of co-accused. Additionally, in his examination under Section 313 of Code, no question was put to him regarding his so called extra judicial confession. To add to the vulnerability, his statement is to the effect that after about 11 days of the incidence the extra judicial confession was made. Strangely he stated that he told the police after three days of the incidence about the extra judicial confession. It is inconceivable that a person would tell the police after three days of the incidence about the purported extra judicial confession which according to the witness himself was made after eleven days. Learned Counsel for the State submitted that there may be some confusion. But it is seen that not at one place, but at different places this has been repeated by the witness.*

16. *Learned Counsel for the appellant also refers to a judgment of this Court in Abdul Razak Murtaza Dafadar v. State of Maharashtra, more particularly para 11 that the Dog Squad had proved the guilt of the accused persons. In this context it is relevant to take note of what has been stated in para 11 which reads as follows: (SCC pp. 239-40)*

> *"11. It was lastly urged on behalf of the appellant that the lower courts ought not to have relied upon the evidence of dog tracking and such evidence was not admissible in order to prove the guilt of the appellant. The evidence of tracker dogs has been much discussed. In Canada and in Scotland it has been admitted. But in the United States there are conflicting decisions:*
>
> *'There have been considerable uncertainty in the minds of the Courts as to the reliability of dogs in identifying criminals and much conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases however, reveals that most Courts in which the question of the admissibility of evidence of-trailing by blood-hounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the person trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime.' (para 378, Am. Juris. 2nd edn. Vol. 29, p. 429.)*
>
> *There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination, the dog s human companion must go into the box and report the dog s evidence, and this is clearly hearsay.*

*Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value. In R. v. Montgomery,1866 NI 160 a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards the police got them on a nearby road. About an hour and half later the police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off and tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been stealing the wire was inconclusive and that the evidence of the behaviour of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog s reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in traffic case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog s evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight.*

*It is submitted by learned Counsel for the appellant that in the said case this Court had upheld the conviction. Though in the said case the conviction was upheld, but that was done after excluding the evidence of Dog Squad. This Court found that the rest of the prosecution evidence proved the charges for which the appellants therein had been convicted."*

13. After touching the different facets relating to the law laid down by Hon'ble Courts on the subject of circumstantial evidence, the testimonies of the prosecution witnesses need discussion and analysis. So, in order to appreciate the rival contentions of the parties we have gone through the record carefully.

14. In the instant case, statement of Smt. Sunpa Devi (complainant) in very material. The entire prosecution story revolves around the testimony of the complainant. She had deposed that on 17.05.2013 around 03.00 p.m., when she was in her home two *nepalis*, who came from Mohri side and going towards Sharmala, were quarreling. One *nepali* had laid another *nepali,* from whose ear blood was oozing. She tried to save him and afterwards they went towards the side of the gorge where they started taking liquor. This witness has further deposed that around 04.30 p.m., she came to Sharmala and some unknown persons called her and informed that two persons were quarreling on the road. She from distance saw that one person stained with blood, who was lying on the road side and other was going towards Mohri side. This witness recognized the accused as the person who was going towards Mohri side. She narrated the incident to Shri Mohan Singh, Chemist, Shri Chander Prakash, shopkeeper and Shri Prem *Nepali*. When she was returning, she saw the accused sitting in the shop of Shri Chander Prakash, so she told to the persons, who were present there, that the accused killed other *Nepali*. Therefore, the accused was caught and brought on the spot. As per this witness, the name of deceased was Harka Bhadur. The accused disclosed his name as Lok Bahadur. She has further deposed that her statement, Ex. PW-1/A, was recorded by the police and she signed the same. She further deposed that police inspected the spot, prepared a spot map and also clicked photographs. This witness, in her cross- examination, has deposed that her house is only at a distance of 5 meters from the road and other houses are half kilometer away from her house. She has further deposed that the spot is visible from other houses as well. As per this witness, blood was oozing from the ears of the deceased and the accused put his foot on his head. She has categorically deposed that both *Nepalis* were inebriated. She did not see any glass bottle in the hand of the deceased and also did not notice the person who called her. She has deposed that the accused came to market on his own, so she told to other persons that the accused killed the deceased. This witness specifically stated that she did not see the accused killing the deceased. She admitted that both the *Nepalis* went towards gorge, which is a steep valley. She admitted it to be correct that if a person fells from the valley, he would sustain injuries and die. She feigned ignorance that who had informed the police. Police visited the spot on the same day around 05.00 p.m., and recorded her statement on the road. As per this witness, police did not record the statement of other witnesses on the same day. Police remained in her house till 11.00 p.m., as the spot of occurrence did not have lights.

15. Another key witness is PW-2, Shri Chaman Lal. He has deposed that he runs a shop at Mohri and last year in front of shop of Chander, approximately 60-70 feet away people were making noise. This witness had telephoned the police. After two days police came to the spot. Police associated him and the complainant in the investigation. The accused was brought by the police to his shop and then taken to the spot. At the instance of the accused police recovered two disposable glasses, which were sealed in a cloth parcel and taken into possession vide memo, Ex. PW-2/A. As per this witness, he and the complainant signed the memo and the accused also signed the same. Police prepared the spot map and memo of demarcation (Ex. PW-2/B). This witness, in his cross-examination, has deposed that there is steep slant on the spot.

16. PW-3, Shri Chander Mohan, is also important witness in the present case. He has deposed that he is a shopkeeper having shop at Mohri. As per the deposition of this witness, tea- and chemist shops of Shri Mohan Singh are there at Mohri and he had engaged Shri Prem Chand as cook in his *dhaba*. On 17.5.2013 around 04.30 p.m., he alongwith Prem and Mohan Singh was standing outside his shop. The complainant came to his pharmacy shop for medicines and she told that a *nepali* had killed other *nepali*. He has further deposed that the complainant identified the accused, who had come near to his

shop. Consequently, they caught the accused and on being inquired by the police he disclosed his name as Lok Bahadur. As per this witness, in his presence the accused did not tell anything and the police took the accused from the spot. This witness was declared hostile and subjected to exhaustive cross-examination. On being cross-examined by the learned Public Prosecutor, this witness admitted that the accused disclosed to the police that he and the deceased consumed liquor together and thereafter the deceased quarreled with him. So, the accused stabbed the deceased on his neck with a broken bottle of glass, so the deceased fell down and ultimately died. This witness, on being cross-examined by the learned Defence counsel, deposed that police was informed by Shri Chaman Lal and police reached the spot around 05.30 p.m. He has deposed that his statement was recorded after two days. He has specifically stated when he caught the accused he was inebriated. Police did not take him to the spot. He has further categorically stated that he heard from people that a *Gorkha* killed a *Nepali*.

17. PW-4, Shri Mohan Lal, is also one of the important witness. He has deposed that he runs a chemist shop at Mohri and Shri Chander Mohan, runs a tea-shop. He has deposed that Shri Chander Mohan had engaged a Nepali as cook in his shop. On 17.5.2013, at about 04.30 p.m., he alongwith Prem and Chander Mohan was standing outside his shop and the complainant came to his shop. The complainant divulged to them that a *Nepali* had killed another *Nepali*. Thereafter, a *Nepali* (accused) came there and the complainant told them that he killed another *Nepali*. So, they caught the accused and Shri Chaman Lal informed the police. Police came on the spot and accused disclosed his name as Lok Bahadur. The accused disclosed to the police that he and the deceased took liquor in the gorge and thereafter they had a quarrel and in the melee he stabbed the deceased with a broken bottle on his neck and killed him. This witness, in his cross-examination, deposed that he did not see the accused stabbing the deceased on his neck with a bottle. He has deposed that his statement was recorded on 19.05.2013. As per this witness, the statements of Shri Chander Mohan and Shri Prem Bhadur were recorded in his presence.

18. PW-5, Shri Krishan Dutt, Halqua Patwari, deposed that he prepared *tatima*, Ex. PW-5/A, and also supplied copy of *jamabandi*, Ex. PW-5/B.

19. Indeed, in murder cases scientific and medical evidence provide unmatched and valuable aid to the Courts to reach on most probable conclusion. In the instant, case PW-6, Dr. Dalip Tekta, medically examined the accused on 18.05.2013. This witness found the following injuries on the persons of the accused:-

> ***"1.*** *Abrasials on the occipital region size 2.5X1/2 C.M. radish in colour underlying bone is normal.*
>
> *2. Contusion on the right parietal region size 4X3X2 c.m bluish in colour under lying bone is normal.*
>
> *3. Abrasion on the left side of the chest near clavicular joint size 3X1/2 c.m radish in colour."*

As per this witness injuries were simple in nature and caused within the duration of 72 hours with blunt weapon. He handed over blood sample, sample of scalp hair, wearing clothes and urine sample to the police. This witness issued medico legal certificate qua the accused which is Ex. PW-6/A and also opined that injuries, as sustained by the accused, could be possible in a scuffle. This witness, in his cross-examination, admitted that injuries mentioned in Ex. PW-6/A are possible in a fall.

20. PW-9, Dr. M.M. Verma, examined the deceased on 18.05.2013. As per this witness, he has noticed the following injury on the person of the deceased :-

*"1. There was an acute lacerate wound over the right neck 1X1 ½ inch in length.*

*2. There was an oblique lacerated would over the left occipito parietal region of skull 1 inch in length.*

*3. There was another lacerated would about 1 inch in length in the region of left eyebrow."*

As per this witness, on the same day, through ASI Ram Ratan, the case was referred to Department of Forensic Sciences, Indra Gandhi Medical College, Shimla. The probable time between death and postmortem was approximately 20 hours. He issued postmortem report No. 15, Ex. PW-9/A. He further deposed that the cause of death was to be ascertained by the Department of Forensic Sciences, Indra Gandhi Medical College, Shimla. This witness, in his cross-examination, deposed that if a person falls on splinters of glasses, the injuries as mentioned in postmortem report, Ex-PW-9/A, can be possible. He has further deposed that if a person falls from steep surface then also injuries mentioned in Ex-PW-9/A, can be possible.

21. Another key witness qua the scientific evidence is PW-21, Dr. Vivek Sahaj Pal, Assistant Director, DNA, SFSL, Junga. He has deposed that on 31.7.2013, five sealed parcels, which were intact, were received in DNA division from Biological and Serology Division, SFSL Junga. He conducted DNA profiling and issued report, Ex. PW-17/N, and concluded as under:-

*I. Identical DNA profile was obtained from Exhibit-16A (pants, Harka Bahadur) and Ext. 16/B (shirt, Harka Bahadur).*

*II. A mixed DNA profile was obtained Exhibit-11-A (pants, Lok Bahadur) and Ext.11B (T-shirt, Lok Bahadur), from which one DNA profile could be identified, and this DNA profile matches completely with the DNA profile obtained from Ext-16/A (pants, Harka Bahadur) and Ext.-16/B (Shirt, Harka Bahadur).*

*III. The partial DNA profile obtained from Ext-5 (broken glass of bottle) is consistent with the DNA profile obtained from Ext-5 (Broken glass of bottle is consistent with the DNA profile obtained from Ext.16a (pants, Harka Bahadur) and ext.-16 (shirt, Harka Bahadur).*

*IV. A mixed and low intensity DNA profile was obtained from Ext-11C (upper, Lok Bahadur) from which nothing specific could be inferred.*

This witness in his cross-examination, has deposed that sample of parcel 13 was highly putrefied and yielded highly degraded DNA and did not show amplification, hence DNA profile could not be generated.

22. PW-11, Dr. Sangeet Dhillon, deposed that on 19.5.2013, at about 12.30 p.m. he conducted postmortem of the corpse of the deceased. He noticed the following injuries on the person of the deceased:-

*"1. Lacerated wound on the left partiooccipital region 8Cm superior and laterial to upper end of left ear 2.5 C.m. X .5x*

*bonedeep. Another LW 1.5 C.m inferior to about wound 1.2 X .5 C.m.*

2. *Vertical LW on right eyebrow 1.2 x.5x bone deep.*
3. *V shape LW on the posterior aspect of left ear 1.2 CM.*
4. *One contusion corresponding to injury number 3.*
5. *Red contusions on left zygomatic region 4x3 C.M.*
6. *Red contusions on the bridge of nose, right chick 3x2 and 2x3 Cm.*
7. *Red contusions on the inner aspect of upper lip and lower lip 1.2x1.8, .8x1.2.*
8. *Red contusions on the superior aspect of left shoulder joint 1.2 x 1.3.*
9. *Oblique stab wound on the right anterolateral aspect of mid region of neck 4.5. C.M X 1.5. C.M. Upper end is 10 C.M from the right ear lobule while the lower end is 14 C.M from the right ear lobule margins are irregular. The stab has pierced the muscle, carotid sheath cutting the internal jugular vain and further gone towards a posterior area between hyoid and thyroid cartilage which has removed the bone of cervical vertebra No. 4."*

This witness opined that the deceased died due to stab injury on the neck, he has preserved the viscera and sent the same alongwith samples for examination. He found 267.63 mg % alcohol in the blood of the deceased.

23. PW-7, Shri Madan Lal Verma, Pradhan Gram Panchayat, Sharmala, deposed that the accused and the deceased used to work for him. As per this witness both of them used to quarrel with each other and when he asked why they quarrel, the deceased told that accused is involved with some lady and wants to take her away. He has further deposed that on 17.05.2013, Shri Om Prakash Sharma, Up-Pradhan, Gram Panchayat, Klint telephonically informed that the deceased and the accused had a fight. Consequently, he went to Mohri, and saw the deceased lying dead and the accused was heavily drunk. As per this witness police alongwith Shri Chater Singh and the complainant were present on the spot. In his presence police took into possession the pieces of meat, potatoes and green chilly and to this effect memo, Ex. PW-7/A, was prepared, which was signed by him. This witness has categorically stated that police took into possession broken pieces of glass bottle and blood-stained glass pieces of liquor bottle. In this regard memos of Ex. PW-7/B and Ex. PW-7/C were prepared, which were signed by him. In his presence police also took into possession five scalp hair from the right hand of the deceased, which were lying in his hand, memo in this regard, Ex. PW-7/D, was prepared, which is signed by him. He has further deposed that vide seizure memo, Ex. PW-7/E, police took into possession grass and mud from the spot. Besides this, blood stained mud and grass were also taken into possession vide seizure memo, Ex. PW-7/F. This witness, in his cross-examination, deposed that he cannot name the lady with whom the accused was involved. The accused did not give beatings to the deceased in his presence.

24. PW-8, Shri Vikram Chauhan, deposed that he used to run mobile sale and repair shop at Chaila. As per this witness on 17.5.2013, around 09.00 a.m., when he was present at his shop, the accused came for repair of his mobile handset, i.e. Lava C-31. He repaired the mobile of the accused charged Rs.380/-. He has further deposed that accused

used to work in the house of Shri Madan Pradhan. The accused left around 11.00 A.M. This witness, during the course of investigation identified the accused.

25. In the instant case, the testimonies of the official prosecution witnesses are not of much significance as the prosecution has to overcome first riddle of proving the incriminating circumstances against the accused by linking all the circusmtances. The testimonies of the above mentioned witnesses are to be looked into in order to link the circumstances and to form a complete chain of circumstances. However, relevant excerpts from the testimonies of the prosecution witnesses are necessary in order to link the circumstances, as portrayed by the non-official prosecution witnesses. Therefore, unnecessary fiddling little details of the official prosecution witnesses are deliberately left.

26. PW-10, Constable Naresh Kumar, in his cross-examination, admitted that the police team returned from the spot around 10.30 P.M. after the Investigating Officer completed all the formalities. He has also admitted that after 08.00 to 09.00 p.m. it is pitch dark. He has further deposed that Investigating Officer completed all the formalities on the spot. This witness did not see any blood stains on the broken glass pieces in the Court. Also, he did not see any blood stains in the mud which was shown to him in the Court.

27. PW-13, Constable Anil Kumar, in his cross-examination, has deposed that hand writings in original *roznamcha* register and in abstract, Ex. PW-13/A, are different. PW-15, HHC Kanshi Ram, deposed differently by saying that entire proceedings in the matter were completed by the Investigating Officer in the house of the complainant.

28. In the present case, the investigation was carried out by PW-17, ASI Kamal Dev. No doubt he has supported the prosecution case and reiterated the story as portrayed by the prosecution. This witness is his cross-examination, has deposed that he had prepared *rukka* on the spot while sitting in the vehicle of the Deputy Superintendent of Police. He did not take finger prints from the liquor bottle.

29. PW-20, Shri Nasib Singh Patial, Scientific Officer, FSL, Junga, chemically analysed the samples sent by the police and issued report, Ex. PW-16-E. This witness, in his cross-examination, has deposed that he did not check blood-stains on the pieces of glass and on the neck piece of the bottle.

30. After close scrutiny of the key prosecution witnesses and noticing the relevant excerpts of the official prosecution witnesses, it would be apt to test the same on the touchstone of veracity and credibility. Indeed, prosecution case mainly hinges on the statements of non-official prosecution witnesses and their depositions are relevant to connect the links in the chain of circumstances. In an umpteen number of cases the Hon'ble Supreme Court and also various High Courts have laid down that the rule of prudence with respect to dealing with circumstantial evidence is that each and every circumstance must connect with other circumstances, so as to form a complete chain of events, ruling out any possibility of innocence of the accused.

31. A threadbare scrutiny of the evidence, which has come on record, shows that the complainant PW-1, deposed that she saw two Nepalis, who were quarreling with each other. She has further deposed that she could not identify those Nepalis. As per testimony of this witness, some unknown person called her and divulged that two persons are quarreling on the road and when she saw from distance one person was lying on the road side, who sustained injuries and the other person was going towards Mohri side. This witness has identified the accused as the same person, who went towards the Mohari side. However, this witness, in his cross-examination deposed that, she did not see the accused killing the deceased. As per the prosecution story, the complainant saw the deceased in the

company of the accused before his gory body was found. Now, as per the prosecution, complainant saw the deceased in the company of the accused. So, one of the strong circumstance is that the complainant saw the accused and the deceased together immediately preceding the death of the deceased.

32. The Hon'ble Supreme Court in ***State of Uttar Pradesh vs. Ram Balak & another, (2008) 15 Supreme Court Cases 551,*** has held as under:

> *"12. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this Court. In State of U.P. v. Satish, it was noted as follows:*
>
> *"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."*
>
> *13. In Ramreddy Rajesh Khanna Reddy v. State of A.P., it was noted as follows:*
>
> *"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration."*

33. Certainly, last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crimes becomes impossible. No doubt, Courts in such cases should look for corroborative evidence. In order to establish the last seen together, deposition of PW-1 is very important. She in categorical terms deposed that, she did not see accused killing the deceased. She has further deposed that some unknown person called her and said two persons are quarreling on the road and when she saw from distance a person was lying on the road, who had sustained injuries and other person was going towards the Mohri side. This witness has identified the accused as the person who was proceeding towards the Mohri side. PW-1, in her cross-examination stated that she did not see the accused killing the deceased. In fact, PW-1 nowhere named the accused to be the person who had killed the deceased, but on the basis of testimony of this witness the prosecution has tried to attract the last seen theory. The corpse of the deceased was found on a road which is a vehicular

road and there is steep slant. The accused while answering question No. 61 in his statement under Section 313 Cr.P.C., has stated as under:-

> *"Q. 61 Do you want to say anything else?*
>
> *Ans; I am innocent and falsely implicated in the present case. I and deceased Harka Bahadur had consumed the liquor in the morning on relevant day. Deceased Harka Bahadur was heavily drunked. I left him and went to got repair my mobile. In the evening I was arrested by the police. I had not committed the murder of deceased Harka Bahadur."*

Certainly, last seen theory comes into force where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is very small that the possibility of any person other than the accused being the author of the crime becomes impossible. However, in the present case, as alleged by the prosecution, the accused was last seen with the deceased by the complainant and the complainant did not see him killing the deceased. Subsequently, the complainant went to Mohri bazaar and saw the accused there, then she divulged to some persons that the accused killed the deceased. In the wake of sequence of events, as portrayed by the prosecution, it becomes highly doubtful that on a steep slant road which is frequented by vehicular traffic, the accused killed the deceased and then left to Mohri bazaar. The behaviour and the conduct of the accused is also to be seen meticulously. Ordinarily, if a person kills someone, he would definitely try to escape and not to roam freely without any fear of being caught. It is a serious circumstance which cannot at all be over-looked. However, in the case in hand the accused was seen by the complainant at Mohri bazaar and then she got him apprehended by the persons who were there. The testimony of PW-1 belittles be stand of the prosecution that complainant saw the deceased in the company of the accused and later on the deceased was found dead, as after the complainant saw them together and later on the accused went to Mohri bazaar without any fear of being caught. The complainant has categorically stated the she did not see the accused killing the deceased. The conspectus of the testimonies of key prosecution witnesses unequivocally shows that where the deceased was found dead there is steep slant and a gorge.

34. The other important witness PW-7, Shri Madan Lal Verma, though stated that in his presence police took into possession pieces of broken glass of bottle of liquor, blood stained pieces of glass bottle of liquor, grass and mud from the spot. However, PW-10, Constable Naresh Kumar, stated that there were no blood stains on broken glass pieces. In the wake of the contradictory statements of PW-7 and PW-10 the testimony of PW-20, Shri Naseeb Singh Patyal, Scientific Officer, FSL, Junga, is important. PW-20, in his cross-examination, has specifically stated that he did not check the blood stains on the pieces of glasses as well as on the neck piece of the bottle. Now, this is a major missing link in the chain of circumstances which cannot at all be over-looked.

35. Likewise, as far as circumstance with respect to blood stains on the piece of glass bottle collected from the spot is concerned, it has come on record is that the deceased was heavily inebriated at that time and the place where he was found dead has steep slant. It is also come on record that the witnesses have only named that there were two *Nepalis* who were quarreling with each other and subsequently the accused was found in the market and there he was apprehended.

36. It has been held by Hon'ble Supreme Court in ***R. Shaji Vs. State of Kerala (2013) 14 SCC 266*** that in a case of circumstantial evidence motive may be considered as a

circumstance which is relevant for the purpose of examining evidence. As per the prosecution story, the motive behind the crime was a dispute with regard to some lady to whom the accused wanted to take away. PW-7, Shri Madan Lal Verma, in his cross-examination, categorically deposed that he cannot disclose the name of the lady with whom the accused was involved. The said lady has also not disclosed to him at any point of time that the accused was involved with her in any manner. After, threadbare examination of the material which has come on record, not even remotely it has come on record that there was some dispute with regard to some lady. In the case in hand there is not even a subtle whisper about what was the motive of the accused in killing the deceased and the motive as portrayed by the prosecution has no substance. Therefore, on this count also the case of the prosecution fails.

37. Now coming to the discrepancies with regard to the investigation, there is variance that the investigation was done while sitting in the vehicle under the torch light, but another witness says that investigation was carried out in the residence of PW-1 (complainant). No doubt, this is not a major contradiction and on this count only the case of the prosecution cannot be said to be marred with loopholes. However, coupled with other major contradictions and discrepancies even minor discrepancies cannot be ignored.

38. The learned counsel for the accused has placed reliance on a judgment of Hon'ble Supreme Court rendered in ***Krishan Chand Vs. State of Himachal Pradesh (2018) 1 Supreme Court Case 222,*** wherein vide paras 20 and 25, it has been held as under :-

> *"20. It is to be noted that the defence version is to the effect that at the instance of one B, the accused had been falsely implicated in the instant case. When, the defence version is of false implication, then it was required of the prosecution to have explained each and every material circumstance/contradiction which came on record.*
>
> *… … … … … … …*
>
> *25. The High Court has not appreciated the fact that PW 4 contradicted himself when he stated that it was dark at 5.00 a.m. but no search lights or the headlights of the vehicles were switched on at the time of preparing the search memo and other documents at the spot."*

In the present case also, the accused was apprehended by local people of Mohri at the instance of the complainant and if not false implication, there are chances of wrong implication of the accused. Even the material which has come on record show that prosecution could not connect the missing links in the chain of the circumstances, so as to make a complete chain of events compelling this Court to conclude that the accused committed the crime. There are major contradictions with regard to investigation being carried out in the vehicle or in the residence of the complainant. The absence of any particular motive behind the crime is also to be taken as a circumstance which goes against the prosecution case. Thus, the judgment (supra) is fully applicable to the facts of the present case.

39. The learned counsel for the accused has also place reliance on of another judgment of Hon'ble Supreme Court rendered in ***Khekh Ram vs. State of Himachal Pradesh, (2018) 1 Supreme Court Cases 202,*** wherein vide paras 33 to 35 it has been held as under:

*"33. It is a common place proposition that in a criminal trial suspicion however grave cannot take the place of proof and the prosecution to succeed has to prove its case and establish the charge by adducing convincing evidence to ward off any reasonable doubt about the complicity of the accused. For this, the prosecution case has to be in the category of "must be true" and not "may be true". This Court while dwelling on this postulation, in Rajiv Singh vs. State of Bihar and another, 2015 16 SCC 369 dilated thereon as hereunder:*

*"66. It is well entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well established cannon of criminal justice is "fouler the crime higher the proof". In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.*

*67. The above enunciations resonated umpteen times to be reiterated in Raj Kumar Singh v. State of Rajasthan as succinctly summarized in paragraph 21 as hereunder:*

*'21. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved and "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.'*

> *68. In supplementation, it was held in affirmation of the view taken in Kali Ram v. State of H.P. that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.*
>
> *69. In terms of this judgment, suspicion, howsoever grave cannot take the place of proof and the prosecution case to succeed has to be in the category of "must be" and not "may be" a distance to be covered by way of clear, cogent and unimpeachable evidence to rule out any possibility of wrongful conviction of the accused and resultant miscarriage of justice. For this, the Court has to essentially undertake an exhaustive and analytical appraisal of the evidence on record and register findings as warranted by the same. The above proposition is so well-established that it does not call for multiple citations to further consolidate the same."*
>
> *(emphasis in original)*
>
> *34. In our estimate, having regard to the quality of evidence on record as a whole and in particular on the aspect of identification, the view taken by the Trial Court being convincingly reasonable is acceptable in comparison to one adopted by the High Court.*
>
> *35. The High Court in the attendant facts and circumstances, in our determination, erred in upturning the findings recorded by the Trial Court. The impugned judgment and order is thus set aside and the acquittal of the appellant is restored. This Court shares the concern expressed by the Trial Court on the shoddy investigation conducted in the case, having regard in particular to the seriousness of the offence involved and reiterate the direction issued by it to the Superintendent of Police, Kullu to enquire into the matter to ascertain the reason for the omission/lapses in the investigation, identify the person(s) responsible therefor and the action taken in connection therewith so as to ensure against repetition of such shortcomings in future. The Superintendent of Police, Kullu would complete the inquiry and submit a report to this Court within a period of three months herefrom. The appeal is allowed. The appellant be released from custody if not required in connection with any other case."*

In the instant case also, the accused was apprehended only on the basis of suspicion raised by the complainant that he had killed the deceased and surprisingly she, in her testimony, deposed that she did not see the accused killing the deceased. The complainant saw the accused and the deceased together and later on the deceased was found dead on a road. After exhaustively discussing the testimonies of the key prosecution witnesses, with certainty it cannot be said that it was the accused who killed the deceased. Indeed, many discrepancies have crept up in the prosecution case which go to the root of the prosecution case and makes it highly doubtful. Therefore, the judgment (supra) is fully applicable to the facts of the present case.

40. On the other hands, the learned Additional Advocate General has also relied upon judicial pronouncements of Hon'ble Supreme Court in order to substantiate her

arguments. She has placed reliance on a judgment of Hon'ble Supreme Court rendered in ***State of Andhra Pradesh vs. Pullagulli Casi Reddy Krishna Reddy alias Rama Krishna Reddy and others, (2018) 7 Supreme Court Cases 623,*** wherein vide para 11 it has been held as under:

> *"11. The principle of "falsus in uno falsus in omnibus" has not been accepted in our country. Even if some accused are acquitted on the ground that the evidence of a witness is unreliable, the other accused can still be convicted by relying on the evidence of the same witness. Minor contradictions and omissions in the evidence of a witness are to be ignored if there is a ring of truth in the testimony of a witness. The High Court was oblivious to this settled position of law. The High Court highlighted the minor inconsistencies and omissions in the evidence of Pws 1 to 3 and Pws 5 to 7 to disbelieve them. The High Court wrongly refused to believe the eyewitnesses on the ground that they attempted to implicate as many persons as possible by making omnibus allegations. The High Court further erred in holding that Pws 1, 6 and 7, who were the eyewitnesses traveling in the jeep with the deceased, were not speaking the truth as they were close relatives and supporters of Deceased 1. The rejection of the evidence of Pws 2, 3 and 5 by the High Court on the ground that they did not attribute specific overt acts to each accused is also erroneous."*

In the case in hand, the evidence does not only contain minor discrepancies and contradictions, on the basis of which the whole of the prosecution case is disproved, however, the prosecution evidence has major lacunae, which cannot at all be overlooked to convict the accused, so, the judgment (supra) is not applicable to the fact of the present case.

41. The learned Additional Advocate General has placed reliance upon another judgment of Hon'ble Supreme Court rendered in ***State of Maharashtra Vs. Suresh, (2000) 1 Supreme Court cases 471,*** wherein vide para 27, it has been held as under:

> *"27. It is regrettable that the Division Bench had practically nullified the most formidable incriminating circumstance against the accused spoken to be PW 22 Dr Nand Kumar. We have pointed out earlier the injuries which the doctor had noted on the person of the accused when he was examined on 25.12.1995. The significant impact of the said incriminating circumstance is that the accused could not give any explanation whatsoever for those injuries and therefore he had chosen to say that he did not sustain any such injury at all. We have no reason to disbelieve the testimony of PW 22 Dr Nand Kumar. A false answer offered by the accused when his attention was drawn to the aforesaid circumstance renders that circumstance capable of inculpating him. In a situation like this such a false answer can also be counted as providing "a missing link" for completing the chain.*

True it is that the deceased died due to fatal injuries sustained by him in his neck. However, as per the prosecution case the accused inflicted an injury on the neck of the deceased with neck of broken glass bottle of liquor. Necessarily, if it so, the broken neck of the bottle of liquor would have had blood stains, but, PW-20 Shri Naseeb Singh Patyal, Scientific Officer, deposed that he did not check the blood-stains on the pieces of glasses and also on the neck piece of the bottle. One of the official prosecution witness further makes it doubtful by

deposing that the piece of broken glass bottle did not have any blood stains. Now, this is a strong circumstance and certainly it creates a strong dent in the prosecution case. Thus, the judgment (supra) is not applicable to the facts of the present case.

42. In view of the above enumerated facts and circumstances of the case it is more than safe to hold that in the instant case the chain of circumstance is not complete and major links are missing. Thus, it cannot be said with impeccability that it was the accused who killed the deceased. It is well established principle of criminal jurisprudence that hundred guilty may escape but one innocent should not be convicted. The discrepancies, contradiction and suspicions which have crept up in the prosecution evidence go to the root of the prosecution case and raises major doubts about the veracity of prosecution story. In the case in hand only a *Nepali* person has been named as perpetrator of the crime, however, there may be other persons other than the accused alongwith the deceased at the time of the occurrence. Therefore, there are doubts and the evidence led by the prosecution, in no way proves its case, rather contrastingly, after meticulously examining the same we are of the considered view that prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. It seems that only on the basis of suspicions raised by the complainant the accused was apprehended by the localities of the Mohri and he was handed over to the police and consequently police proceeded against him. This Court in ***Rajdev alias Raju & another vs. State of H.P., Criminal Appeal No. 288 of 2015,*** decided on 30.05.2016, has held as under:

> *"51. It is settled position of law that suspicion however strong cannot be a substitute for proof. In a case resting completely on the circumstantial evidence the chain of circumstances must be so complete that they lead only to one conclusion, that is the guilt of the accused. In our opinion, it is not safe to record a finding of guilt of the accused Manoj Sahani and the accused Manoj Sahani is entitled to get the benefit of doubt."*

43. After exhaustively discussing the entire gamut of the prosecution case with the aid of relevant evidence and law, the inescapable conclusion is that the prosecution has failed to prove the guilt of the accused conclusively and beyond the shadow of reasonable doubt and the finding of guilt, as recorded by the learned Trial Court, needs to be interfered with. Accordingly, the appeal is allowed the judgment is learned Trial Court is set aside. The accused is acquitted for the offence punishable under Section 302 IPC and ordered to be released forthwith. Fine amount, if already deposited be refunded to the accused. Since the accused is in jail, he be released forthwith, if not required in any other case, however, subject to his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned Additional Sessions Judge (CBI), Shimla, undertaking specifically therein that in the event of an appeal is preferred against this judgment, he shall appear in the Hon'ble Supreme Court.

44. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of Jail concerned in conformity with this judgment forthwith.

45. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of.

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

Rukmani Devi & Ors. .....Appellants/defendants.
Versus
Rajinder Singh ....Respondent/Plaintiff.

RSA No. 361 of 2012.
Reserved on : 24th October, 2018.
Decided on : 31st October, 2018.

**Indian Succession Act, 1925** - Section 63 – Will - Attestation – Proof - Marginal witness "D.K." nowhere deposing about testator signing or thumb marking will in his presence or in presence of other witness or he signing will in presence of testator - Other marginal witness not examined by propounder - Held, due execution of will not proved - Regular Second Appeal against decree based on concurrent findings also dismissed. (Paras 8 to 10)

For the Appellants: Mr. Suneel Awasthi, Advocate.
For Respondent: Mr. Y. P. Sood, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

Both the learned Courts below under concurrently recorded pronouncement, upon, Civil Suit No. 249 of 2008, hence decreed the plaintiffs' suit for declaration. Being aggrieved, therefrom, the defendants/appellants have instituted the instant appeal before this Court.

2. Briefly stated the facts of the case are that plaintiff Rajinder Singh filed a suit for declaration to the effect that the Will of 12.1.1999 executed by late Sh. Tulsi Ram be declared null and void and in addition to this, he also sought the relief of injunction against the respondents by restraining them from dispossessing him from the land measuring 1-6-0 bighas, bearing Khasra No.1203/1157, situated in mauja Garoroo, Tehsil Jogindernagar, District Mandi, H.P. The plaintiff has instituted the suit on the ground that he is the only son of late Sh. Tulsi Ram from his first wife, and, thereafter Tulsi Ram married with defendant No.1, and, out of this wedlock three daughters i.e. defendant No.2 to 4, were born. According to the plaintiff, his father had given land measuring 1-6-0 bighas to him. Upon which, he constructed his house by spending Rs.2 lacs in the year 1986, and, the remaining part of the suit land is being used by courtyard by the plaintiff. It has been further pleaded that Sh. Tulsi Ram, at the instigation of the defendants, had filed another suit for possession and mesne profits regarding the suit land, and, the court framed the following issue in the said suit "Whether the defendant has spent about two lacs for construction of his house in the year 1986, if so its effect", and, this issue was decided in favour of the plaintiff, and, the suit was dismissed by the learned Court of Civil Judge (Sr. Division), Jogindernagar on 16.12.2003., The appeal preferred against the said judgment and decree was also dismissed on 22.9.2007. Sh. Tulsi Ram died on 19.7.2008, and, he performed al his last rites. The defendants then started threatening him that they have one Will of Sh. Tulsi Ram in their favour. When the plaintiff searched the record regarding the Will of 12.1.1999, then, he came to know about the said Will, which is stated to be result of fraud, mis-representation and coercion on the part of the defendants. The plaintiff asserted the fact that he is in possession of the suit land. On these submission, the plaintiff prayed

that the suit be decreed, and, the Will of 12.1.1999 may be declared as null and void. In addition to this, the plaintiff also sought the relief of permanent prohibitory injunction.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections, inter alia, maintainability, suit is liable to be stayed under Section 10 CPC, estoppel etc. On merits, the suit has been contested on the ground the suit land was purchased/acquired by Sh. Tusli Ram, and, he built his house over it. On these submission, the defendants prayed for dismissal of the suit.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the Will dated 12.01.1999, executed by late Sh. Tulsi Ram is null and void qua the suit land, and, the same is result of fraud and undue influence, as alleged?OPP.
2. Whether the plaintiff is the only son of late Sh. Tulsi Ram and has given the suit land to construct the house in the year 1986 by spending Rs. Two lacs and remaining land was used as court yard and kitchen garden, as alleged?OPP.
3. Whether Sh. Tulsi Ram had sold the ancestral land at Sandhol and have constructed house at Garoroo of Jogindernagar, as alleged?OPP.
4. Whether the suit of the plaintiff is not maintainable in the present form? OPD.
5. Whether the plaintiff has no cause of action to file the present suit?OPD.
6. Whether the present suit is liable to be stayed under Section 10 of CPC? OPD.
7. Whether the plaintiff is estopped by his own act and conduct to file the present suit?OPD.
8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the plaintiff's suit. In an appeal, preferred therefrom, by, the defendants/appellants herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the findings recorded by the learned trial Court.

7. Now the 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, on 7.12.2012 admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the findings of the Courts below regarding non compliance of Section 63 of the Indian Succession Act in proving the Will dated 12.1.1999, Ex.PW1/A is not in accordance with law."

**Substantial question of Law No.1:**

8. Deceased testator one Tulsi Ram, under, a testamentary disposition, borne in Ex. PW1/A, hence bequeathed his properties, vis-a-vis, the legatees named therein. For Ex.PW1/A, to acquire a pervasive aura of validity, the legatees constituted thereunder also the propounder thereof, was hence, enjoined to adduce cogent proof, in satiation of the ingredients borne, in, Section 63, of, the Indian Succession Act, provisions whereof stand extracted hereinafter:-

> "63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [12] [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
>
> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Whereupon alone the Will, can be constituted to be validly, and, duly executed by the deceased testator. A perusal of the afore extracted provisions, unfolds, that it being incumbent upon the propounder of the Will, to prove hence its valid and due execution by (i) ensuring stepping into the witness box, of, both the marginal witnesses thereto or one of them; (ii) and the marginal witness stepping into the witness box, making a clear testification qua the deceased testator rather embossing his signatures or thumb impression thereon, imperatively in his presence, and, thereafter the marginal witness(es) also rendering a testification qua his/their in the presence, of, the deceased testator hence doing likewise. Reemphasizingly, the stepping into the witness box, of, the marginal witness(es) to Ex.PW1/A, is, statutorily imperative. The defendants have examined DW-3, Sh. D.K. Chauhan, the marginal witness to EX.PW1/A. He in his examination, though, has made echoings qua EX.PW1/A being scribed at the instance of the deceased testator. He further testified qua his along with the scribe and identifier, rather appending their respective signatures, upon, Ex.PW1/A, in, their respective presence. He has acquiesced to a suggestion meted to him, during, the course of his cross-examination, that Tulsi Ram had orally disclosed to him qua his giving the suit land to Rajinder Singh, and, his constructing, a, house thereon. However, this witness nowhere, in his testification, rather testifies qua the deceased testator embossing, his signatures/thumb impressions, upon, EX.PW1/A in his presence, as well as, in the presence, of, other marginal witness thereto. He has also omitted to make any echoing in his examination-in-chief qua his embossing his signatures thereon, in, the presence of the deceased testator. The other marginal witness to Ex.PW1/A, stood, not examined by the defendant, for, proving, the,valid and due execution

of Ex.PW1/A, on the ground of his being won over, hence, the ingredients of Section 63, of, the Indian Succession Act, visibly, remain unsatiated. Furthermore, evidence has also come on record, that, plaintiff Rajinder Singh, has, also constructed a house, upon, the suit land, and, more over the attesting witness, to, Ex.PW1/A, DW-3 has also in his cross-examination, unfolded qua Tulsi Ram rather disclosing to him qua Rajinder Singh, hence constructing a house, upon, the suit land. Moreover, DW-1, the scribe of Will Ex.PW1/A has also unravled, in his cross-examination, qua deceased Tulsi Ram, hence, disclosing him, qua his giving the land to Rajinder Singh, in, the year 1986, and, his also constructing a house thereon. Consequently, when the deceased testator had already given the suit property to Rajinder Singh, and, the latter had constructed a house thereon, hence, there was no occasion, for, the deceased testator, to, make a bequest of the aforesaid suit property, vis-a-vis, beneficiaries thereof. Moreover, in these circumstances, every possibility, of, Will of the deceased testator being dominated, by its beneficiaries hence cannot be ruled out. For the foregoing reasons, this Court is constrained to hold, that, the statutory ingredients borne in Section 63 of the Indian Succession Act, standing not proven, vis-a-vis, the valid and due execution, of, Ex.PW1/A.

9. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the respondent/plaintiff, and, against the appellants/defendants.

10. In view of the above discussion, there is no merit in the present Regular Second Appeal, and, it is dismissed accordingly. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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**BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE, CHANDER BHUSAN BAROWALIA, J.**

The Excise & Taxation Commissioner, Himachal Pradesh, Kasumpti, Shimla-9
... Applicant.

Versus

M/s Shivalik Tyres, Kumar Hatti, District Solan, H.P. ...Respondent

STR No. 1 of 2011
Date of Decision : October 24 , 2018

**Central Sales Tax Act, 1956 -** Section 14 - Entry (iv), sub entry (xiv) – "Rubber tyres", whether included in sub entry (xiv) ? Held, word "tyres" in sub entry (xiv) of sub-section (iv) of Section 14 of Act cannot be read in isolation – It has to be read in group of items in which entry is made - Sub-section (iv) starts with words "iron and steel" and items referred to in entry (xiv) necessarily to be read contextually in that background along with other entries 'wheels, tyres, axels and wheel sets'- Word "tyre", cannot be read to mean rubber tyre or tyres retreaded with rubber. (Paras 8 & 14)

***Cases referred:***

Collector of Central Excise, Kanpur Vs. Krishna Carbon Paper Co., (1989) 1 SCC 150

Commissioner of Central Excise, New Delhi vs. Connaught Plaza Restaurant Private Limited, New Delhi, (2012) 13 SCC 639

Geep Flashlight Industries Ltd. vs. Union of India & others, (2002) 9 SCC 545

Oswal Agro Mills Ltd. v.CCE, 1993 Supp (3) SCC 716

Reliance Cellulose Products Ltd., Hyderabad Vs. Collector of Central Excise, Hyderabad-I Division, Hyderabad, (1997) 6 SCC 464

Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur, (1996) 9 SCC 402

For the petitioner : Mr. Ajay Vaidya, Senior Addl. A.G., Ms. Ritta Goswami, Addl. A.G., Mr. Vikas Rathore, Addl. A.G., Mr. J.S. Guleria, Dy. A.G. and Ms. Svaneel Jaswal, Dy.A.G. for the applicant.

For the respondent : *Ex-parte*.

The following judgment of the Court was delivered:

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**Sanjay Karol, Judge.** (Oral)

In terms of the present reference, this Court is called upon to answer the following question of law, arising out of order dated 21.5.2010 (Annexure A-1), passed by Chairperson, H.P. Tax Tribunal Dharamshala, Camp at Shimla, in Appeal No. 109 of 2009, titled as *M/s Shivalik Tyres vs. The Excise and Taxation Commissioner, H.P.*:

> "Whether under section 14 in Chapter-IV "Goods of special importance in inter-state trade or commerce" of CST Act, 1956, sub-entry (XIV) of main entry No. (IV) containing reference to "tyres" could be construed as tyres made of "rubber" even when the main classification is of 'Iron and Steel'?"

2. Facts are not in dispute. Respondent assessee, who is in the business of retreading of tyres was assessed to tax under the provisions of the Himachal Pradesh General Sales Tax Act, 1968 (hereafter referred to as the 'State Act'). The Assessing Officer, vide order dated 27.11.2003 (Annexure A-2) found the assessee to have furnished incorrect returns resulting into evasion of tax and as such, after carrying out addition, assessed the component of tax and resultant penalty payable by the Assessee. In all the amount of tax assessed is `1,21,000/-.

3. In an appeal preferred by the Assessee, the said order came to be affirmed by the Excise & Taxation Commissioner, Himachal Pradesh, Shimla, vide order dated 28.8.2009 passed in Appeal No. 171/06/07, titled as *M/s Shivalik Tyres Kumarhatti vs. Deputy Excise & Taxation Commissioner* (Annexure A-3).

4. However, the Tribunal, vide order dated 21.5.2010 (Annexure A-1), while remanding the matter back to the Assessing Authority held the case of the Assessee to fall within the ambit and scope of the Central Sales Tax Act, 1956 (hereinafter referred to as the 'Central Act') and not the 'State Act'.

5. Accordingly vide order dated 4.2.2011, the Tribunal has made the instant Reference.

6. The relevant provisions of the 'Central Act' are reproduced as under:

The Central Sales Tax Act, 1956:

"14. Certain goods to be of special importance in inter-State trade or commerce.— It is hereby declared that the following goods are of special importance in inter-State trade or commerce:—

(i) to (iii) … … …

(iv) iron and steel, that is to say, --

(i) to (xiii) … … …

(xiv) wheels, tyres, axles and wheels sets;

(xv) … … …

(xvi) defectives, rejects, cuttings, or end pieces of any of the above categories.

(v) to (vi) … … …

15. Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State.—

Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:—

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed five per cent of the sale or purchase price thereof;

(b) to (d) … … …"

7. In the instant case there is no question of repugnancy between the two Statutes. There is no dispute about the Assessee being subjected to levy of tax. The only issue being applicability of the Statutes, Central or the State Act. If the case of the Assessee was to fall within the ambit and scope of the provisions of Section 14 of the 'Central Act', the Assessee is liable to be assessed at a lesser amount of duty.

8. In our considered view the word "tyres" in entry (xiv) of sub-section (iv) of Section 14 of the 'Central Act' cannot be read in isolation and has to be read in the group of items in which the entry is made. Sub-section (iv) starts with the words "iron and steels", thus items referred to in entry (xiv) necessarily has to be read contextually in that background along with other entries being the 'wheels, tyres, axles and wheels sets'. Here the word "tyres" cannot be read so as to mean rubber tyres. It has to be read conjunctively with other entries, genus of which is iron and steel. Tyres necessarily would not acquire the connotation of rubber tyres so understood in common parlance, unlike a trader specifically dealing with the product.

9. The principle to be adopted for construction of tariff entries is no longer *res integra.* In the absence of statutory definitions, excisable goods mentioned in tariff entries are to be construed according to the trade practice.

10. In *Geep Flashlight Industries Ltd. vs. Union of India & others,* (2002) 9 SCC 545, the Apex Court observed as under:

> "4. The learned counsel contended that the plastic torch manufactured by the petitioner is nothing else but plastic tube made of plastic in which certain other devices are inserted so as to make it a torch but it nonetheless retains the character of a plastic tube. A mere reference to Tariff Item 15-A(2) would show that the articles therein described are plastic material in different shapes and forms and not articles made from such plastic material. There is a noticeable difference between plastic material in different shapes and forms such as tubes, rods, sheets, etc. and articles made from such plastic material such as plastic torch. It would be doing violence to the language if one were to include plastic torch in articles under Tariff Item 15-A(2) on the ground that a plastic tube is used for manufacturing plastic torch. Articles such as tubes, rods, sheets, foils, sticks, etc., of plastic material merely describe plastic material in different shapes and forms and each word used therein takes its colour from the word just preceding and just succeeding and the adjectival clause "articles made of plastics". Articles made of plastic means articles made wholly of commodity commercially known as plastics, and not articles made from plastics along with other materials. By no canon of construction, a plastic torch can be read in conjunction with plastic tubes, rods, sheets, foils, etc., made of plastics. Plastic torch is a distinct and different commodity commonly known in the market as torch. Ordinarily, torch is not described by the name of the material used in the tube in which the device of torch is housed. The commodity known, advertised, sold and offered in the market is torch. The prefix plastic merely describes the quality of torch as distinguished from other types of torches. It is not sold primarily as plastic tube.
>
> 5. By a catena of decisions it is settled law that an expression used in a taxing statute for describing a commodity must be given the meaning which is generally given to it by a person in the trade or in the market of commodities and should be interpreted in the sense the person conversant with the subject-matter of the statute and dealing with it would attribute to it. (See *Ramavatar Budhaiprasad v. Asstt. STO,* AIR 1961 SC 1325.) The High Court approached the matter from this angle and reached the correct conclusion that the expression "articles made of plastics" used in Tariff Item 15-A(2) does not cover such articles which are not directly made from the material indicated in sub-item (1) but are made from articles made out of such material."

11. In *Commissioner of Central Excise, New Delhi vs. Connaught Plaza Restaurant Private Limited, New Delhi,* (2012) 13 SCC 639, the apex Court reiterated its earlier principle and observed as under:

> "20. Time and again, the principle of common parlance as the standard for interpreting terms in the taxing statutes, albeit subject to certain exceptions, where the statutory context runs to the contrary, has been reiterated. The application of the common

parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law maker;

"it is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts." [See :*Oswal Agro Mills Ltd. v.CCE*, 1993 Supp (3) SCC 716].

12. In the said decision, Court held that fruits and vegetables could not be construed to be salted peanuts or for that matter beetle leaves could not be held to be vegetables. Further it reiterated its view taken in its earlier decisions in the following terms:

**"**27. In *Collector of Central Excise, Kanpur Vs. Krishna Carbon Paper Co.,* (1989) 1 SCC 150 this Court has opined thus :

"12. It is a well settled principle of construction, as mentioned before, that where the word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the legislature.....But there is a word of caution that has to be borne in mind in this connection, the words must be understood in popular sense, that is to say, these must be confined to the words used in a particular statute and then if in respect of that particular items, as artificial definition is given in the sense that a special meaning is attached to particular words in the statute then the ordinary sense or dictionary meaning would not be applicable but the meaning of that type of goods dealt with by that type of goods in that type of market, should be searched."

28. In *Reliance Cellulose Products Ltd., Hyderabad Vs. Collector of Central Excise, Hyderabad-I Division, Hyderabad,* (1997) 6 SCC 464 it was observed:

"20. In other words, if the word used in a fiscal statute is understood in common parlance or in the commercial world in a particular sense, it must be taken that the Excise Act has used that word in the commonly understood sense. That sense cannot be taken away by attributing a technical meaning to the word. But if the legislature itself has adopted a technical term, then that technical term has to be understood in the technical sense. In other words, if in the fiscal statute, the article in question falls within the ambit of a technical term used under a particular entry, then that article cannot be taken away from that entry and placed under the residuary entry on the pretext that the article, even though it comes within the ambit of the technical term used in a particular entry, has acquired some other meaning in market parlance. For example, if a type of explosive (RDX) is known in the market as Kala Sabun by a section of the

> people who uses these explosives, the manufacturer or importer of these explosives cannot claim that the explosives must be classified as soap and not as explosive."
>
> 29. ... ... ...
>
> 30. In *Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur*, (1996) 9 SCC 402, this Court while applying the common parlance test held that the appellant's product "Dant Lal Manjan" could not qualify as a medicament and held as follows:
>
> > "3. ...The Tribunal rightly points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellants if the same runs counter to how the product is understood in popular parlance."**"**

13. The origin of the word “tyres”, as is so described in the dictionary, was in the 15th century denoting curved pieces of iron with which the carriage wheels were shod. In fact, it is also described as a strengthening band of metal fitted around the rim of a wheel especially of a railway vehicle. There can be a case where such tyres may be having a rubber covering, but then it would definitely not cover the activity of the Assessee who is in the business of retreading of rubber tyres.

14. As such, in our considered view the entry “tyres” in the central legislation would not be construed as tyres retreaded with rubber, even though the main classification is that of iron and steel. Thus the Assessee would be liable to be assessed as per the ‘State Act’ and not the ‘Central Act’.

The Reference is answered accordingly.

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**BEFORE HON’BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.**

State of H.P. .....Appellant
Versus
Amar Nath ....Respondent

Cr. Appeal No. 27 of 2008
Reserved on: 19.11.2018
Decided on : 21.11.2018

**Code of Criminal Procedure, 1973** – Sections 378 and 386 – Appeal – Powers of Appellate Court – Held, Appellate Court has power to review and reappreciate evidence adduced before Trial Court – But It must give proper weight and consideration to findings of Trial Court -

And should interfere with acquittal if based on total misappreciation of facts or erroneous view of law or entire approach in dealing with evidence patently illegal. (Para. 6).

**Indian Penal Code, 1860** – Sections 279, 337, 338 and 304A – Rash and negligent driving and death – Proof - Trial Court acquitting accused on ground that his identity as driver of offending vehicle not established – Appeal- On facts, witnesses not identifying accused as driver of vehicle – Rather deposing that one 'P' was driving it at relevant time – No evidence of negligent driving on part of driver – Held, resultant death not on account of rash and negligent driving of driver – Acquittal upheld. (Para 24).

**Indian Penal Code, 1860** – Section 279 – Rash driving – Proof – High Speed – Held, high speed of vehicle itself not proof of rash driving – Situation in which driver is placed also a relevant factor. (Para 24).

***Cases referred:***

Aher Raja Khima v. State of Saurashtra AIR 1956 SC 217
Ajmer Singh v. State of Punjab AIR 1953 SC 76
Atley v. State of U.P. AIR 1955 SC 807
Badri Prasad Tiwari vs. State I (1994) ACC 676
Balbir Singh v. State of Punjab AIR 1957 SC 216
Bhagwan Singh and Ors. v. State of M.P. 2002 (4) SCC 85
Bishan Singh and Ors. v. State of Punjab 1973 (3) SCC 288
C. Antony v. K.G. Raghavan Nair 2003 (1) SCC 1
Chandrappa and Ors. v. State of Karnataka 2007 (4) SCC 415
Ghurey Lal vs. State of U.P. 2008 (10) SCC 450
Harijana Thirupala and Ors. v. Public Prosecutor, High Court of A.P., 2002 (6) SCC 470
K. Gopal Reddy v. State of A.P. (1979) 1 SCC 355
Khedu Mohton and Ors. v. State of Bihar 1970 (2) SC 450
Khem Karan and Ors. v. State of U.P. and Anr. 1974 (4) SCC 603
Lekha Yadav v. State of Bihar 1973 (2) SCC 424
M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200
Madan Lal v. State of J&K 1997 (7) SCC 677
Madan Mohan Singh v. State of Uttar Pradesh AIR 1954 SC 637
Mohammed Aynuddin alias Miyam vs. State of Andhra Pradesh, AIR 2000 SC 2511
Noor Khan v. State of Rajasthan AIR 1964 SC 286
Ram Kumar v. State of Haryana 1995 Supp. (1) SCC 248
Rathnashalvan vs. State of Karnataka, AIR 2007 SC 1064
Sambasivan and Ors. v. State of Kerala 1998 (5) SCC 412
Sheo Swarup v. King Emperor AIR 1934 PC 227
Shivaji Sahabrao Bobade and Anr. v. State of Maharashtra 1973 (2) SCC 793
State of Himachal Pradesh vs. Piar Chand, 2003 (2) Shim. L.C. 341
State of Karnataka v. K. Gopalkrishna 2005 (9) SCC 291
State of Karnataka vs. Satish (1998) 8 SCC 493
Surajpal Singh and Ors. v. State AIR 1952 SC 52
The State of Goa v. Sanjay Thakran 2007 (3) SCC 755
Tota Singh and Anr. v. State of Punjab 1987 (2) SCC 529
Tukaram Sitaram Gore vs. State AIR 1971 Bombay 164
Tulsiram Kanu v. State AIR 1954 SC 1
Umedbhai Jadavbhai v. State of Gujarat 1978 (1) SCC 228

For the appellant: Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Addl. A.Gs. With Mr. Bhupinder Thakur, Dy. A.G.

For the respondent: Mr. Bimal Gupta, Senior Advocate with Ms. Rubeena Bhatt, Advocate.

The following judgment of the Court was delivered:

**Tarlok Singh Chauhan, Judge**

The State is aggrieved by the order of acquittal passed by learned Judicial Magistrate, 1st Class, Manali, District Kullu, H.P. on 06.10.2007 whereby he acquitted the respondent under Sections 279, 337, 338, 304-A IPC and Section 182 of the Motor Vehicles Act.

2. The case of the prosecution is that on 27.3.2006, the complainant Dilli Devi, Leela Devi, Bantu Devi, Dearu Ram, Rounie and Chet Ram while travelling in vehicle No. HP-33T-9825 were going to Patalikuhal from place Pangan. When the vehicle reached at a place near Sukhali at 1.18 p.m., then a vehicle Tata Sumo came from the opposite side and while giving pass to the said vehicle, the driver of the vehicle No. HP-33T-9825 could not judge the side as a result of which the same fell down. The occupants of the vehicle sustained injuries and one of them succumbed to the same. It was on the basis of the statement of Dilli Devi that an FIR came to be registered against the respondent. After completion of investigation, the respondent was tried for commission of offence punishable under Sections 279, 337, 338 and 304-A IPC and Section 182 of the Motor Vehicles Act.

3. The prosecution examined six witnesses and thereafter the statement of the respondent was recorded under Section 313 Cr.P.C. and his defence was that of total denial. He also tendered in evidence copy of order dated 25.4.2007 passed by learned Motor Accident Claims Tribunal, Kullu and statements Ex.DB, DC and memo of costs Ex.DD.

4. It is vehemently argued by learned Additional Advocate General that the findings recorded by the learned Court below are perverse inasmuch as it has failed to appreciate the truthful and trustworthy deposition of PW-2 Banto Devi and PW-6 Rajesh both of whom have been injured in the occurrence. That apart, the prosecution case has further been proved by PW-1 Dilli Devi whose statement has been misconstrued and mis-appreciated by the learned Court below.

5. On the other hand, learned counsel for the respondent would argue that the findings recorded by the learned Court below being strictly in consonance with the evidence that has come on record, no exception to the same can be taken.

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

6. At the outset, it would be necessary to deal with the ambit and scope of the powers of the appellate Court in dealing with an appeal against acquittal and the law on the subject has been succinctly dealt with by the Hon'ble Supreme Court in ***Ghurey Lal vs. State of U.P. 2008 (10) SCC 450,*** wherein after taking into consideration all the previous precedence summed up the legal position as under:-

> *43. The earliest case that dealt with the controversy in issue was Sheo Swarup v. King Emperor AIR 1934 PC 227. In this case, the ambit and scope of the powers of the appellate court in dealing with an appeal against acquittal*

*has been aptly elucidated by the Privy Council. Lord Russell writing the judgment has observed as under: (at p. 230):*

> *"...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...."*
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> *The law succinctly crystallized in this case has been consistently followed by this Court. On proper analysis of the ratio and findings of this case, it is revealed that the findings of the trial court are based on the fundamental principles of the criminal jurisprudence. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the trial court. The appellate court undoubtedly has wide powers of re-appreciating and re- evaluating the entire evidence but it would be justified in interfering with the judgment of acquittal only when the judgment of the trial court is palpably wrong, totally ill- founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.*

*44. This Court again in the case of Surajpal Singh and Ors. v. State AIR 1952 SC 52, has spelt out the powers of the High Court. The Court has also cautioned the Appellate Courts to follow well established norms while dealing with appeals from acquittal by the trial court. The Court observed as under:*

> *"7. It is well established that in an appeal under Section 417 Criminal P.C., the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well-settled that the presumption of innocence of the accused was further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very*
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> *substantial and compelling reasons."*
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> *This Court reiterated the principles and observed that presumption of innocence of accused is reinforced by an order of the acquittal. The appellate court could have interfered only for very substantial and compelling reasons.*

*45. In Tulsiram Kanu v. State AIR 1954 SC 1, this Court explicated that the appellate court would be justified in reversing the acquittal only when very substantial question and compelling reasons are present. In this case, the Court used a different phrase to describe the approach of an appellate court against an order of acquittal. There, the Sessions Court expressed that there was clearly reasonable doubt in respect of the guilt of the accused on the evidence put before it. Kania, C.J., observed that it required good and sufficiently cogent reasons to overcome such reasonable doubt before the appellate court came to a different conclusion.*

*46. In the same year, this Court had an occasion to deal with Madan Mohan Singh v. State of Uttar Pradesh AIR 1954 SC 637, wherein it said that the High Court had not kept the rules and principles of administration of criminal justice clearly before it and that therefore the judgment was vitiated by non-advertence to and mis-appreciation of various material facts transpiring in evidence. The High Court failed to give due weight and consideration to the findings upon which the trial court based its decision.*

*47. The same principle has been followed in Atley v. State of U.P. AIR 1955 SC 807, wherein the Court said:*

> *"5….It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.*
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> *It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal."*

*48. The question was again raised prominently in Aher Raja Khima v. State of Saurashtra AIR 1956 SC 217. Bose, J. expressing the majority view observed (at p.220):*

> *"1….It is, in our opinion, well settled that it is not enough for the High Court to take a different view of the evidence; there must also be substantial and compelling reasons for holding that the trial court was wrong; Ajmer Singh v. State of Punjab AIR 1953 SC 76; and if the trial Court takes a reasonable view of the facts of the case, interference under Section 417 is not justifiable unless there are really strong reasons for reversing that view.*

*49. In Balbir Singh v. State of Punjab AIR 1957 SC 216, this Court again had an occasion to examine the same proposition of law. The Court observed as under:*

> *"12…..It is now well settled that though the High Court has full power to review the evidence upon which an order of acquittal is founded, it is equally well settled that the presumption of innocence of the accused person is further reinforced by his acquittal by the trial Court and the views of the trial Judge as to the credibility of the witnesses must be given proper weight and consideration; and the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses must also be kept in mind, and there must be substantial and compelling reasons for the appellate Court to come to a conclusion different from that of the trial Judge."*

*50. A Constitution Bench of this Court in M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200, observed as under:*

> *There is no doubt that the power conferred by Clause (a) which deals with an appeal against an order of acquittal is as wide as the power conferred by Clause (b) which deals with an appeal against an order of conviction, and so, it is obvious that the High Court s powers in dealing with criminal appeals are equally wide whether the appeal in question is one against acquittal or against conviction. That is one aspect of the question. The other aspect of the question centres round the approach which the High Court adopts in dealing with appeals against orders of acquittal. In dealing with such appeals, the High Court naturally bears in mind the presumption of innocence in favour of an accused person and cannot lose sight of the fact that the said presumption is strengthened by the order of acquittal passed in his favour by the trial Court and so, the fact that the accused person is entitled for the benefit of a reasonable doubt will always be present in the mind of the High Court when it deals with the merits of the case. As an appellate Court the High Court is generally slow in disturbing the finding of fact recorded by the trial Court, particularly when the said finding is based on an appreciation of oral evidence because the trial Court has the advantage of watching the demeanour of the witnesses who have given evidence. Thus, though the powers of the High Court in dealing with an appeal against acquittal are as wide as those which it has in dealing with an appeal against conviction, in dealing with the former class of appeals, its approach is governed by the overriding consideration flowing from the presumption of innocence.…*
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> *The test suggested by the expression "substantial and compelling reasons" should not be construed as a formula which has to be rigidly applied in every case, and so, it is not necessary that before reversing a judgment of acquittal, the High Court must necessarily characterize the findings recorded therein as perverse.*
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> *The question which the Supreme Court has to ask itself, in appeals against conviction by the High Court in such a case, is whether on the material produced by the prosecution, the High Court was justified in reaching the conclusion that the prosecution case against the appellants had been proved beyond a reasonable doubt, and that the contrary view taken by the trial Court was erroneous. In answering this question, the Supreme Court would,no doubt, consider the salient and broad features of the evidence in order to appreciate the grievance made by the appellants against the conclusions of the High Court.*

*51. In Noor Khan v. State of Rajasthan AIR 1964 SC 286, this Court relied on the principles of law enunciated by the Privy Council in Sheo Swarup (supra) and observed thus:*

> *"Sections 417, 418 and 423 give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the*

*trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."*

*52. In Khedu Mohton and Ors. v. State of Bihar 1970 (2) SC 450, this Court gave the appellate court broad guidelines as to when it could properly disturb an acquittal. The Court observedas under:*

*"3. It is true that the powers of the High Court in considering the evidence on record in appeals under Section 417, Cr. P.C. are as extensive as its powers in appeals against convictions but that court at the same time should bear in mind the presumption of- innocence of accused persons which presumption is not weakened by their acquittal. It must also bear in mind the fact that the appellate judge had found them not guilty. Unless the conclusions reached by him are palpably wrong or based on erroneous view of the law or that his decision is likely to result in grave injustice, the High Court should be reluctant to interfere with his conclusions. If two reasonable conclusions can be reached on the basis of the evidence on record then the view in support of the acquittal of the accused should be preferred. The fact that the High Court is inclined to take a different view of the evidence on record is not sufficient to interfere with the order of acquittal.*

*(emphasis supplied)*

*53. In Shivaji Sahabrao Bobade and Anr. v. State of Maharashtra 1973 (2) SCC 793, the Court observed thus:*

*"5...An appellant aggrieved by the overturning of his acquittal deserves the final court s deeper concern on fundamental principles of criminal justice....But we hasten to add even here that, although the learned judges of the High Court have not expressly stated so, they have been at pains to dwell at length on all the points relied on by the trial court as favourable to the prisoners for the good reason that they wanted to be satisfied in their conscience whether there was credible testimony warranting, on a fair consideration, a reversal of the acquittal registered by the court below. In law there are no fetters on the plenary power of the Appellate Court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinise the probative material de novo, informed, however, by the weighty thought that the rebuttable innocence attributed to the accused having been converted into an acquittal the homage our jurisprudence owes to individual liberty constrains the higher court not to upset the holding without very convincing reasons and comprehensive consideration, In our view the High Court s judgment survives this exacting standard.*

*54. In Lekha Yadav v. State of Bihar 1973 (2) SCC 424, the Court following the case of Sheo Swarup (supra) again reiterated the legal position as under:*

*"6……'3…. The different phraseology used in the judgments of this Court such as-*

*(a) substantial and compelling reasons:*

*(b) good and sufficiently cogent reasons;*

*(c) strong reasons.*

*are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion, but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal but should express the reasons in its judgment which led it to hold that the acquittal was not justified.*

*55. In Khem Karan and Ors. v. State of U.P. and Anr. 1974 (4) SCC 603, this Court observed:*

*"5...Neither mere possibilities nor remote possibilities nor mere doubts which are not reasonable can, without danger to the administration of justice, be the foundation of the acquittal of an accused person, if there is otherwise fairly credible testimony.*

*56. In Bishan Singh and Ors. v. State of Punjab 1973 (3) SCC 288, Justice Khanna speaking for the Court provided the legal position:*

*"22. It is well settled that the High Court in appeal under Section 417 of the CrPC has full power to review at large the evidence on which the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless is be found expressly stated be in the Code, but in exercising the power conferred by the Code and before reaching its conclusion upon fact the High Court should give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; & (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.*

*57. In Umedbhai Jadavbhai v. State of Gujarat 1978 (1) SCC 228, the Court observed thus:*

*"6. In an appeal against acquittal, the High Court would not ordinarily interferewith the Trial Court's conclusion unless there are compelling reasons to do so inter alia on account of manifest errors of law or of fact resulting in miscarriage of justice."*

*58. In K. Gopal Reddy v. State of A.P. (1979) 1 SCC 355, the Court observed thus:*

*It stems out of the fundamental principle of our criminal jurisprudence that the accused is entitled to the benefit of any reasonable doubt. If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But, fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him. If the preponderance of probability is all one way, a bare possibility of another view will not entitle the accused to claim the benefit of any doubt. It is, therefore, essential that any view of the evidence in favour of the accused must be reasonable even as any doubt, the benefit of which an accused person may claim, must be reasonable. "A reasonable doubt", it has been remarked, "does not mean some light, airy, insubstantial doubt that may flit through the minds of any of us about almost anything at some time or other, it does not mean a doubt begotten by sympathy out of reluctance to convict; it means a real doubt, a doubt founded upon reasons. [Salmond J. in his charge to the jury in R.V. Fantle reported in 1959 Criminal Law Review 584.]*

*{emphasis supplied}*

*59. In Tota Singh and Anr. v. State of Punjab 1987 (2) SCC 529, the Court reiterated the same principle in the following words:*

*"This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a re-appreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that nointerference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous.*

*(emphasis supplied)*

*60. In Ram Kumar v. State of Haryana 1995 Supp. (1) SCC 248, this Court had another occasion to deal with a case where the court dealt with the powers of the High Court in appeal from acquittal. The Court observed as under:*

*"15...the High Court should not have interfered with the order of acquittal merely because another view on an appraisal of the evidence on record was possible. In this connection it may be pointed out that the powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379 (sic 386) CrPC are as extensive as in any appeal against the order of conviction. But as a*

*rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the trial court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of accused to the benefit of any doubt and the slowness of appellate court in justifying a finding of fact arrived at by a judge who had the advantage of of seeing the witness. No doubt it is settled law that if the main grounds on which the Court below has based its order acquitting the accused, are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal. We shall, therefore, examine the evidence and the material on record to see whether the conclusions recorded by the Trial Court in acquitting the appellant are reasonable and plausible or the same are vitiated by some manifest illegality or the conclusion recorded by the Trial Court are such which could not have been possibly arrived at by any Court acting reasonably and judiciously which may in other words be characterized as perverse.*

*61. This Court time and again has provided direction as to when the High Courts should interfere with an acquittal. In Madan Lal v. State of J&K 1997 (7) SCC 677, the Court observed as under:*

*"8. ...that there must be "sufficient and compelling reasons" or "good and sufficiently cogent reasons" for the appellate court to alter an order of acquittal to one of conviction...."*

*62. In Sambasivan and Ors. v. State of Kerala 1998 (5) SCC 412, while relying on the case of Ramesh Babulal Doshi (Supra), the Court observed thus:*

*"7. The principles with regard to the scope of the powers of the appellate court in an appeal against acquittal, are well settled. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial court in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate court can interfere with the order of acquittal.*

*63. In Bhagwan Singh and Ors. v. State of M.P. 2002 (4) SCC 85, the Court repeated one of the fundamental principles of criminal jurisprudence that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Court observed as under:*

*"7. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Such is not a jurisdiction limitation on the appellate court but a Judge madeguidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided.*

*64. In Harijana Thirupala and Ors. v. Public Prosecutor, High Court of A.P., 2002 (6) SCC 470, this Court again had an occasion to deal with the settled*

*principles of law restated by several decisions of this Court. Despite a number of judgments, High Courts continue to fail to keep them in mind before reaching a conclusion. The Court observed thus:*

> *"10. The principles to be kept in mind in our system of administration of criminal justice are stated and restated in several decisions of this Court. Yet, sometimes High Courts fail to keep them in mind before reaching a conclusion as to the guilt or otherwise of the accused in a given case. The case on hand is one such case. Hence it is felt necessary to remind about the well-settled principles again. It is desirable and useful to remind and keep in mind these principles in deciding a case.*
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> *11. In our administration of criminal justice an accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him to be guilty of the offence with which he is charged. Further if two views are possible on the evidence produced in the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted. In cases where the court entertains reasonable doubt regarding the guilt of the accused the benefit of such doubt should go in favour of the accused. At the same time, the court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on fanciful grounds or on the basis of conjectures and surmises. The case of the prosecution must be judged as a whole having regard to the totality of the evidence. In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of the evidence in totality on the prosecution case or innocence of the accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses. It must be added that ultimately and finally the decision in every case depends upon the facts of each case.*
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> *12. Doubtless the High Court in appeal either against an order of acquittal or conviction as a court of first appeal has full power to review the evidence to reach its own independent conclusion. However, it will not interfere with an order of acquittal lightly or merely because one other view is possible, because with the passing of an order of acquittal presumption of innocence in favour of the accused gets reinforced and strengthened. The High Court would not be justified to interfere with the order of acquittal merely because it feels that sitting as a trial court it would have proceeded to record a conviction; a duty is cast on the High Court while reversing an order of acquittal to examine and discuss the reasons given by the trial court to acquit the accused and then to dispel those reasons. If the High Court fails to make such an exercise the judgment will suffer from serious infirmity.*
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> *(emphasis supplied)*

*65.In C. Antony v. K.G. Raghavan Nair 2003 (1) SCC 1had to reiterate the legal position in cases where there has been acquittal by the trial courts. This Court observed thus:*

> *"6. This Court in a number of cases has held that though the appellate court has full power to review the evidence upon which the order of acquittal is founded, still while exercising such an appellate power in a case of acquittal, the appellate court, should not only consider every matter on record having a bearing on the question of fact and the reasons given by the courts below in support of its order of acquittal, it must express its reasons in the judgment which led it to hold that the acquittal is not justified. In those line of cases this Court has also held that the appellate court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal, and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the finding of the trial court.*

*66. In State of Karnataka v. K. Gopalkrishna 2005 (9) SCC 291, while dealing with an appeal against acquittal, the Court observed:*

> *"17...In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal.*

*67. In The State of Goa v. Sanjay Thakran 2007 (3) SCC 755, this Court relied on the judgment in State of Rajasthan v. Raja Ram 2003 (8) SCC 180 and observed as under:*

> *"15. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.... The principle to be followed by appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference.*
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> *The Court further held as follows:*
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> *" 16. it is apparent that while exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would*

*not take the view which would upset the judgment delivered by the court below.*

*68. In Chandrappa and Ors. v. State of Karnataka 2007 (4) SCC 415, this Court held:*

*(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, 1973 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.*

*69. The following principles emerge from the cases above:*

*1. The appellate court may review the evidence in appeals against acquittalunder Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.*

*2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court s acquittal bolsters the presumption that he is innocent.*

*3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that trial court was wrong.*

*70. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court s acquittal:*

*1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court s decision. "Very substantial and compelling reasons" exist when:*

*i) The trial court s conclusion with regard to the facts is palpably wrong;*

*ii) The trial court s decision was based on an erroneous view of law;*

*iii) The trial court s judgment is likely to result in "grave miscarriage of justice";*

*iv) The entire approach of the trial court in dealing with the evidence was patently illegal;*

*v) The trial court s judgment was manifestly unjust and unreasonable;*

*vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.*

*vii) This list is intended to be illustrative, not exhaustive.*

*2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.*

*3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.*

7. Bearing in mind the aforesaid exposition of law, it would be noticed that one of the main reasons for acquittal of the respondent as given by the learned trial Magistrate is failure to establish the identity of the respondent being the driver of the vehicle at the relevant time.

8. The respondent in his defence has produced copy of order dated 25.4.2007 passed by learned Motor Accident Claims Tribunal,Kullu and on perusal of para-9 of the order, it is clearly evident that the learned Tribunal has observed that the vehicle in question was being driven by one Prem Chand at the relevant date and time and not by the accused Amar Nath. Noticeably, this is even the defence of the respondent.

9. As observed earlier, the prosecution examined six witnesses, out of whom, PW-4 Rishi Raj is the witness of seizure memo and only PW-1 Dilli Devi, PW-2 Banto Devi and PW-6 are the witnesses of the occurrence. PW-1 Dilli Devi has not supported the case of the prosecution and was declared hostile. Nothing material could be elicited in the cross-examination by learned APP as she stated that she did not know the person who was driving the vehicle at the relevant time and further denied that the occurrence took place due to the high speed at which the vehicle was being driven.

10. PW-2 Banto Devi has not attributed any rash and negligent act on the part of the respondent and stated that the occurrence took place due to the vehicle being driven at

a high speed. Whereas, PW-6 Rajesh, who was stated to be one of the occupants of the vehicle was not in a position to clearly identify the driver of the vehicle and he too only depose that the vehicle was being driven at a high speed. PW-6 has also doubted the identity of the accused whereby he categorically stated that the vehicle in question was being driven by Prem Chand and not by Amar Nath.

11. Even if the order passed by the learned Tribunal is left out from consideration, even then it would be noticed that the prosecution has miserably failed to lead clear, cogent and convincing evidence that it was the respondent, who was driving the vehicle at the relevant time. It is very intriguing to note that despite there being no allegations of any rashness and culpable act of the respondent, yet the FIR came to be registered against him on the basis of allegations of error of judgment which to my mind cannot be termed to be a criminal Act, on the basis of which the prosecution could have been launched.

12. As regards the allegation that the vehicle was being driven at high speed. In ***Tukaram Sitaram Gore vs. State AIR 1971 Bombay 164***, the learned Single Judge of the Bombay High Court has held that high speed of a motor vehicle does not by itself prove rashness or negligence of driver. It was further held that there can be no presumption of negligence from the mere fact that a man is knocked down and killed by a motorist. Relevant observations read as under:-

> *"3. As far as the first point is concerned, the Supreme Court has, in its unreported decision, D/-21-3-1968 in (1968) Criminal Appeal No. 154 of 1965 (SC), held that the use of the expression "high speed" (that being the expression used by a witness in the case before the Supreme Court) was not enough to prove rashness or negligence, unless evidence was elucidated from the witness who used that expression as to what his notion of speed was. As far as witness Kasturi Satayya is concerned, no evidence whatsoever has been elicited from him to show what his notion of "fast speed" was. As far as witness Yasminkhan is concerned, an attempt has been made to elicit from him, in the course of cross-examination, as to what his notion of "fast speed" was, and he stated that the lorry was, in his opinion, proceeding at a speed of 35 miles per hour when the boy was knocked down. The speed of 35 miles per hour is, no doubt, slightly in excess of the speed-limit in the city (except along Marine Drive), but it can by no means be said to be a speed which is so excessive as to amount, per se, to rashness or negligence. The evidence that the accused was driving the motor lorry at fast speed at the time of the incident is, therefore, of no avail to the prosecution in the present case.*
>
> *6. There is no other fact emerging from the prosecution evidence from which such an inference can be drawn. Hearing criminal appeals during the last few months, I have come across several cases of prosecutions under Section 304-A in which Magistrates appear to have presumed negligence, once a man is knocked down and killed by a motorist. There can be no such presumption. Not only must there be evidence of rashness or negligence acceptable to the Court but, as laid down by the Supreme Court in the case of Suleman Rahiman v. State of Maharashtra, 70 Bom LR 536 at p.538= (AIR 1968 SC 829 at p.831) there must be proof that the rash or negligent act of the accused was the proximate cause of the death and there must be a direct nexus between the death of a person and the rash or negligent act of the accused. In running-down cases the death of the pedestrian may very well be purely accidental, or may be due to his own negligence. To presume that because a*

*pedestrian has been knocked down and has died, the driver of the motor vehicle that knocked him down must be guilty of rashness or negligence overlooks these two possibilities. It is necessary for subordinate Courts to bear in mind that the prosecution must produce evidence to establish rash or negligent driving of the motor vehicle by the accused. I am told that, at one time, it was the practice of the Chief Presidency Magistrate of Bombay to allot running-down cases only to those Magistrates who knew motor-driving. The traffic problem in the city has now become very acute and I wonder whether it would not be advisable for the Chief Presidency Magistrate to revert to that practice, if it is possible to do so."*

13. It is more than settled that in order to bring home the guilt of rash and negligent driving, three things need to be proved by the prosecution that too beyond any reasonable doubt:-

*i) that the accident actually took place;*

*ii) that the accident took place due to rash and negligent driving;*

*iii) that the accused was the person, who was driving the vehicle at that time.*

14. These words i.e. "rash" and "negligent", have not been defined in the Indian Penal Code. However as per Blacks Law Dictionary, Eighth Edition the word 'Negligent' is characterized by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances. 15. Quoting from the article "Negligence, Mens Rea and Criminal Responsibility" by H.L.A. Hart in Punishment and Responsibility the dictionary further goes on to explain the difference between an act done inadvertently and an act done negligently.

*"A careful consideration is needed of the difference between the meaning of the expression like 'inadvertently' and 'while his mind was a blank' on the one hand, and 'negligently' on the other hand. In ordinary English, and also in Lawyer's English, when harm has resulted from someone's negligence, if we say of that person that he has acted negligently we are not thereby merely describing the frame of mind in which he acted. 'He negligently broke a saucer' is not the same kind of expression as 'he inadvertently broke a saucer'. The point of adverb 'inadvertently' is merely to inform us of the agent's psychological state, whereas if we say 'He broke it negligently' we are not merely adding to this an element of blame or reproach, but something quite specific, viz. we are referring to the fact that the agent failed to comply with a standard of conduct with which any ordinary reasonable man could and would have complied: a standard requiring him to take precautions against harm. The work 'negligently', both in legal and non legal contexts, makes an essential reference to an omission to do what is thus required: it is not a flatly descriptive psychological expression like 'his mind was a blank'."*

16. The Oxford Advanced Learner's Dictionary, Sixth Edition defines 'Rash' as doing something that may not be sensible without first thinking about the possible results.

17. In ***Badri Prasad Tiwari vs. State I (1994) ACC 676***, it was held by the Hon'ble Orissa High Court that in order to establish the offence either under Section 279 or 304-A IPC, the commission of rash and negligent act has to be proved. The driving or riding on a public way, while offence under Section 304-A extends to any rash and negligent not

falling short of culpable homicide. A distinction between “rashness” and “negligence” is that “rashness” conveys an idea of doing a reckless act without considering any of its consequences, whereas, “negligence” connotes want of proper care.

18. It would be noticed that the instant is a case where apart from the bare statement of PW-1 that the vehicle was being driven by the petitioner at a high speed, there was no attempt made to establish that there was any rash and negligent act on the part of the driver of the vehicle. “High speed” is an expression which is relative and subjective. Therefore, merely because of the vehicle was being driven at a high speed does not mean that the driver was driving rashly and negligently.

19. This was so held by the Hon’ble Supreme Court in ***State of Karnataka vs. Satish (1998) 8 SCC 493*** wherein it was observed as under:

> *“4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.*
>
> *5. There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged.”*

20. The Hon’ble Supreme Court has defined “rashness” and “negligence” in ***Mohammed Aynuddin alias Miyam vs. State of Andhra Pradesh, AIR 2000 SC 2511*** wherein it has been held as under:-

> *“10. A rash act is primarily an over hasty act. It is opposed to a deliberate act. Still a rash act can be a deliberate act in the sense that it was done without due care and caution. Culpable rashness lies in running the risk of doing an act with recklessness and with indifference as to the consequences. Criminal negligence is the failure to exercise duty with reasonable and proper care and precaution guarding against injury to the public generally or to any individual*

*in particular. It is the imperative duty of the driver of a vehicle to adopt such reasonable and proper care and precaution."*

21. This Court in ***State of Himachal Pradesh vs. Piar Chand, 2003 (2) Shim. L.C. 341*** while dealing with the meaning of the expression "rashness" and "negligence" observed as under:-

> *"18. Criminal rashness is doing a dangerous or wanton act with the knowledge that it is so and may cause injury but without intention to cause injury and without knowledge that injury would probably be caused. Therefore, to incur criminal liability, the act must be done with rashness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise reasonable care and proper precaution imperative to be adopted by a person to avoid causing of injury to the public or a person or an individual."*

22. Thus, it is absolutely clear that the element of "rashness" and "negligence" is a sine-qua-non for the offences under Sections 279/304-A IPC and the same cannot be presumed.

23. At this stage, I may also refer to the judgment of the Hon'ble Supreme Court in ***Rathnashalvan vs. State of Karnataka, AIR 2007 SC 1064*** wherein the Hon'ble Supreme Court has clearly held that the provisions of Section 304-A IPC would apply to such acts which are rash and negligent and are direct cause of death of another person. Relevant observations read thus:-

> *"7. Section 304-A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is direction at offences outside the range of Sections 299 and 300 IPC. The provision applies only to such acts which are rash and negligent and are directly cause of death of another person. Negligence and rashness are essential elements under Section 302-A. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Rashness means doing an act with the consciousness of a risk that evil consequences will follow but with the hope that it will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are determining factors. A question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient considering all the circumstances of the case. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused.*
>
> *8. As noted above, "Rashness" consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all*

*the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted.*

*9. The distinction has been very aptly pointed out by Holloway J. in these words :*

> *"Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but In circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the negligence of the civic duty of Circumspection." (See In re : Nidamorti Nagabhusanam 7 Mad. H.C.R. 119)"*

24. Thus, the mere proof of accident in itself is not sufficient as the prosecution was required to establish beyond reasonable doubt that the accident was caused by the accused and it was due to rash and negligent driving of the vehicle by the accused. The death should be direct result of rash and negligent act. Meaning thereby, it must be *"causa causans".* It is not enough that it may have been *causa sine-qua-non* and, therefore, the mere fact that the accused may have been driving the vehicle at a very high speed in itself may not attract the provisions of Section 279 IPC and further Section 304-A IPC which also requires the driving of a vehicle to be in a rash and negligent manner. The fact that the vehicle may have been driven in a speed cannot by itself without judging the situation in which driver has been placed to be a factor to prove the rashness and negligence.

25. Once the identity of the respondent and thereafter there being no proof that the vehicle in question was being driven in a rash and negligent manner, then obviously the learned Magistrate was left with no other option but to acquit the respondent.

26. In view of the aforesaid discussion, I find no merit in this appeal and the same is accordingly dismissed, so also the pending application(s) if any.

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

Sat Pal (since deceased through LRs) .....Petitioners.
Versus
Dayawant Singh .....Respondent.

Civil Revision No.83 of 2010.
Decided on: 2nd/5th November, 2018.

**Himachal Pradesh Urban Rent Control Act, 1987 –** Section 14(1) **–** Eviction of tenant- Rebuilding and reconstruction- Proof- Landlord, a co-sharer in building seeking eviction of tenant from part of building on ground of its bonafidely required for rebuilding which is not possible without evicting tenant. Rent Controller passing eviction order and Appellate Authority upholding order in appeal –Revision against- Held- No evidence to show that building in dilapidated condition requiring reconstruction- No cogent and reliable evidence regarding exact age of building. No evidence either whether eviction petitions filed against

tenants possessing other parts of building. Petition allowed. – Eviction order set aside- Rent suit dismissed. (Paras 12 to 15)

For the petitioners: Mr. Anuj Gupta, Advocate.
For the respondent: Mrs. Seema K. Guleria, Advocate

The following judgment of the Court was delivered:

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

In this petition order dated 9.4.2010, passed by learned appellate Authority, Shimla in Civil Misc. Appeal No.66-S/14 of 2009, is under challenge. **Learned appellate Court has dismissed the appeal filed by the petitioner, hereinafter referred to as the respondent-tenant and upheld the order dated 7.9.2009 passed by learned Rent Controller (Court No.6), Shimla in a petition filed under Section 14(1) of H.P. Urban Rent Control Act,** hereinafter referred to as the Act in short, registered as Case No.45/2 of 2007.

2. The respondent-herein is landlord. He is one of the co-owners of the residential premises known as **'Chor View'**, Sanjauli, Shimla-6. He has rented out one set comprising two rooms, one glazed verandah, Kitchen, Bathroom and latrine to the respondent-tenant. The rough plan is Ex.PW-3/C. **The eviction of the respondent-tenant has been sought on the ground that the demised premises is bonafidely required by him for the purpose of rebuilding of old structure, which is not possible without getting the same vacated.** The rebuilding, according to the landlord, is required in view of the premises in question is 100 years old and had outlived its life. Another tenant is Smt. Santosh, against her also the eviction petition is stated to be filed. The petitioner-landlord further submits that the building will be reconstructed after pulling down the existing old structure made by Dhajji/bricks and to replace the same with new RCC structure.

3. The respondent-tenant has resisted and contested the petition. In preliminary, the objections that the petitioner-landlord has not approached the Court with clean hands and suppressed the material facts and that eviction petition has been filed with an ulterior and malafide motive to coerce the respondent to increase the rent or purchase the demised premises were raised. On merits, while denying the case as set out in the petition, it is submitted that the petitioner-landlord has suppressed the facts qua a portion of the building he has already sold to the tenant, who have now become exclusive owners thereof. Such sets are adjoining to the sets owned and possessed by the petitioner-landlord. It is also submitted that the entire construction of the building known as **'Chor view'** is interconnected and dependent upon the side walls of other sets, therefore, the rebuilding /reconstruction of entire structure is not possible, unless the owners of adjoining sets having exclusive rights of their respective sets, agree to vacate the same. The floor of the building is also wooden, interlinked with each other to provide stability to entire structure. Any attempt to remove the same will result in collapse of entire structure, including the portion of other owners i.e. Kanta Dube and Tilak Raj etc. The respondent-tenant also apprehends that in such a situation the Municipal Corporation, Shimla will permit reconstruction/ rebuilding of the demised premises.

4. In rejoinder, the contents of the preliminary objections have been denied being wrong and on merits the case as set out in the petition reiterated.

5. On the pleadings of the parties, learned Rent Controller has framed the following issues:

1. Whether the applicant is entitled for the eviction order on the ground that the tenanted premises is bonafidely required for the purpose of re-building and reconstruction as alleged? OPA
2. Whether the tenant is liable to vacate the premises as the same is unsafe and unfit for human habitation, as alleged? OPA
3. Whether the application is not maintainable? OPR
4. Whether the applicants have not come to the court with clean hands, as alleged? OPR
5. Whether the applicants have suppressed the material facts, as alleged? OPR
6. Relief.

6. The parties were put to trial on the issues so framed. The petitioner landlord in turn has examined AW-1 Jaman Dass, working as Mate in the AP Branch of Municipal Corporation, Shimla, who has produced the record of the building. The petitioner-landlord Dayawant has also stepped into the witness box as AW-2. He has also examined Shri Nika Ram, alleged GPA of the respondent as AW-3. AW-4 H.S. Bisht is the so called expert witness.

7. The respondent, on the other hand, has himself stepped into the witness-box as RW-1 and examined one Somesh Kumar, RW-2 and Shri Bhupinder Singh Rishi as RW-3. Learned Rent Controller, on appreciation of the evidence available on record has thus accepted the rent petition and ordered the eviction of the respondent-tenant. Learned lower appellate Court has affirmed the order passed by learned rent Controller and dismissed the appeal.

8. The legality and validity of the impugned judgment has been questioned in the present petition on several grounds including that the evidence available on record was not appreciated by both Courts below in its right perspective. As a matter of fact, main emphasis has been laid on the factum of the other co-sharers of the building and according to respondent-tenant, the petitioner-landlord cannot rebuild or reconstruct the building in his share without the sets in the building vacated by the co-owners and the other tenants.

9. This matter was partly heard during pre-lunch session in the presence of learned counsel representing the petitioner-landlord and partly during post lunch session, of course in her absence, who, no doubt, had prayed for adjournment on the ground to argue some other case, however, declined. The matter, therefore, was heard further in the presence of learned vice counsel.

10. On going through the pleadings of the parties and the evidence available on record, there is no dispute so as to the **petitioner-landlord is one of the co-sharers in the building** known as **'Chor View',** situated at Sanjauli, Shimla-6. There is again no controversy so as to other tenants are also occupants of this building. Nothing is there in the petition as to what will happen to the sets belonging to other co-owners and the tenants in case the petitioner-landlord is permitted to demolish his portion of the building for reconstruction. **Though in the petition, it has been submitted that the building will be reconstructed after its demolition.** As a matter of fact, reconstruction of any building is not possible nor safe and in the interest of other habitants unless the same is got vacated as a whole.

11. Although the petitioner-landlord while in the witness-box has expressed his ignorance that Smt. Kanta Dube and Tilak Raj were his tenants and that the sets with them stand sold to them, however, AW-3 Nika Ram, who claims himself to be the General Power of Attorney of the petitioner-landlord has admitted that he himself sold the sets to few of the tenants, who were residing in the building in question. He has named such tenants to be Smt. Kanta Dube and Janak Raj. As per his further admission the set belonging to Kanta Dube is adjacent to that of the respondent-tenant. He further admits that the walls of both sets are common. He also admits that roof and floor of both sets are also common and of wooden planks. Though the petitioner and AW-3 and for that matter the expert AW-4, all have denied the suggestion that without getting the set of Kanta Dube vacated, the set in the use and occupation of respondent-tenant and the remaining sets in the building in his share cannot be demolished or reconstructed. However, even a layman will also understand that without getting the old building vacated, it is not safe to demolish and re-construct the specific portion thereof and rather doing so will be at the risk and costs of other owners/tenants of the remaining portion of the said building. This Court in a recent judgment dated 26.07.2018, passed in Civil Revision No. 27/2006 titled Smt. Mansa Devi (since deceased) through her legal representatives V. Krishan Pal Sood (since deceased) through his legal representatives, in an identical situation has held as under:

> "12. Admittedly, Mr. M.P. Gupta, is the owner of top floor of that portion of the building, the repair/reconstruction whereof is required to be carried out. Admittedly the repair/re-construction is only possible in case the building is got vacated. It is the own admission of the petitioner-landlord that no petition for vacation of the top floor by said Shri M.P. Gupta has been filed by him. True it is that in his examination-in-chief it is stated that said Shri M.P. Gupta during negotiation with him has assured that he will vacate the top floor in the event of reconstruction of that portion of the building. The own statement of the petitioner, however, cannot be believed as a gospel truth. As a matter of fact, had M.P. Gupta been in favour of vacation of the top floor of the building in his possession the petitioner-landlord would have produced him and examined as a witness in this petition. In such a situation, the petitioner-landlord has failed to make out a case that the building is in dilapidated condition and the same can only be restored to its good condition only by way of reconstruction.
>
> 14.....Otherwise also, the judgment passed by learned lower Appellate Court based upon the happening of certain events i.e. the sanction of the plan by the competent authority and on consideration of the undertaking, if any, given by Shri M.P. Gupta aforesaid qua vacation of top floor of the building is not executable."

12. The claim of the landlord in Mansa Devi's case supra was, therefore, on sound footing as compared to the case in hand because there the co-owner Sh. M.P. Gupta as per landlords' case had allegedly assured to vacate the top floor on obtaining order for re-construction of the demised premises which, however, is not the position in the case in hand because the respondent-landlord has not obtained consent of his co-owners namely, Kanta Dube and Janak Raj nor that of other tenants. Therefore, in view of the legal position discussed hereinabove, in the present case, no order could have been passed qua eviction of the petitioner-tenant from the demised premises on the ground of the same bonafidely required for the purpose of re-building and re-construction.

13. Otherwise also, **cogent and reliable evidence has not come on record to show that the building is in a dilapidated condition, hence needs re-construction**. It is

stated by AW-1 Sh. Jamna Dass, Mate A.P. Branch Municipal Corporation, Shimla that as per record, he produced no notice is yet issued either to the landlord or the tenants that the building is unsafe and not worth living. Notice, according to him, has not been issued for the reason that building is in good condition. Though, stated again that he had no personal knowledge qua exact condition of the building, however, as per record he produced, nothing is there to suggest that no notice qua the condition of the building as not good has ever been issued by the Municipal Corporation. He has also stated that as per record even landlord has also not submitted the map qua re-construction of the building for approval to the Municipal Corporation. Therefore, the testimony of the respondent-landlord that he has submitted the map for approval is highly doubtful.

14. AW-2 the landlord and AW-3 Nika Ram have also admitted that they have not received any notice from Municipal Corporation, Shimla qua the building being unsafe or unfit for human habitation. As per their version, the building rather is joint property of all the owners being not partitioned amongst the owners who are 3-4 in number.

15. There is also **no cogent and reliable evidence to show as to what is the exact age of the building**. While in the petition, its age is given as 100 years, according to respondent-tenant its age is 60-65 years. The suggestion in this behalf put to AW-2 and AW-3 is denied by them being wrong. The fact remains that what is the exact age of the building **'Chor View'** is not proved satisfactorily on record. It is not the case of the respondent-landlord that he himself constructed this building. Therefore, how he could have given the age of the building as 100 years is not understandable. The spot inspection report Ext. PW-4/A having been prepared on the basis of inspection conducted behind the back of the petitioner-tenant cannot be believed to be true. Otherwise also, such self-styled reports are being produced in evidence by the landlords in the cases of this nature. The evidence as has come on record by way of statement of petitioner-tenant Satpal and also that of RW-2 Suresh Kumar and RW-3 Bhupinder Singh that without getting the whole building vacated, its repair is not possible, is nearer to the factual position. They, however, have no objection in case the landlord reconstructs their portion of building by maintaining a gap between the wall of their side by raising construction of new wall. The further observations in the impugned order that obtaining the consent of other co-owners is a matter between them and the landlord, lead to the only conclusion that the judgment passed is not executable.

16. For all the reasons discussed hereinabove, this **petition succeeds and the same is accordingly allowed**. Consequently, the impugned judgment is quashed and set aside and the rent petition dismissed. No orders as to costs.

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

Ankush ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 1327 of 2018
Decided on: October 30, 2018

**Narcotic Drugs & Psychotropic Substances Act,1985-** Sections 21 & 37**- Code of Criminal Procedure, 1973-** Section 439**-** Regular bail- Grant of-Petitioner allegedly found possessing 6 grams of heroin seeking bail- Prosecution resisting prayer on ground of his being involved in another case under Act- Held- Accused in custody for the last four months– Mere pendency of previous case cannot be ground for rejection of bail in subsequent FIRs- Trial in previous case still pending for adjudication and his guilt not yet proved- Freedom of individual is of utmost importance and same cannot be curtailed for indefinite period. Gravity alone cannot be decisive ground to deny bail rather competing factors are required to be balanced by court while exercising its discretion. Petition allowed- Bail granted subject to conditions. (Paras 8 to 15).

***Cases referred:***

Manoranjana Sinh alias Gupta vs. CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation (2012)1 SCC 49

| | | |
|---|---|---|
| For the petitioner | : | Mr. V.S. Chauhan, Advocate. |
| For the respondent | : | Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General.<br>ASI Inder Dev Sharma, I/O, Police Station, Kullu, HP. |

The following judgment of the Court was delivered:

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**Sandeep Sharma, Judge** (oral):

Bail petitioner, namely Ankush, who is behind the bars since 5.7.2018, has approached this court in the instant proceedings filed under S. 439 CrPC, praying therein for grant of bail in FIR No. 159 of 2018 dated 5.7.2018 under S. 21 of the Narcotic Drugs & Psychotropic Substances Act, registered at Police Station, Kullu, District Kullu, Himachal Pradesh.

2. Sequel to order dated 8.10.2018, ASI Inder Dev Sharma, I/O, Police Station, Kullu, HP has come present with the record. Mr. Dinesh Thakur, learned Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Perusal of status report suggests that the bail petitioner named herein above, came to be apprehended with the contraband i.e. 6 grams of heroin at place known as, "Kainchi Mor", Bhekhli Road, Kullu, by the police party on 5.7.2018 and since then, he is behind the bars.

4. Mr. V.S. Chauhan, learned counsel representing the bail petitioner states that bare perusal of record/status report suggests that no case, if any, is made out against the bail petitioner under S. 21 of the Act *ibid*, because the contraband never came to be recovered from the exclusive and conscious possession of the bail petitioner rather, the police party, as per its own story, recovered the contraband from a drain. He further contended that there is nothing on record suggestive of the fact that independent witnesses came to be associated by the police party at the time of so called recovery effected from the bail petitioner, which itself suggests that the bail petitioner has been falsely implicated. Lastly Mr. Chauhan, contended that the contraband i.e. 6 grams of heroin alleged to have been recovered from the bail petitioner, is of 'inter-mediate' quantity and as such, rigours of

S. 37 of the Act *ibid* are not attracted and bail petitioner can be ordered to be enlarged on bail, during the pendency of the trial. Mr. Chauhan, further contended that since the bail petitioner has already suffered for more than three months, in case, he is allowed to remain behind the bars for indefinite period, it could amount to pre-trial conviction.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly admitting the fact that the *Challan* stands filed in the competent Court of law and nothing is required to be recovered from the bail petitioner, contended that keeping in view the past record of the bail petitioner, he does not deserve to be enlarged on bail. Mr. Thakur, learned Additional Advocate General, further contended that the record reveals that in the year 2015, similar case under the Act *ibid* was registered against the bail petitioner and trial pursuant to the same is still pending adjudication in the competent Court of law. Mr. Thakur, further contended that there is ample evidence adduced on record by the investigating agency to demonstrate the fact that the contraband referred to herein above came to be recovered from the exclusive and conscious possession of the bail petitioner and as such, there is no force in the arguments of the learned counsel representing the bail petitioner that his client has been falsely implicated.

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

7. Having heard the learned counsel representing the parties and perused the material available on record, this court finds force in the arguments of Mr. V.S. Chauhan, learned counsel representing the bail petitioner that the contraband alleged to have been recovered from the bail petitioner is of 'inter-mediate' quantity i.e. 6 grams of heroin and in case, he is allowed to remain behind the bars for indefinite period, it would amount to pre-trial conviction, especially when he has already suffered for about four months.

8. No doubt, record/ status report reveals that in the year 2015, a case under the Act *ibid* was registered against the bail petitioner, but it has been repeatedly held by Hon'ble Apex Court and this court also that case, if any, registered in the past, can not be a ground for rejection of bail in the subsequent FIRs. Apart from above, no material has been placed on record by the investigating agency to substantiate the fact that in the event of bail petitioner being enlarged on bail, he may flee from justice.

9. Recently it has been held by the Hon'ble Apex Court as also this court that freedom of an individual is of utmost importance and same can not be curtailed for indefinite period, especially when guilt is yet to be proved in accordance with law. This court is fully conscious of the fact that the offence, if any, committed under the Act *ibid* is heinous crime, but as has been noticed herein above, rigours of S. 37 of the Act *ibid* are not attracted in the present case keeping in view the inter-mediate quantity of the contraband alleged to have been recovered from the possession of the bail petitioner.

10. Leaving everything aside, guilt, if any, of the bail petitioner is yet to be proved in accordance with law, as such, this court sees no impediment in accepting the prayer for enlargement on bail made on behalf of the bail petitioner.

11. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his guilt has not been proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society."

12. 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."

13. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins

after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

14. 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.

15. 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.

16. In view of above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the learned trial court, besides following conditions:

(a). He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c). He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d). He shall not leave the territory of India without the prior permission of the Court.

(e). He shall surrender passport, if any, held by him.

17. 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.

18. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of instant petition alone.

The petition stand accordingly disposed of.

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

Bharti Kapoor .. Petitioner
Versus
Des Raj .. Respondent

CMPMO No. 271 of 2017
a/w CMP No. 10699 of 2018
Decided on: October 31, 2018

**Code Of Civil Procedure, 1908-** Sections 24 and 151-**Hindu Marriage Act, 1955 -** Sections 13(1) and 13B (1) & (2) – Wife filing divorce petition against husband and latter filing restitution petition against her- Wife filing application in High Court for transfer of petition of husband to the court at place where her divorce petition was pending- Parties settling dispute before High Court and praying for decree by way of mutual consent- Held- Parties already in litigation for considerable period- No possibility of reproachment or conciliation between them- Efforts at mediation and reconciliation tried and failed - Waiting period will only prolong their agony - Statutory period of six months as envisaged under Section 13B of Act for grant of divorce by way of mutual consent waived- Pending divorce petition converted into petition for divorce by way of mutual consent- Decree of divorce granted- Amardeep Singh vs. Harveen Kaur, (2017) 8 SCC 746 relied upon.(Paras 8 to 10).

***Cases referred:***

Priyanka Khanna vs. Amit Khanna, (2011) 15 SCC 612
Veena vs. State (Government of NCT of Delhi) and another, (2011)14 SCC 614

For the petitioner : Ms. Veena Sharma, Advocate.
For the respondent : Mr. Dalip K. Sharma, Advocate.

The following judgment of the Court was delivered:

**Sandeep Sharma, Judge**:(oral)

Instant petition under S. 24 read with S. 151 CPC has been filed on behalf of the petitioner, Smt. Bharti Kapoor for transfer of HMA Case No. 03 of 2017 titled Des Raj vs. Bharti Kapoor, pending adjudication before the learned Civil Judge (Senior Division), Chamba, Himachal Pradesh to the court of learned Civil Judge, Bilaspur, Himachal Pradesh.

2. Precisely, the facts of the case as emerge from the record are that marriage of petitioner and respondent was solemnized on 28.4.2015 as per Hindu rites and customs. Parties cohabited together as husband and wife cordially for some, but ultimately disputes cropped up between them resulting into institution of cross-cases by both the sides. Petitioner Bharti Kapoor filed Case No. 16 of 2016 under Report No. 282/3 of 2016 in the court of Judicial Magistrate 1st Class, Bilaspur and respondent filed a petition under S. 9 of Hindu Marriage Act, for restitution of conjugal rights, for the transfer of which, present petition came to be filed by the petitioner-Bharti Kapoor.

3. On 23.8.2017, learned counsel representing the respondent stated that dispute can be amicably resolved if parties are persuaded to do so and as such, matter was posted for 6.9.2017, on which two months' time was given to the parties to explore possibility their residing together. Matter came to be listed on various dates, but the efforts put by both the sides as also this court, to resolve the disputes between the parties, failed to bear any fruits and as such, on 17.4.2018, it was informed that the parties have decided to part their ways and to get the marriage dissolved by a decree of divorce by entering into a compromise on the same date i.e. 17.4.2018. As per compromise, petitioner Bharti Kapoor has conceded to get the marriage dissolved in lieu of one time alimony of `21.00 Lakh, payable in two installments i.e. `10.50 Lakh on or before 30.5.2018 and rest on or before 31.10.2018.

4. Today, i.e. 31.10.2018, during the proceedings of the case, petitioner Bharti Kapoor acknowledged receipt of `21.00 lakh in two installments i.e. `10.50 vide cheque on 31.5.2018 and `10.50 Lakh today during the proceedings of the case before this Court. Statements of both the parties, on oath, were recorded as also that of the witnesses to the compromise dated 17.4.2018, which are made part of the court file. Parties by way of compromise have undertaken to withdraw all the cases instituted against each other. Parties have also filed an application under S. 13-B(1) of the Hindu Marriage Act for granting decree of divorce by mutual consent thereby dissolving their marriage alongwith compromise dated 17.4.2018, which is taken on record. Registry to assign number to the same.

5. In the aforesaid application filed under Section 13B of the Hindu Marriage Act, parties, while praying jointly for dissolution of their marriage by way of mutual consent have averred that they are living separately from each other for the last many years at their respective addresses mentioned in the memo of parties and during this period there has been no cohabitation as such, there is no relationship of husband-wife between them. It has been further stated in the application that parties have mutually agreed for their marriage to be dissolved because there has been no cohabitation between them and there is no likelihood of their cohabiting in future and their marriage has broken beyond repair.

6. In view of the settlement arrived *inter se* parties, respondent has paid a sum of Rs.21.00 Lakh to the petitioner as one time settlement, whereas respondent has specifically agreed that she will not claim any maintenance in future from the petitioner and shall have no claim to the property of the petitioner. Both the parties have mutually agreed to withdraw cross-cases instituted by them against each other.

7. Having taken note of averments contained in joint application filed under Section 13B of Hindu Marriage Act, as well as statements of the parties, this court sees no impediment in accepting prayer made in the application. There is appears to **no possibility of reproachment or conciliation between the parties and as such, prayer for grant of divorce by way of mutual consent deserves to be considered by this Court by converting instant petition to petition under Section 13B of Hindu Marriage Act.**

8. Accordingly, for the reasons and circumstances narrated herein above, present petition is ordered to be converted into a petition under Section 13B of Hindu Marriage Act. Since both the parties are living separately for the last many years and they have been litigating with each other, statutory period of six months as envisaged under Section 13B of the Act for grant of divorce by way of mutual consent, can be waived, especially when there is no possibility of rapprochement of the parties and marriage has broken beyond repair. In this regard, it would be apt to take note of the judgment rendered by the Hon'ble Apex Court in **Veena** vs. **State** (**Government of NCT of Delhi**) **and another**, (2011)14 SCC 614, wherein the Hon'ble Apex Court has held as under:

> 12." We have heard the learned counsel for the parties and talked to the parties. The appellant has filed a divorce petition under Section 13(1)(a) of the Hindu Marriage Act, 1955, being HMA No.397/2008 which is pending before the Court of Sanjeev Mattu, Additional District Judge, Karkardooma Courts, Delhi. In the peculiar facts and circumstances of this case, we deem it appropriate to transfer the said divorce petition to this Court and take the same on Board. The said petition is converted into one under Section 13B of the Hindu Marriage Act and we grant divorce to the parties by mutual consent."

9. Reliance is also placed on a judgment rendered by Hon'ble Apex Court in **Priyanka Khanna** v. **Amit Khanna**, (2011) 15 SCC 612, wherein Hon'ble Apex Court has held as under:-

> "7. We also see form the trend of the litigations pending between the parties that the relationship between the couple has broken down in a very nasty manner and there is absolutely no possibility of a rapprochement between them even if the matter was to be adjourned for a period of six months as stipulated under Section 13-B of the Hindu Marriage Act. 8. We also see from the record that the first litigation had been filed by the respondent husband on 2.6.2006 and a petition for divorce had also been filed by him in the year, 2007. We therefore, feel that it would be in the interest of justice that the period of six months should be waived in view of the above facts."

10. In the instant case also, statutory period of six months deserves to be waived keeping in view the fact that the marriage between the parties has broken beyond repair and there seems to be no possibility of parties living together. The Hon'ble Apex Court in Civil Appeal No.11158 of 2017 [arising out of Special Leave Petition (Civil) No.20184 of 2017] titled as **Amardeep Singh** vs. **Harveen Kaur**, decided on 12.09.2017, has held as under:-

> "13. Learned amicus submitted that waiting period enshrined under Section 13(B)2 of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in K. Omprakash vs. K. Nalini 10, Karnataka High Court in Roopa Reddy vs. Prabhakar Reddy11, Delhi High Court in Dhanjit Vadra vs. Smt. Beena Vadra12 and Madhya Pradesh High Court in Dinesh Kumar Shukla vs.

Smt. Neeta13. Contrary view has been taken by Kerala High Court in M. Krishna Preetha vs. Dr. Jayan 10 AIR 1986 AP 167 (DB) 11 AIR 1994 Kar 12 (DB) 12 AIR 1990 Del 146 13 AIR 2005 MP 106 (DB) Moorkkanatt14. It was submitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2). Thus, the Court should consider the questions:

i) How long parties have been married?

ii) How long litigation is pending?

iii) How long they have been staying apart?

iv) Are there any other proceedings between the parties?

v) Have the parties attended mediation/ conciliation?

vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

14 AIR 2010 Ker 157

14. The Court must be satisfied that the parties were living separately for more than the statutory period and **all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.**

15. We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

16. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

17. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash versus Nanhku and ors.15as follows:

15 (2005) 4 SCC 480 "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

21. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

11. Consequently, in view of the detailed discussion made hereinabove, application filed under Section 13B of the Hindu Marriage Act, is allowed and in view of the peculiar facts and circumstances, as enumerated hereinabove, as well as law laid down by

Hon'ble Apex Court, the marriage between the parties is ordered to be dissolved by mutual consent. Registry is directed to draw a decree of dissolution of marriage by mutual consent accordingly. Terms and conditions contained in the compromise dated 17.4.2018, referred hereinabove, shall also form part of the decree

12. Needless to say, both the parties shall abide by all the terms and conditions contained in the application.

13. The instant petition alongwith the application under S. 13B(1) of the Hindu Marriage Act is disposed of in the aforesaid terms. Pending applications, if any, are also disposed of.

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

Rikko Devi ...Petitioner
Versus
Sant Ram and others ...Respondents

CrMP(M) No. 1261 of 2018
Decided on: November 2, 2018

**Indian penal Code, 1860-** Sections 323, 354 and 427**- Code of Criminal Procedure, 1973-** Sections 372 and 378(3) – Assault, outraging of modesty and mischief- Trial court acquitting accused of offences of assault, outraging of modesty and mischief- Petition seeking leave to appeal against by victim- Held- Close scrutiny of evidence revealing that parties were inimical to each other on account of dispute regarding irrigation of fields- Cross FIRs regarding same incident by both parties against each other – No Independent witnesses joined in investigation by investigating officer though incident witnessed by 40-50 persons- Only persons related to victim were made witnesses-Case also pending against complainant party in respect of same incident- On evidence commission of aforesaid offences against accused not proved beyond doubt- Petition seeking leave to appeal dismissed (Paras 17 &18)

***Cases referred:***
Ajmer Singh vs. State of Haryana decided on 15 February, 2010, [2010(2) RCR (Crl) 132]
C. Magesh and others vs. State of Karnataka (2010) 5 SCC 645

For the applicant: Mr. Rakesh Chauhan, Advocate.
For the respondents: Mr. Kulbhushan Khajuria, Advocat, for respondents No.1 and 2.
Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood,
Additional Advocates General, for the respondent-State.

The following judgment of the Court was delivered:

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

By way of instant petition filed under Section 378 (3) CrPC, applicant/complainant has sought leave of this Court to file appeal against judgment dated 29.6.2018 passed by the learned Chief Judicial Magistrate, Chamba, District Chamba (HP)

in Case No. 206-I/2013, whereby respondents No.1 and 2-accused (hereinafter, 'accused'), who were charged with and tried for the commission of offence punishable under Sections 354, 427 and 323 IPC, have been acquitted of the aforesaid charges.

2. Briefly stated the facts as emerge from the record are that the a complaint came to be filed on behalf of the applicant with the Police Station, Pangi, District Chamba, Himachal Pradesh alleging therein that on 20.8.2012 in the morning she had linked her fields through a Kuhal and when water stopped coming in the said Kuhal, she went to see the Kuhal and noticed that accused Sant Ram had diverted water to his fields, upon which applicant diverted the water to her fields, when allegedly, Sant Ram came from behind, caught hold of her breasts, tore her shirt and broke her golden chain. It is further alleged that accused No.2 Devi Saran, brother of accused No.1 also came to the spot and aided the former in commission of offence and in this process both the accused gave beatings to the applicant. On hearing her cries, brother of applicant Mahender, Jalam Singh, Man Singh and Jeevan Singh came to spot and rescued applicant from clutches of accused. Applicant is stated to have sustained injuries on her body. Incident was narrated by applicant to her uncle Bhim Singh (PW-7) and sister Rajo Devi and accordingly, they approached the police for lodging of FIR in question. Police after lodging of FIR, started investigation into the alleged crime and took into possession shirt Ext. P-1 and got the applicant medically examined from MO, CHC Killar, who issued MLC Ext. PW-5/C. Statements of witnesses were recorded. On completion of investigation, *Challan* came to be presented in the competent Court of law i.e. Chief Judicial Magistrate, Chamba.

3. Learned Court below, on finding prima facie case against accused, served notice of accusation for having committed offence punishable under Ss. 354, 323 and 427 read with S. 34 IPC, to which accused pleaded not guilty and claimed trial. Prosecution in order to prove its case against accused, examined as many as eight witnesses. No witness was examined by the accused in their defence, however, in the statements recorded under S. 313 CrPC, they denied the case of prosecution and claimed to be innocent.

4. Subsequently, the learned Court below below, vide judgment dated 20.6.2018, acquitted the accused of the aforesaid charges by concluding that the prosecution has not been able to prove the case beyond all reasonable doubt. Since the State chose not to file an appeal laying therein challenge to the judgment of acquittal passed by the learned Court below, complainant has approached this court by way of present application seeking therein leave to file appeal against the impugned judgment of acquittal.

5. Mr. Rakesh Chauhan, learned counsel representing the applicant, vehemently argued that impugned judgment passed by the learned trial Court is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence adduced on record by the prosecution and as such same deserves to be set aside. Mr. Chauhan, while inviting attention of this Court to the impugned judgment passed by learned trial Court vis-à-vis evidence led on record by the prosecution, strenuously argued that prosecution proved beyond reasonable doubt that the accused tried to outrage the modesty of the applicant/complainant. Mr. Chauhan, further contended that there is ample evidence, be it ocular or documentary, adduced on record by the prosecution, suggestive of the fact that on 20.8.2012, accused not only gave beatings to the complainant/applicant but tried to outrage her modesty and as such prayed that leave to appeal may be granted and accused may be convicted for the charges framed against him, after setting aside the judgment of acquittal.

6. Mr. Kulbhushan Khajuria, learned counsel representing respondents No. 1 and 2/accused, while inviting attention of this Court to the impugned judgment of acquittal

passed by the learned Special Judge, vehemently argued that it has rightly appreciated the evidence adduced by the respective parties and acquitted the accused finding no evidence against them. Mr. Khajuria, further argued that the FIR lodged by the complainant is counter-blast to the FIR lodged by them. Mr. Khajuria, further averred that the prosecution has miserably failed to bring home the guilt of the accused and as such, learned Special Judge is right in acquitting the accused. Mr. Khajuria, further argued that since there was no truth in the allegations levelled by the complainant against accused, as such only the State has chosen not to file any appeal against the acquittal of his clients and the complainant just to harass and humiliate the accused, has filed the instant application seeking leave to file appeal against the judgment passed by learned Special Judge, which deserves to be dismissed.

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

8. Having heard the learned counsel for the applicant and perused record, this court sees no reason to interfere with the well reasoned judgment passed by the learned Court below, which definitely is based upon correct appreciation of the attending facts and circumstances of the case.

9. Close scrutiny of the material available on record reveals that dispute *inter se* complainant and the accused arose on account of diversion of water coming through a *Kuhal*. Complainant (PW-1), in her examination-in-chief stated that on 20.8.2012, at about 10.30 am, she was irrigating her fields through a Kuhal but suddenly water stopped and then she went to the spot and found that the accused Sant Ram had broken the Kuhal and diverted water towards his fields. She further deposed that when she inquired from the accused Sant Ram, he not only abused her but caught hold of her breast and torn her shirt. She further stated that when she raised hue and cry, brother of accused, Devi Saran also came on the spot and caught hold of her and gagged her mouth. Complainant also alleged that both the accused named above gave her beatings with kick and fist blows and when she cried for help, her brother Mahender, Jalam Singh, Man Singh and Jeevan Singh came to the spot and rescued her from the clutches of accused. She stated that due to beatings by accused, she lost her golden chain, earring and nose-pin and sustained injuries on her left arm and left side breast and other parts of the body. She deposed that both the accused, who are brothers, tried to outrage her modesty and in this regard, she had lodged report at Police Station, Pangi, which is marked as Mark 'X'. During her cross-examination, complainant fairly admitted that accused also lodged a criminal case against her and her family members regarding the same incident prior to her lodging the case against the accused. She also admitted that a criminal case is pending against her and her brothers Mahender Singh, cousin brothers Man Singh, Jeevan Singh and Jalam Singh, which has been lodged by Devi Saran, in which wife of Devi Saran and her niece had sustained injuries. Complainant also volunteered that the accused have lodged a false case. Complainant denied the suggestion that they used to call the accused and their family members by their caste and obstructed them from entering the temple by proclaiming that they belonged to lower caste. Complainant admitted that the accused had lodged case prior to lodging of complaint by her. She denied the suggestion that accused never caught hold of her from breast nor gave her beatings nor any golden chain or earring and nose-pin had been lost. She feigned ignorance as to on which part of body she sustained internal injuries. Complainant stated that when police took her shirt entire Praja was also present on the spot.

10. Similarly, PW-2 Mahender Singh stated that on 20.8.2012, he was doing construction work of temple when at about 10.30am, he heard noise of crying of his sister.

He alongwith Man Singh and Jeevan visited the spot and saw that accused Sant Ram and Devi Saran were giving beatings and they had also torn the shirt of his sister from left side. He further deposed that they saved their sister from the clutches of accused and during scuffle, his sister lost her earring, nose-pin and a golden chain. In his cross-examination, this witness stated that 40-50 persons were doing construction work of temple and out of them, Govind Ram, Chaman Singh, Basant Singh, Hari Lal, Hem Raj, Paras Ram and Roshan Lal etc. were present there. He stated that the construction work of temple was being done adjacent to the fields and place of occurrence was at a distance of 200 metres from the temple. He further stated that they only witnessed the occurrence and none else saw it. He feigned ignorance as to for how much time quarrel continued. He also stated that the Police Station is at a distance of 17 kms form the spot. He also feigned ignorance that on same day, wife of accused Devi Saran and niece Suman were also got medically examined. He denied that the case was pending against them qua the same incident. He feigned ignorance that the case pending against him was regarding setting on fire the orchard of accused in which his real brother Rakesh and Kishan and cousin brother Bodh Ram are accused. He also feigned ignorance that one case is also pending against his sister (complainant) in which he, Rakesh Kumar, Kehar Singh, Jeevan Singh and Man Singh are also accused. He denied that the case which was pending against them was qua giving beatings to Devi Saran, Hir Dei and Suman. He denied the suggestion that accused have not given any beatings to his sister nor molested her. However, he feigned ignorance about the fact that accused had lodged FIR on the same day prior to lodging FIR by his sister.

11. PW-3 Jalam Singh, stated that he did not remember the date and month but about 3-4 year back, he was doing construction work of temple in the village. He further stated that he was called by the police and one shirt Ext. P1 was taken into possession by the police vide *Fard* Ext.PW-1/A, which bears his signatures under red circle at place 'B'. He identified the shirt to be the same and stated that except this nothing has happened in his presence. This witness was declared hostile and cross-examined by the prosecution, wherein he denied that on 20.8.2012, he, Man Singh, Jeevan and Mahender Singh visited the spot on hearing the noise of Mahender Singh and saw that accused had caught hold of victim and also torn her wearing shirt. He further denied that they rescued the victim from the clutches of accused. This witness admitted that the shirt was handed over to the police by victim. Though this witness admitted that accused belong to his village and are known to him but denied the suggestion that for this reason, he was deposing falsely. He has denied portion 'A' to 'A' of his statement, Marj 'J' recorded by the police.

12. PW-4 Jeevan Singh, stated that on 21.8.2012, he was doing construction work at Kuthal Village when at about 10.30 am on hearing noise of Mahender Singh, he and Bhim Singh visited the spot and saw that Devi Saran and Sant Ram (both accused) had caught hold of victim and had also torn her shirt. He stated that they rescued the victim from the clutches of accused. He stated that accused had torn the shirt of accused and victim had lost her golden chain and nose-pin. During cross-examination, this witness stated that meeting at Kuthal Village was on 20th August. He stated that accused persons belong to Scheduled Caste family and they belong to Rajpoot family. He feigned ignorance that on 20.8.2012, father of accused was ousted from the temple by saying that they belong to Scheduled Caste family. He admitted that accused and his family members have lodged criminal case against him, Mahender Singh and Rakesh Kumar qua trespass into the house. Self stated that it was false case. He feigned ignorance that aforesaid case was lodged against them on 20.8.2012. He also admitted that victim is also accused in the aforesaid case. He denied that they did not allow the accused to irrigate their fields through Kuhal and broken the same. He feigned ignorance about distance of temple from the fields. He stated that at the time of occurrence, there were 30-35 persons gathered on the spot. He denied the

suggestion that they proclaimed that accused belonged to Scheduled Caste Family and restrained them from entering into the temple. He denied that accused neither torn the shirt of victim nor molested her.

13. Careful perusal of the statements having been made by aforesaid witnesses, if read in conjunction, clearly suggest that all the prosecution witnesses are closely related to each other. It also emerges from their statements that 40-45 persons were present on the spot at the time of alleged incident. It is not understood as to why prosecution failed to associate independent witnesses especially when they were available in abundance.

14. Leaving everything aside, statement having been made by PW-3 Jalam Singh completely demolished the case of the prosecution because he specifically denied the case of prosecution that on the date of alleged incident, accused not only gave beatings to the complainant rather made an attempt to outrage her modesty. True it is that this witness was declared hostile and cross-examined but if cross-examination conducted upon this witness is perused carefully, it nowhere suggests that prosecution was able to extract anything contrary to what he stated in his examination-in-chief, rather, he specifically denied that on 20.8.2012, he after having heard cries of complainant, visited the spot alongwith Man Singh, Jeevan (PW-4) and Mahender Singh (PW-2). He specifically denied that he alongwith other persons i.e. PW-3, PW-4 and PW-2 rescued the victim from the clutches of the accused. He specifically denied portion 'A' to 'A' of his statement Mark 'J', recorded by the police. If statement of PW-4, Jeevan is read, it also suggests that accused persons belong to Scheduled Caste family, whereas complainant and prosecution witnesses belong to Rajpoot community. Statement of PW-4 suggests that on 20.8.2012, father of accused was ousted from the temple by saying that they belong to Scheduled Caste. This witness categorically admitted that accused and their family members lodged a criminal case against him, Mahender Singh (PW-2) and Rakesh Kumar qua trespass into house. He specifically admitted that victim-complainant is also accused in the present case.

15. PW-2 Mahender Singh stated that construction work of temple was being done adjacent to the fields and place of occurrence is 200 metres from temple, whereas complainant, in her statement, deposed that construction work of temple was being done at a distance of half a kilometre and it was being done by Praja, in which her brother Mahender Singh, uncle Kehar Singh, cousin brothers Man singh, Jeevan Singh and Jalam Singh were doing work, who came on the spot when she cried for help. In the statement, complainant, who is best person to narrate the actual incident, has stated that temple was being constructed at a distance of half a kilometre from the spot and as such, it is difficult to believe that noise, if any, of complainant was heard by her brothers Mahender Singh and others at a distance of half a kilometre. If it is presumed that above named persons had heard noise even then it is hard to believe that within a few minutes they reached the spot and till that time, accused were present on the spot.

16. Complainant also admitted in her cross-examination that a criminal case is pending against her brother Mahender Singh, Man Singh, Jeevan and Jalam Singh, which has been lodged by Devi Saran, wherein wife and niece of Devi Saran had sustained injuries. She denied that they used to call accused and their family by caste and obstructed them from entering the temple on the pretext that they belonged to Scheduled Caste. She admitted that accused persons lodged case prior to lodging of present case against them.

17. By now, it is well settled that in criminal trials, evidence of eye witnesses requires careful assessment and needs to be evaluated for its credibility. It has been repeatedly held by the Hon'ble Apex Court that fundamental aspect of criminal jurisprudence rests upon well established principle that, "*no man is guilty until proved so.*"

Utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. **It has been repeatedly held by the Hon'ble Apex Court that there must be a string that should join evidence of all the witnesses, thereby satisfying the test of 'consistency' in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on the touchstone of 'consistency'. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in C. Magesh and others versus State of Karnataka (2010) 5 SCC 645, wherein it has been held as under:-**

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-( SCC p.704, para 14)
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> > **"14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."**
>
> **46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.**

18. Close scrutiny of evidence as discussed herein above clearly suggests **that parties are /were inimical to each other and prior to lodging of FIR by complainant** in the case at hand, accused Devi Saran had also lodged criminal case against the complainant and her brothers named above, vide FIR, Ext. D1, perusal of which clearly suggests that accused Devi Saran had filed complaint prior in time qua same incident against complainant and her brothers, which fact has been otherwise admitted by complainant and other witnesses, as such, learned trial Court rightly arrived at a conclusion that subsequent FIR lodged by complainant party is just a counter blast to the FIR lodged by the accused party.

19. At the cost of repetition, it may be observed that only the relatives of complainant heard the cries of the complainant and came to the spot for the rescue of complainant and further it is only the relatives of the complainant, who have been cited as witnesses by the prosecution, especially when as per own admission of the complainant and other prosecution witnesses, number of people had gathered at the spot. No doubt, statements of interested witnesses can not be brushed aside solely on the ground of non-association of independent witnesses but it is equally settled by now that, while determining guilt, if any, of the accused, on the basis of statement made by interested witnesses, courts are required to be extra cautious and they are required to see/determine, whether witnesses termed to be interested are going to be benefited in any way, while deposing in favour of complainant and against accused or not?

20. **The Hon'ble Apex Court in Ajmer Singh vs State of Haryana decided on 15 February, 2010, [2010(2) RCR (Crl) 132] has held that the police has to show that efforts were made to associate independent witnesses but same could not be associated despite such efforts. The Hon'ble Apex Court held as under:**

> "The learned Counsel for the appellant has submitted that the evidence of the official witness cannot be relied upon as their testimony, has not been corroborated by any independent witness. We are unable to agree with the said submission of the learned Counsel. It is clear from the testimony of the prosecution witnesses PW-3 Paramjit Singh Ahalwat, D.S.P., Pehowa, PW-4 Raja Ram, Head Constable and PW-5 Maya Ram, which is on record, that efforts were made by the investigating party to include independent witness at the time of recovery, but none was willing. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence. In the present case, both the trial court and the High Court by applying recognized principle of evaluation of evidence of witnesses has rightly come to the conclusion that the appellant was arrested and Charas was recovered from the possession of the appellant for which he had no licence. We find no good reason to differ from that finding."

21. In the case at hand, as is clear from record, accused who hail from Scheduled Caste community filed FIR on the same day i.e. Ext. D1 against complainant and her cousin, who are prosecution witnesses in the case at hand that they were not allowed to enter the temple and were given beatings being Scheduled Caste. Factum with regard to lodging of FIR prior in time stands duly admitted by complainant as well as other prosecution witnesses, meaning thereby all the witnesses associated by prosecution to prove its case are personally interested in the success of criminal case as they stand named by accused in the FIR lodged by them (accused).

22. Since cross FIR's came to be lodged on same day qua same incident and in the same Police Station, one Investigating Officer ought to have investigated both the cases and after arriving at some definite conclusion, as to which party was aggressor/offender/guilty, should have presented the *Challan* in the competent Court of law but, in the case at hand, it has not been done and as such, learned Court below rightly held that this fact is fatal to the prosecution and proceeded acquit the accused.

23. Consequently, in view of discussion made herein above, this Court sees no illegality or infirmity in the impugned judgment passed by learned Special Judge, as such, same is upheld. Leave to appeal is rejected. Petition is dismissed.

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

Shri Hem Chand and others ..Petitioners
Versus
Shri Dharam Parkash and others ..Respondents

CMPMO No. 429 of 2017
Decided on November 13, 2018

**Constitution of India, 1950-** Article 227**- Indian Evidence Act, 1872-** Section 73- Plaintiffs challenging will executed by father in favor of defendants- Plaintiffs filing application for sending will for comparison of signatures of testator to handwriting expert- Trial court dismissing application- Petition against- Held- For carrying out comparison of disputed signatures, there has to be admitted or proved signatures on record- Section 73 authorizes court to compare disputed signatures with admitted or proved signatures and arrive at its own conclusion regarding genuineness of signatures- However plaintiffs in pleadings not disputing signatures of testator on will- No admitted signatures of testator on record- Signatures on bank account opening application not proved to be of testator- Trial court justified in dismissing application of plaintiffs- Petition dismissed (Paras 18 & 19).

***Cases referred:***

Ajit Savant Manjagavi vs. State of Karnataka AIR 1997 SC 3255
G. Someshwar Rao vs. Samineni Nageshwar Rao (2009) 14 SCC 677
State (Delhi Admn.) vs. Pali Ram AIR 1979 SC 14
Umesh Chandra vs. State of Rajasthan, AIR 1982 SC 1057

For the petitioners: Mr. Romesh Verma, Advocate.
For the respondents: Mr. Y.P. Sood, Advocate.

The following judgment of the Court was delivered:

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

Being aggrieved and dissatisfied with order dated 17.8.2017 passed by the learned Civil Judge, Court No.4, Shimla, Himachal Pradesh, in Case No. 3-1 of 17/14, whereby an application having been filed by the petitioners-plaintiffs (hereinafter, 'plaintiffs') under S.73 of the Indian Evidence Act, (hereinafter, 'Act'), praying therein for sending signatures of deceased Tulsi Ram, for comparison to the handwriting expert, came to be dismissed, plaintiffs have approached this court in the instant proceedings, filed under Article 227 of the Constitution of India, praying therein to allow their application and send signatures of Tulsi Ram for comparison to the handwriting expert.

2. Briefly stated, the facts of the case borne out from the record are that the plaintiffs filed a suit for declaration to the effect that they are the only legal heirs of Tulsi Ram with respect to property as entered in Khata No. 18/17, Khatauni No. 41/39, Khasra Nos. 12, 13, 25, 26, 145, 148, 150, 151, 152, 153, 154 and 155, Kita 12 and Khata No. 18/17, Khatauni No. 72/70, Khasra Nos. 1 and 48, Khatauni No. 73/72, Khasra Nos. 308,

309 and 311, Khata No. 74/71, Khasra Nos. 312 and 313, situated in Mauja Nehwat, Tehsil Suni, District Shimla, Himachal Pradesh, Khata No. 2 Min./2 Khatauni No. 10/5, Khasra No. 437, situate at Mauja Nehwat, Tehsil Suni, District Shimla, Khata No. 19/18, Khatauni No. 42/40, Khasra Nos. 138, 138/1, 139 and 140, Khatauni No. 43/11, Khasra No. 142, situated at Mauja Durgapur, Tehsil Suni, District Shimla, Himachal Pradesh (hereinafter, 'suit land') and the Will dated 6.10.2003, is illegal, wrong and void.

3. Respondents-defendants (hereinafter, 'defendants') by way of filing written statement, refuted the averments contained in the plaint.

4. During the pendency of the suit, plaintiffs filed an application under S. 73 of the Act, averring therein that the suit in question has been filed by the plaintiffs alleging therein that the deceased Tulsi Ram never executed any Will/document and same is a fabricated document. Plaintiffs further claimed that on the basis of fabricated document, right of the plaintiffs is being denied in the suit land. In the application, as referred to above, plaintiffs averred that late Tulsi Ram was having a bank account with UCO Bank, Durgapur, which he used to operate till his death and the original account opening form of the Bank has been placed on record by PW-5. It is further averred in the application that late Tulsi Ram and his brothers partitioned the land themselves in the presence of witnesses and writing to this effect has been executed on 23.6.2002 and document in question has been proved before the court by leading evidence by the plaintiffs and also the original documents have been placed on record. It is further averred in the application that in the aforesaid document, signatures of Tulsi Ram are different than the signatures on the Will. Plaintiffs further averred that the alleged Will is a forged document because true signatures of the testator late Tulsi Ram found on the aforesaid document are different from the signatures appearing on the bank account opening form and partition agreement dated 23.2.2006, therefore, signatures appearing on the Will are required to be compared with the signatures appearing on bank account opening form and partition agreement and expert opinion in this regard be called for.

5. Defendants contested the aforesaid application and contended that the plaintiffs can not be allowed to raise dispute with regard to signatures, being beyond the pleadings in the suit. They also submitted that the onus to prove that the Will in question is surrounded by suspicious circumstances, is upon the plaintiffs, which they have failed to discharge and as such, at this belated stage, prayer made in the application for sending signatures for comparison, can not be accepted. Apart from above, defendants also contended before the court below that the signatures proposed to be sent to the expert are not the admitted signatures of deceased Tulsi Ram, as such, for want of admitted signatures, comparison can not be carried out with the disputed signatures, hence, application be dismissed.

6. Learned trial Court, having taken note of the pleadings adduced on record by the respective parties, dismissed the application vide order dated 17.8.2017. In the aforesaid background, plaintiffs are before this court, in the instant proceedings.

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

8. Careful perusal of the material available on record reveals that the plaintiffs filed suit for declaration that they are legal heirs of late Tulsi Ram and the Will alleged to have been executed by their predecessor-in-interest Tulsi Ram is illegal, wrong and void. Since plaintiffs termed the Will in question alleged to have been executed by deceased Tulsi

Ram to be forged one, definitely the onus to prove the same is upon them, as has been rightly observed by the learned Court below in the impugned order.

9. By now, it is well settled that for carrying out comparison of disputed signatures, there has to be admitted signatures on record. Under S.73 of the Act, court, of its own, can compare signatures/handwriting and can form its own opinion, whereas, under Ss. 45 and 47 of the Act, court can take opinion of handwriting expert. Irrespective of opinion of handwriting expert, court can also compare admitted signatures with the disputed one and arrive at an independent conclusion. S.73 authorises a court to compare disputed signatures with the admitted signatures and arrive at its own conclusion regarding genuineness of the signatures, but proof of identification of handwriting/signatures can be; (a) by means of direct evidence; (b) by means of familiar evidence; (c) by means of comparison by court; (d) by admission of the parties; (e) by means of scientific means of comparison by an expert; and lastly (f) by means of circumstantial evidence.

10. In the case at hand, plaintiffs by way of application under S.73 prayed that the signatures of deceased Tulsi Ram appearing on the bank account opening form of UCO Bank, Durgapur and partition agreement dated 23.6.2002 be sent to the expert for comparison with his signatures on the disputed Will executed on 26.10.2003, but careful perusal of the provisions contained under S.73 of the Act, clearly suggests that court, with a view to ascertain whether signatures /writing or seal is that of the person, by whom it is purported to have been written or made, may get it compared with the admitted or proved signatures of that person. S. 73 of the Act is reproduced herein below:

> "73. Comparison of signature, writing or seal with others admitted or proved. — In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose. The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person."

11. In the case at hand, there is no dispute that the person, whose signatures are sought to be compared, is no more alive and as such court has/had no occasion to obtain his specimen signatures as provided under S.73 of the Act. Another option available to the court under S.73 is to fall back upon the proved/admitted signatures of the person, whose signatures are sought to be compared. In the case at hand, as per plaintiffs, admitted signatures are available upon the document i.e. bank account opening form and private partition dated 23.6.2002. Record reveals that the document i.e. private partition has been strongly disputed by the defendants and said document is not an admitted document inter se parties, rather, it emerges from the record that during the course of evidence, its exhibition has been strongly objected by the defendants. True it is that the defendants have not disputed factum with regard to deceased Tulsi Ram having bank account in UCO Bank, Durgapur but the question which needs to be determined in the instant proceedings is, whether the signatures of Tulsi Ram on the said form can be said to be admitted signatures in terms of S.73 or not?

12. PW-5, Manager of UCO Bank, though in his statement admitted that the deceased Tulsi Ram had opened the bank account on 11.9.1989, but it is not in dispute that the Will in question was allegedly executed in the year 2003 i.e. after fourteen years of

opening the bank account. PW-5 also stated before the court below that he did not see the deceased Tulsi Ram signing the aforesaid form at the relevant time i.e. 11.9.1989, meaning thereby that PW-5 is not a witness to the execution of said account opening form.

13. This court, further finds from the reading of plaint having been filed by the plaintiffs that they nowhere pleaded that the Will in question does not bear true signatures of deceased Tulsi Ram, rather plaintiffs have simply stated that the document/Will as alleged to have been executed is a false document and same is fabricated one.

14. Having carefully gone through the contents of application filed under S. 73 preferred by the plaintiffs, vis-à-vis reasoning assigned by the learned Court below, while rejecting the same, this court is not persuaded to agree with the contention of Mr. Romesh Verma, Advocate that the learned Court below erred in concluding that since there is no admitted signatures of deceased Tulsi Ram, prayer made for comparison of the signatures can not be allowed. Signatures, if any, on the bank account opening form, which was opened on 11.9.1989, can not be said to be admitted signatures of deceased Tulsi Ram, especially when there is none to state that he saw Tulsi Ram signing the form at the time of opening bank account. Private partition dated 23.6.2002 has been strongly disputed by the defendants, as has been taken note herein above, as such, no fruitful purpose would be served in case signatures, if any, of the deceased Tulsi Ram on private partition are ordered to be compared with the so called admitted signatures of Tulsi Ram on bank account opening form. By now, it is well settled that one disputed document can not be used for comparison of signatures with another disputed signatures, rather comparison of disputed signatures would be only useful when it is done with admitted signatures, but in the instant case, neither the admitted signatures of deceased person are available nor person whose signatures are sought to be compared is available for giving specimen signatures.

15. Another argument advanced by Mr. Verma, that the bank account opening form is a public document and signatures on the same can not be denied, rather, same are deemed to be admitted, also deserves outright rejection in the given facts and circumstances of the case.

16. No doubt, the bank account opening form is a public document and bank concerned is the custodian of the same, but still, the question remains that who would prove that it was the deceased, who had signed the form on 11.9.1989, at the time of opening the account. PW-5, Manager of the Bank concerned though, in his statement recorded before court below, admitted that the bank account of Tulsi Ram was opened on 11.9.1989, but he categorically stated that he did not see deceased /testator signing aforesaid form on the relevant date, meaning thereby that he is not a witness to the execution of the account form, whereas S. 73 specifically speaks about proved/admitted signatures of the person, who is purported to have written/made the same. PW-5, being Manager of the Bank definitely can not deny the factum with regard to opening of account by deceased on 11.9.1989, being custodian of record, which is definitely a public document, but since he had no occasion to see Tulsi Ram putting his signatures on the form, he can not be said to be a witness to the execution of the account opening form.

17. Reliance placed by Mr. Romesh Verma, learned counsel representing the plaintiffs on the judgment passed by the Hon'ble Supreme Court in **Umesh Chandra** v. **State of Rajasthan**, AIR 1982 SC 1057, is wholly misplaced because the facts of the present case are totally different to the facts, which were before the Hon'ble Apex Court in **Umesh Chandra**(supra), in which Hon'ble Apex Court has held that as per S.35 of the Indian Evidence Act, there is no legal requirement that a public or other official document should be kept only by a public officer, rather all that is required is that it should be regularly

kept/maintained in discharge of official duties. In the aforesaid judgment, Hon'ble Apex Court, in the given facts and circumstances of that case, further observed that it could not be said that the admission form as well as school register, both of which were, according to evidence, maintained in due course of business, were not admissible in evidence because they were not kept or maintained by any public officer. Under S.35, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only. Therefore, those documents would be admissible under S.35 and Ss. 73 and 74 would be irrelevant. Relevant paras of aforesaid judgment are reproduced herein below:

> "10. The first document wherein the age of the appellant was clearly entered is Ext. D-1 which is the admission form under which he was admitted to class III in St. Teressa's Primary School, Ajmer. In the admission form, the date of birth of the appellant has been show a as 22.6.1957. The form is signed by Sister Stella who was the Headmistress. The form also contains the seal of the school, DW, Ratilal Mehta, who proved the admission form, has clearly stated that the form was maintained in the ordinary course of business and was signed only by the parents. The evidence of Ratilal Mehta (DW 1) is corroborated by the evidence of Sister Stella (DW 3) herself who has also endorsed the fact of the date of birth having been mentioned in the admission form and has also clearly stated on oath that the forms were maintained in regular course and that they were signed by her. She has also stated that at the time when the appellant was first admitted she was the headmistress of St. Teressa Primary School, Ajmer. The High Court seems to have rejected this document by adopting a very peculiar process of reasoning which apart from being unintelligible is also legally erroneous. The High Court seems to think that the admission forms as also the School's register (Ext. D-3) both of which were, according to the evidence, maintained in due course of business, were not admissible in evidence because they were not kept or made by any public officer. Under s. 35 of the Evidence Act, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only. The High Court seems to have confused the provisions of sections 35, 73 and 74 of the Evidence Act in interpreting the documents which were admissible not as public documents or documents maintained by public servants under sections 34, 73 or 74 but which were admissible under s. 35 of the Evidence Act which may be extracted as follows:
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> > "35. Relevancy of entry in public record made in performance of duty
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> > An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such books, register or record is kept, is itself a relevant fact." (Emphasis ours)
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> 11. A perusal of the provisions of s. 35 would clearly reveal that there is no legal requirement that the public or other official book should be kept only by a public officer but all that is required is that it should be regularly kept in discharge of her official duty. This fact has been clearly proved by two independent witnesses, viz., DW 1, Ratilal Mehta and DW 3, Sister Stella. The question does not present any difficulty or complexity as in our opinion the section which would assist in this behalf is s. 35 of the Evidence Act which provides for relevancy of entry in the public record. In this connection we may refer to a decision of this Court in Mohd. Ikram

Hussain v. State of U.P., where Hidayatullah, J. speaking for the Court, observed as under:

> "In the present case Kaniz Fatima was stated to be under the age of 18. There were two certified copies from school register which show that on June 20, 1960, she was under 17 years of age. There was also the affidavit of the father (here evidence on oath) stating the date of her birth and the statement of Kaniz Fatima to the police with regard to her own age. These amounted to evidence under the Indian Evidence Act and the entries in the school registers were made ante litem motam.""

18. In the case before Hon'ble Apex Court, question was with regard to admissibility of admission form as well as school register, maintained in due course of business by the School, in evidence and Hon'ble Apex Court held that the admission form as well as school register maintained in due course of business by a person, whose duty it is to maintain the document, would be admissible under S.35 and Ss. 73 and 74 would be irrelevant. But, in the case at hand, question is not with regard to admissibility of the bank account opening form of Tulsi Ram, rather question is whether his signatures on the said account opening form, which was opened on 11.9.1989, can be said to be admitted signatures in terms of S.73, especially when there is none to certify or state that he saw Tulsi Ram putting his signatures on the said form.

19. Mr. Romesh Verma, learned counsel representing the plaintiffs also placed reliance upon following judgments:-

1. **Ajit Savant Manjagavi** v. **State of Karnataka** AIR 1997 SC 3255
2. **G. Someshwar Rao** v. **Samineni Nageshwar Rao** (2009) 14 SCC 677
3. **State (Delhi Admn.)** v. **Pali Ram** AIR 1979 SC 14

Mr. Romesh Verma, Advocate, while relying upon above judgments, tried to demonstrate that the court has ample power to send the disputed signatures to the expert for having his opinion for proper adjudication of the case, however, since there is no dispute with regard to power of the court under S.73 of the Act to send the disputed signatures for comparison with the admitted signatures to the expert, this court sees no reason to discuss the aforesaid judgments.

20. In view of the detailed discussion made herein above, there is no merit in the present petition, which is accordingly dismissed alongwith all pending applications. Record of court below, if received, be sent back forthwith. Interim directions, if any, are vacated.

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

ICICI Bank Ltd. and others ...Petitioners

Versus

State of Himachal Pradesh and another ...Respondents

CrMMO No. 176 of 2017
Decided on: November 13, 2018

**Code of Criminal Procedure, 1973-** Section 482 **-** Complaint u/s S 406, 409 and 420 IPC against bank officials for forcible repossession of vehicle in default of loan. Petition for quashing of summoning order and consequential proceedings. In complaint no allegation, specific in nature against bank officials, there is not even a whisper that what role was actually played by officials i.e. accused. Held- test to be applied by court is as to whether uncontroverted allegations as made prima facie establish offence. Court to take into consideration any special features which appear in case to consider whether it is in interest of justice to permit a prosecution to continue. Petition allowed and summoning order of trial court quashed. (Paras 12 to 19)

***Cases referred:***

Asmathunnisa vs. State of A.P. (2011) 11 SCC 259
GHCL Employees Stock Option Trust vs. India Infoline Ltd. (2013) 4 SCC 505
Prashant Bharti vs. State (NCT of Delhi), (2013) 9 SCC 293
Rajiv Thapar and Ors vs. Madan Lal Kapoor, (2013) 3 SCC 330

| | |
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| For the petitioners: | Mr. Vijay K. Verma, Advocate. |
| For the respondents: | Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General, for respondent No.1.<br>Mr. Naresh K. Gupta, legal aid counsel, for respondent No.2. |

The following judgment of the Court was delivered:

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

By way of present petition filed under S. 482 CrPC, prayer has been made on behalf of the petitioners-accused (hereinafter, 'accused') for quashing of summoning order dated 1.4.2017, as well as consequential proceedings i.e. Case No. 165-1-11 pending before the Judicial Magistrate 1st Class, Badsar, District Hamirpur, Himachal Pradesh.

2. For having bird's eye view, necessary facts as emerge from the record are that the respondent No.2-complainant (hereinafter, 'complainant') approached the learned Court below by way of a complaint under Ss. 406, 409 and 420 IPC, alleging therein that she had approached the accused, who are bankers, for availing loan for purchase of a mini-truck (Mahindra & Mahindra 207 DI). On the request of complainant, loan was availed on installments commencing from 1.2.2005 to 1.12.2008. As per complainant, she paid installments from time to time and last installment of Rs. 17,000/- was paid in the month of June, 2007, but no receipt was issued to that effect. Allegedly, accused, illegally and forcibly, took away the aforesaid vehicle of the complainant on 11.6.2007 on account of non-payment of installments. Complainant also lodged report to the police but no action was taken against the accused. Complainant also personally requested the accused to release vehicle but despite her repeated requests, vehicle was not released and as such, she was compelled to approach the competent Court of law. By way of complaint, complainant alleged that on the assurance given by the accused, she waited till 6.5.2011, whereafter, she served a legal notice upon the accused, but they failed to reply to the same. In nutshell, complainant alleged that since accused failed to return a sum of Rs. 47,573/-, they have committed criminal breach of trust and have taken law in their own hands and embezzled and misappropriated valuable security of the complainant by playing fraud and as such, they be punished in accordance with law.

3. Subsequently, learned Court below, on the basis of aforesaid complaint having been filed by the complainant, recorded preliminary evidence of complainant, Urmila Devi, her husband Ajay Kumar, who was guarantor and official of the ICICI Bank, Shailender Vishnoi, who produced the record and proceeded to pass impugned summoning order dated 1.4.2017, whereby accused came to be summoned for 6.6.2017. In the aforesaid background, accused have approached this court in the instant proceedings filed under S. 482 CrPC, praying therein for quashment of summoning order and consequential proceedings pending before Judicial Magistrate 1st Class, Badsar.

4. Pursuant to notice issued in the instant petition, State of Himachal Pradesh has filed its reply, perusal whereof clearly suggests that the complainant, Urmila Devi never reported the matter to the police, rather police made inquiry after having received orders of Judicial Magistrate 1st Class Badsar. Police after having conducted inquiry, submitted its report, annexure R-1. Police, in its inquiry reported that since complainant failed to pay installments, bank officials after having informed the complainant, seized the vehicle in question and as such, no case, if any, is made out under Ss. 406, 409 and 420 IPC, against the accused.

5. At this stage, it may be noticed that careful perusal of zimni orders passed by court below suggests that on 22.12.2011, court below after having received complaint, fixed matter for recording of preliminary evidence on 6.2.2014. Statement of complainant Umila Devi (CW-1) and her husband Ajay Kumar (CW-2) was recorded on 28.11.2012, whereas, statement of official witness Shailender Vishnoi (CW-3) was recorded on 19.11.2013. Subsequently, on 10.4.2014, court below considered the facts and circumstances of the case and felt it necessary to call for report of the police under S. 202 CrPC and accordingly, sent a reference to Station House Officer, Badsar, with a direction to investigate the matter so as to ascertain as to whether there are sufficient grounds to proceed against the accused for alleged commission of offences or not?

6. **Careful perusal of order dated 17.6.2014, suggests that report under S. 202 CrPC was received by the court below, however, while passing impugned order dated 1.4.2017, whereby accused came to be summoned, court below failed to take note of the report of the police, rather, it solely placed reliance upon the statement of complainant, Urmila Devi and her husband Ajay Kumar, CW-2.**

7. **Having heard the learned counsel representing the parties and perused the material available on record, this court is persuaded to agree with the contention of Mr. Vijay K. Verma, learned counsel representing the accused that there is no allegation, specific in nature, if any, against the Managing Director of the Bank, rather, this court having carefully gone through the annexure P-1, finds that there is not even a whisper that what role was actually played by the officials i.e. accused, while advancing loan or subsequently in receiving the installments. Complainant has simply stated in the complaint that on her having made request, loan was advanced to her for purchase of vehicle in question. She has further stated that accused illegally and forcibly took aforesaid vehicle of complainant into custody on 11.6.2007 and report to this effect was made by the complainant to the Police Station Badsar, which fact has not been supported by the police. As has been taken note herein above, though complainant has named three persons as accused in the complaint i.e. Managing Director, Director and Branch Manager of ICICI Bank, but there is no specific averment that what role was played by them at the time of advancement of loan and its recovery, rather, papers for advancement were initiated through some agency i.e. Mahindra and Mahindra Finance and subsequently loan was advanced through Collection Manager, who has not been named in the complaint.**

**8.** If averments made in the complaint are read in their entirety, same clearly suggest that complainant was in default of making payment and as such, it can not be said that Bank officials unlawfully seized the vehicle, rather, there is material on record i.e. report of police, that the Bank officials prior to taking custody of vehicle, intimated the complainant that since she has failed to make payment, vehicle in question is being taken away by the Bank.

9. True it is that by now, it is well settled that when prosecution at its initial stage is sought to be quashed, test to be applied by the court is whether uncontroverted allegations made prima facie establish offence but, in the case at hand, as has been taken note herein above, there is no specific allegation by name against the accused rather, there appears to be bald allegation of the complainant. There is no allegation that a particular accused i.e. Managing Director or the Director of the bank illegally seized the vehicle or caused damage to the complainant, rather, in the entire complaint, there are bald and vague allegations against accused, who are sought to be arrayed as accused.

10. Interestingly, the learned Magistrate below, while issuing process against the accused failed to take not of the report of the police, wherein it was specifically recorded that the officials of Bank prior to having taken custody of vehicle, had actually intimated the complainant that since she has failed to pay the installments, vehicle is liable to be seized, as such, no case under Ss. 406, 409 and 420 IPC is made out. Otherwise also, while issuing process, magistrate/court concerned is/was always under obligation to record its satisfaction about prima facie case against the person(s) sought to be arrayed as accused, but in the case at hand, there is no such satisfaction recorded, rather, the Magistrate below has simply, on the statement of complainant and her husband, proceeded to summon accused against whom definitely there are no specific allegations contained in the complaint.

11. At this stage, reliance is placed upon a decision rendered by Hon'ble Apex Court in **GHCL Employees Stock Option Trust** v. **India Infoline Ltd.** (2013) 4 SCC 505, wherein it has been held as under:

> 12. **From bare perusal of the complaint and the allegations made therein, we do not find in any of the paragraphs that the complainant has made specific allegations against respondent Nos.2 to 7. In paragraph 2 of the complaint, it is alleged that respondent Nos.2 to 6 are looking after the day-to-day affairs of the Company. With whom the complainant or its authorized representative interacted has also not been specified. Although in paragraph 11 of the complaint it is alleged that the complainant on numerous occasions met accused Nos.2 to 7 and requested to refund the amount, but again the complainant has not made specific allegation about the date of meeting and whether it was an individual meeting or collective meeting. Similarly, in paragraph 17 of the complaint, there is no allegation that a particular Director or Managing Director fabricated debit note. In the entire complaint there are bald and vague allegations against respondent Nos.2 to 7.**
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> **13. There is no dispute with regard to the legal proposition that the case of breach of trust or cheating are both a civil wrong and a criminal offence, but under certain situations where the act alleged would predominantly be a civil wrong, such an act does not constitute a criminal offence.**
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> 14. Be that as it may, as held by this Court, summoning of accused in a criminal case is a serious matter. Hence, criminal law cannot be set into motion as a

matter of course. The order of Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record.

15. In the case of Madhavrao Jiwaji Rao Scindia and Another Etc. vs. Sambhajirao Chandrojirao Angre and Others Etc. AIR 1988 SC 709, this Court held as under:

> "7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, **the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue.** This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

16. In the case of Punjab National Bank and Others vs. Surendra Prasad Sinha, AIR 1992 SC 1815, a complaint was lodged by the complainant for prosecution under Sections 409, 109 and 114, IPC against the Chairman, the Managing Director of the Bank and a host of officers alleging, inter alia, that as against the loan granted to one Sriman Narain Dubey the complainant and his wife stood as guarantors and executed Security Bond and handed over Fixed Deposit Receipt. Since the principal debtor defaulted in payment of debt, the Branch Manager of the Bank on maturity of the said fixed deposit adjusted a part of the amount against the said loan. The complainant alleged that the debt became barred by limitation and, therefore, the liability of the guarantors also stood extinguished. It was, therefore, alleged that the officers of the Bank criminally embezzled the said amount with dishonest intention to save themselves from financial obligation. The Magistrate without adverting whether the allegations in the complaint prime facie make out an offence charged for, in a mechanical manner, issued the process against all the accused persons. The High Court refused to quash the complaint and the matter finally came to this Court. Allowing the appeal and quashing the complaint, this Court held as under:

> "6. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing Director of the Bank by name and a host of officers. There lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into

consideration before issuing process lest it would be an instrument in the hands of the private complainant as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. Considered from any angle we find that the respondent had abused the process and laid complaint against all the appellants without any prima facie case to harass them for vendetta."

17. In the case of Maksud Saiyed vs. State of Gujarat and Others (2008) 5 SCC 668, this Court while discussing vicarious liability observed as under :-

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz., as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

18. From bare perusal of the order passed by the Magistrate, it reveals that two witnesses including one of the trustees were examined by the complainant but none of them specifically stated as to which of the accused committed breach of trust or cheated the complainant except general and bald allegations made therein. While ordering issuance of summons, the learned Magistrate concluded as under :-

"The complainant has submitted that the accused Nos.2 to 6 are the directors of the company and accused No.7 is the secretary of the company and were looking after the day to day affairs of the company and were also responsible for conduct and business of the accused No.1 and some time or the other have interacted with the complainant.

I have heard arguments on behalf of the complainant and perused the record. From the allegations raised, documents placed on record and the evidence led by the witnesses, prima facie an offence u/s 415, 409/34/120B is made out. Let all the accused hence be summoned to face trial under the aforesaid sections on PF/RC/Speed Post/courier for 2.12.2008."

19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against respondent Nos.2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them. Recently, in the case of M/s.Thermax Ltd. & Ors. vs. K.M. Johny & Ors. 2011 (11) SCALE 128, & ors. while dealing with a similar case, this Court held as under :-

"38. **Though Respondent No.1 has roped all the appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with appellant-Company by initiating the criminal prosecution, it is pointed out that appellant Nos. 2 to 8 are the Ex-Chairperson, Ex-Directors and Senior Managerial Personnel of appellant No.1 – Company, who do not have any personal role in the allegations and claims of Respondent No.1. There is also no specific allegation with regard to their role**

39. Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406,420 read with Section 34 IPC, it is to be noted that the concept of 'vicarious liability' is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant-Company."

12. After having carefully gone through the averments contained in the complaint as well as material placed alongwith the same, this court has no hesitation to conclude that the magistrate below, while issuing process has not bothered to peruse the contents of complaint as well as material placed alongwith the same to see whether prima facie case, if any, is made out against the accused or not? Contents of complaint having been filed by the complainant are wholly irrelevant as far as commission of offences under aforesaid provisions of law is concerned. Besides this, the persons, who allegedly came to seize the vehicle have not been arrayed as accused by the complainant, nor the officials of the Mahindra and Mahindra Finance have been named as accused, as such, no proceedings could have been initiated on the basis of the complaint, against the petitioners/accused who have not been attributed any role by the complainant.

13. Now, this Court deems it necessary to elaborate upon the **scope and competence of this Court to quash the criminal proceedings while exercising power under Section 482 of Cr.PC. Hon'ble Apex Court in judgment titled State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335 has laid down several principles, which govern the exercise of jurisdiction of High Court under Section** 482 Cr.P.C. Before pronouncement of aforesaid judgment rendered by the Hon'ble Apex Court, a three-Judge Bench of Hon'ble Court in case titled State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699, held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. Relevant para is being reproduced herein below:-

"7....In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere

> law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

14. Subsequently, Hon'ble Apex Court in **Bhajan Lal** (supra), has elaborately considered the scope and ambit of Section 482 Cr.P.C. Subsequently, Hon'ble Apex Court in Vineet Kumar and Ors. v. State of U.P. and Anr., while considering the scope of interference under Sections 397 Cr.PC and 482 Cr.PC, by the High Courts, has held that High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to quashed. The Hon'ble Apex Court has further held that the saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In the aforesaid case, the Hon'ble Apex Court taking note of seven categories, where power can be exercised under Section 482 of the Cr.PC, as enumerated in Bhajan Lal's case, i.e. 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, quashed the proceedings

15. Hon'ble Apex Court in **Prashant Bharti** v. **State (NCT of Delhi)**, (2013) 9 SCC 293, while drawing strength from its earlier judgment titled as Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330, has reiterated that high Court has inherent power under Section 482 Cr.PC., to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charge, but such power must always be used with caution, care and circumspection. While invoking its inherent jurisdiction under Section 482 of the Cr.P.C., the High Court has to be fully satisfied that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts and the material adduced on record itself overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice. In the aforesaid judgment titled as Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293, the Hon'ble Apex Court has held as under:-

> "22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under: (2013) 3 SCC 330, paras 29-30)
>
> > 29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would

naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

30.1 Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal - proceedings, in exercise of power vested in it under

> Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

16. Hon'ble Apex Court in **Asmathunnisa** v. **State of A.P.** (2011) 11 SCC 259, has held as under:

> "12. This Court, in a number of cases, has laid down the scope and ambit of the High Court's power under section 482 of the Code of Criminal Procedure. Inherent power under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute.
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> 13. The law has been crystallized more than half a century ago in the case of R.P. Kapur v. State of Punjab AIR 1960 SC 866 wherein this Court has summarized some categories of cases where inherent power can and should be exercised to quash the proceedings. This Court summarized the following three broad categories where the High Court would be justified in exercise of its powers under section 482:
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> (i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;
>
> (ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;
>
> (iii) where the allegations constitute an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."
>
> 14. In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736, according to the court, the process against the accused can be quashed or set aside :
>
> "(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
>
> (2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
>
> (3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like".

15. This court in State of Karnataka v. L. Muniswamy & Others (1977) 2 SCC 699, observed that the wholesome power under section 482 Cr.P.C. entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice requires that the proceedings ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In this case, the court observed that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the Legislature. This case has been followed in a large number of subsequent cases of this court and other courts."

17. Hon'ble Apex Court in **Asmathunnisa** (supra) has categorically held that where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like, High Court would be justified in exercise of its powers under S. 482 CrPC.

18. From the bare perusal of aforesaid exposition of law, it is quite apparent that exercising its inherent power under Section 482 of Cr.PC., High Courts can proceed to quash the proceedings if it comes to the conclusion that allowing the proceedings to continue would be an abuse of the process of the law.

19. In view of above, petition at hand is allowed. Summoning order dated 1.4.2017, as well as consequential proceedings against the accused i.e. Case No. 165-1-11 pending before the Judicial Magistrate 1st Class, Badsar, District Hamirpur, Himachal Pradesh are quashed and set aside.

20. Pending applications are disposed of. Interim directions, if any, are vacated. Record of the learned Court below be sent back forthwith.

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

Gaurav Rana .. Petitioner
Versus
Smt. Arti Rana .. Respondent

CMPMO No. 135 of 2018
Decided on: November 14, 2018

**Code of Civil Procedure, 1908-** Sections 22 and 24 **- Hindu Marriage Act, 1955-** Section 13 (1)**- Code of Criminal Procedure, 1973-** Section 125- Transfer of matrimonial cases- Earlier, on petition of wife, divorce petition of husband pending in court at Shimla transferred by High Court to court at Dharamshala- Thereafter, wife joined company of husband at Shimla and started living with him- However after some time she again started residing separately from him but at Shimla- Husband filing petition for transfer of matrimonial cases from courts at Dharamshala to courts at Shimla- On finding wife living at

Shimla and she having filed case under Domestic violence Act against husband at Shimla, matrimonial cases pending in courts at Dharamshala ordered to be transferred to courts at Shimla- Petition allowed. (Paras 4 to 6)

For the petitioner : Mr. Arun Sehgal, Advocate.
For the respondent : Ms. Anjali Soni Verma, Advocate.

The following judgment of the Court was delivered:

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**Sandeep Sharma, Judge**:(oral)

By way of instant petition filed under Ss.22 and 24 CPC, prayer has been made on behalf of petitioner for transfer of petition No. 21S/30/2015 titled Gaurav Rana vs. Arti Rana, filed under S. 13(1)(iA) of the Hindu Marriage Act, 1955 (hereinafter, 'Act') and petition No. 2/2016 titled Arti Rana vs. Gaurav Rana filed under S.125 CrPC, from the courts at Dharamshala to the courts at Shimla.

2. Averments contained in the petition suggest that the petitioner-husband had filed a petition under S. 13(1)(iA) of the Act, praying therein for dissolution of marriage by a decree of divorce on the ground of cruelty against the respondent-wife, before the learned District Judge, Shimla, however, same was subsequently ordered to be transferred to the court of learned District Judge, Kangra at Dharamshala on a transfer petition having been filed by the respondent-wife, as she claimed before this court that she was residing with her parents in Kangra. It also emerges from the averments contained in the petition that in between, there was some amicable settlement *inter se* parties and as per compromise *inter se* the parties, respondent-wife started living with the petitioner-husband in his premises at Shimla. However, the fact remains that on account of certain differences, they were unable to live together for considerable time, whereafter, respondent-wife filed FIR under S. 498A IPC i.e. FIR No. 151/2016 against the petitioner-husband and his family members. Respondent-wife also filed a petition under the Domestic Violence Act, which is pending before the learned Additional Chief Judicial Magistrate, Court No.1, Shimla.

3. By way of instant petition, petitioner-husband has prayed for transfer of petition filed by him under S.13(1)(iA) of the Act for dissolution of marriage pending before the learned District Judge, Kangra at Dharamshala on the ground that since the respondent-wife is living at Shimla, it would be convenient for both the parties in case, cases as referred to herein above, are ordered to be transferred to Shimla. Petitioner has also stated in his petition that he being the only son, is responsible to take care of his old aged parents, who are suffering from many ailments, as is evident from the medical evidence, adduced on record.

4. Respondent-wife by way of reply has opposed aforesaid prayer made on behalf of the petitioner-husband. However, she has specifically admitted the fact with regard to her having filed petition against her husband under Domestic Violence Act in the court at Shimla. She also admitted the factum with regard to her residing at Lower Bazaar Shimla with her minor child. She has also not disputed that at present her minor child is studying in a school at Shimla. It is quite apparent from the perusal of reply filed by the respondent that at present, for all intents and purposes, she is living at Shimla and it would be in her interest in case, cases mentioned above, pending at Dharamshala are transferred to the courts at Shimla. No doubt, at one point of time, this court, having taken note of the prayer made by respondent-wife by way of CMPMO No. 395 of 2015, had earlier ordered for transfer of divorce petition from Shimla to Dharamshala, but at that time, this court was made to

understand that the respondent-wife is living in Kangra with her parents, but, as has been taken note herein above, material available on record, especially the reply filed by the respondent, suggests that at present respondent-wife is living at Shimla with her children, who are pursuing their studies at Shimla. Apart from above, she has also initiated some legal proceedings against petitioner-husband at Shimla.

5. Consequently, in view of the above, this court is of the view that no prejudice, whatsoever, would be caused to the respondent-wife, in case, prayer made in the instant petition is allowed and cases mentioned in the same are ordered to be transferred to Shimla.

6. In view of above, present petition is allowed. petition No. 21S/30/2015 titled Gaurav Rana vs. Arti Rana, filed under S. 13(1)(iA) of the Hindu Marriage Act, 1955 and petition No. 2/2016 titled Arti Rana vs. Gaurav Rana filed under S.125 CrPC, are ordered to be transferred from the courts of learned District Judge, Kangra at Dharamshala and learned Judicial Magistrate 1st Class(II) Dharamshala to the courts of learned District Judge, Shimla and Judicial Magistrate 1st Class, Shimla. Records of both the cases be transferred to the courts at Shimla immediately.

7. Learned counsel for the parties, undertake to cause presence of the parties before the courts at Shimla on **28.11.2018**.

8. Pending applications, if any, are disposed of. Interim direction, if any, is vacated. Registry to apprise the learned Courts below with regard to passing of instant order, enabling them to do the needful.

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

M/S Changer Vidut Kranti Pvt. Ltd. and another ..Petitioners

Versus

State of Himachal Pradesh and others ..Respondents

CrMMO No. 413 of 2017
Decided on November 15, 2018

**Code of Criminal Procedure, 1973**- Sections 470(3), 482- **Factories Act, 1948** – Section 106- Cognizance- Limitation- Computation- Petitioner filing petition for quashing of complaint filed by Labour Inspector for offences under Act on ground of its being barred by limitation- Held- Section 106 of Act though stipulates that no court shall take cognizance of offences under Act after expiry of three months from date of commission of alleged offence, but time taken for obtaining prosecution sanction from government has to be excluded by virtue of S.470(3) of Code for computation of period of limitation- Labour inspector conducting inspection on 3-2-17 sending records for sanction on 13-2-17 and obtaining prosecution sanction on 11-5-17- Complaint filed on 22-5-17 not barred by limitation- Petition dismissed. (Paras 9 & 10)

For the petitioners: Mr. R.L. Verma, Advocate.

For the respondents: Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General.

The following judgment of the Court was delivered:

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

By way of present petition filed under S. 482 CrPC, prayer ahs been made on behalf of the petitioners-accused for quashing of complaint bearing No. 64-III/2017, pending before the learned Judicial Magistrate 1st Class, Baijnath, District Kangra, Himachal Pradesh titled Labour Inspector vs. M/S Changer Vidut Kranti Pvt. Ltd. and another, on the ground that as per S.106 of the Factories Act, 1948 (hereinafter, 'Act'), no court can take cognizance of any offence punishable under this Act, after expiry of three months from the date of alleged offence.

2. In nutshell, case of the petitioners, as has been projected in the petition at hand is that the Labour Inspector, Department of Labour and Employment, Himachal Pradesh had inspected the premises of the petitioners on 3.2.2017, whereafter, he having noticed certain discrepancies, proposed to register a case under various provisions of the Act, however, the fact remains that, on the basis of aforesaid inspection carried out by the Labour Inspector, Department of Labour and Employment, Himachal Pradesh, case in the court of learned Judicial Magistrate 1st Class, Baijnath, District Kangra, Himachal Pradesh, came to be registered/lodged on 22.5.2017, i.e. after expiry of three months from the date of inspection.

3. Mr. R.L. Verma, learned counsel representing the petitioners, while inviting attention of this Court to the provisions of S.106 of the Act, vehemently argued that no court can take cognizance of any offence, punishable under this Act, unless complaint thereof is made within three months from the date when alleged commission came to the knowledge of the Labour Inspector. S. 106 is reproduced herein below:

> "106. Limitation of prosecutions. No Court shall take cognizance of any offence punishable under this Act unless complaint thereof made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector: Provided that where the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed.
>
> 2*[Explanation.--For the purposes of this section,--
>
> (a) in the case of continuing offence, the period of limitation shall be computed with reference to every point of time during which the offence continues;
>
> (b) where for the performance of any act time is granted or extended on an application made by the occupier or manager of a factory, the period of limitation shall be computed from the date on which the time so granted or extended expired."

4. No doubt, careful perusal of the aforesaid provision of law clearly suggests that no court can take cognizance of any offence punishable under this Act, unless complaint is made within three months from the date, on which commission of alleged offence came into the knowledge of the Inspector.

5. In the case at hand, careful perusal of reply having been filed by the respondents suggests that the inspection of the premises of petitioners was conducted on

3.2.2017, but thereafter case for prosecution sanction was sent to the Labour Commissioner-cum-Chief Inspector Factories on 13.2.2017 by respondent No.3 and prosecution sanction was received by Labour Inspector, Palampur, District Kangra, Himachal Pradesh on 11.5.2017 and thereafter, case was filed before the learned Court below on 22.5.2017.

6. Mr. Sanjeev Sood, learned Additional Advocate General, while inviting attention of this Court to the provisions of Section 470(3) CrPC, strenuously argued that the time spent in procuring prosecution sanction from the competent authority is/was required to be excluded while computing limitation and as such, case filed by the Labour Officer against the petitioners is well within limitation, as such, present petition deserves to be dismissed.

7. At this stage, it would be profitable to take note of provisions of S.470 CrPC, which provide as under:

> *"Exclusion of time in certain cases*
>
> 1. In computing the period of limitation, the time during which any person has been prosecuting with due diligence another prosecution, whether in a Court of first instance or in a Court of appeal or revision, against the offender, shall be excluded:
>
>    **Provided** that no such exclusion shall be made unless the prosecution relates to the same facts and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> 2. Where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, in computing the period of limitation, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.
>
> 3. Where notice of prosecution for an offence has been given, or where, under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, then, in computing the period of limitation, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded."

8. Careful perusal of aforesaid provisions of S.470)3) CrPC, clearly suggests that where notice of prosecution for an offence is given, or where, under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, then, in computing the period of limitation, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

9. In the case at hand, learned counsel representing the petitioner was unable to dispute that the concerned Labour Inspector after having inspected the premises on 3.2.2017, had sent the case for prosecution sanction to Labour Commissioner-cum-Chief Inspector Factories on 13.2.2017, rather, material placed on record by the respondents suggests that respondent No.3, after having received report from respondent No.4, forwarded the case to the Labour Commissioner-cum-Chief Inspector Factories, on 13.2.2017, for prosecution sanction and sanction was received on 11.5.2017, whereafter, case came to be filed before the learned trial Court on 22.5.2017.

10. Consequently, in view of the detailed discussion made herein above as well as provisions of law extracted above, there is no merit in the present petition and the same is dismissed. Pending applications, if any, are disposed of. Interim directions, if any, are vacated. Record of the court below, if received, be sent back forthwith.

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

CWP No. 10142 of 2011 with
CWP's No. 7862, 7882 and 7901 of 2012
Decided on: November 19, 2018

| | | |
|---|---|---|
| **1.** | **CWP No. 10142 of 2011** | |
| | ACC Limited | ... Petitioner |
| | Versus | |
| | The State of Himachal Pradesh and others | ... Respondents |
| **2.** | **CWP No. 7862 of 2012** | |
| | Rania Ram Sharma and others | ... Petitioners |
| | Versus | |
| | State of Himachal Pradesh and others | ... Respondents |
| **3.** | **CWP No. 7882 of 2012** | |
| | Sanjay Sharma and others | ... Petitioners |
| | Versus | |
| | State of HP and others | ... Respondents |
| **4.** | **CWP No. 7901 of 2012** | |
| | Raj Kumar and others | ... Petitioners |
| | Versus | |
| | State of Himachal Pradesh and others | ... Respondents |

**Constitution of India, 1950**- Article 226- Writ Petition- Exercise of jurisdiction- Petitioner Company, engaged in manufacturing cement seeking directions to State to ensure free egress and ingress to its unit with police assistance if required- And also permit it to engage trucks or multi axle truck from other sources- Respondent truck union (R5) short of trucks- Petitioner praying for necessary directions to office bearers and members of truck union (R5) not to cause obstruction in transportation of raw material or furnished products to and from unit- On finding paucity of trucks with Truck Union (R5), High Court permitted Union to replace one multi axle trucks against too old trucks expeditiously within period of two months- Option also given to members of Union to replace another old truck with multi axle truck to maintain equal distribution- Petition disposed of. (Paras 2 & 7 to 10)

***Cases referred:***

Lekh Ram Verma and another vs. State of Himachal Pradesh and others, CWP No. 9665 of 2011-G decided on 1.5.2012

Rania Ram and others vs. State of Himachal Pradesh and others, CWP No. 7862 of 2012

**CWP No. 10142 of 2011**

For the petitioner: Mr. K.D. Sood, Senior Advocate with Mr. Het Ram Thakur, Advocate.

For the respondents: Mr. S.C. Sharma, Additional Advocate General with Mr. Amit Kumar, Deputy Advocate General, for respondents No.1 to 4.
Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Pal Thakur, Advocate, for respondent No.5.
Mr. J.L. Bhardwaj, Advocate, for respondent No. 6.
None for respondent No. 7.

**CWP No. 7862 of 2012**

For the petitioners: Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate.

For the respondents: Mr. S.C. Sharma, Additional Advocate General with Mr. Amit Kumar, Deputy Advocate General, for respondents No.1 to 3.
Mr. K.D. Sood, Senior Advocate with Mr. Het Ram Thakur, Advocate, for respondent No.4.
Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Pal Thakur, Advocate, for respondent No.5.

**CWP No. 7882 of 2012**

For the petitioners: Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.

For the respondents: Mr. S.C. Sharma, Additional Advocate General with Mr. Amit Kumar, Deputy Advocate General, for respondents No.1 to 3.
Mr. K.D. Sood, Senior Advocate with Mr. Het Ram Thakur, Advocate, for respondent No.4.
Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Pal Thakur, Advocate, for respondent No.5.

**CWP No. 7901 of 2012**

For the petitioner: Mr. Sunil Mohan Goel, Advocate.

For the respondents: Mr. S.C. Sharma, Additional Advocate General with Mr. Amit Kumar, Deputy Advocate General, for respondents No.1 to 3.
Mr. K.D. Sood, Senior Advocate with Mr. Het Ram Thakur, Advocate, for respondent No.4.
Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Pal Thakur, Advocate, for respondent No.5.
Mr. Rajnish Maniktala, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

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

Since, common questions of law and facts are involved in all these petitions, same were tagged together and are being disposed of by this common judgment.

2. By way of CWP No. 10142 of 2011, filed under Art. 226 of the Constitution of India, petitioner i.e. ACC Limited, approached this court mainly praying for the following reliefs:

> "a. Direct respondents 1 to 4 to ensure free egress and ingress and facilities in the petitioner unit in Barmana, Tehsil Bilaspur, District Bilaspur, H.P. and allow transportation of its raw-material, cement and clinker in

trucks/multi-axle trucks hired by them from other unions or private parties or its own trucks to the extent respondent No. 5 union is not able to supply as presently there is shortage of 480 trucks;

b. Direct respondents No.1 to 3 that respondents 5 to 7, its members, workers and employees not cause any interference or obstruction for the transportation of the petitioner product, raw-material within and outside the State of Himachal Pradesh in hired trucks or its own trucks or trucks engaged from any other source other than respondent No.5 to the extent it is not able t supply the trucks;

c. Direct the respondents 1 to 4 to maintain law and order and take preventive action for breach of peace and untoward incidents due to the acts of omission and commission on the part of the respondents 5 to 7;

d. Director respondents 5 to 7, their employees, agents, servants and members not to interfere with the Constitutional and statutory right of the petitioner to transport its products and causing any obstruction to the petitioner companies goods and finished products within and outside the State of Himachal Pradesh in the trucks hired from any source or its own trucks;"

3. Writ petition having been filed by above named petitioner came to be tagged with CWP No. 9665 of 2011-G titled **Lekh Ram Verma and another** v. **State of Himachal Pradesh and others**,(decided on 1.5.2012) and Division Bench of this court passed following order on 24.11.2011:

"The issue raised in these two writ petitions pertains to the perennial problem cropping up periodically with regard to the transportation of goods to and from ACC factory at Barmana, Bilaspur. The promise of the Company was only to provide direct and indirect employment while setting up the cement factory. It appears the oustees and other affected persons had formed a cooperative society, but the membership was limited to the people who owned trucks. There was a restriction with regard to the maximum number of trucks by the members i.e. two trucks. Subsequently, it appears the society did not grant membership to all those applicants, who also came forward with the grievance that they are also affected parties. That issue is still pending with various authorities. In the meanwhile, the company faced the serious problem with regard to the transportation of goods. According to them, in view of the disputes and also in view of the inadequate number of trucks available with the members of the society, they are not in a position to handle their work and, therefore, it is the request of the company that they may be given a free hand to engage anybody for transportation of the goods to and from the Company.

Faced with the potential threat on the request made by the company, the members submitted that they may be granted some time to sort out the disputes and according to them the disputes of all the affected parties can be settled amongst themselves. That appears to be a genuine request. The affected parties, if so advised, has to find out the solution to settle the disputes amongst themselves lest they shall not and cannot stand in the way of the work in the factory being smoothly carried out. As suggested, one month's time is granted to the oustees and the affected parties to find out a solution amongst themselves. In case any assistance is required from the Registrar, Cooperative Society, they are free to have the intervention of that

Authority as well. The disputes will include the issue on new membership, number of the trucks, type of the trucks etc.

Till a resolution of the disputes is found, as above, there has to be an appropriate interim arrangement. We are informed that around 100 multi axil trucks have been purchased prior to 30th September, 2011 by some of the members. The purchase, as above, was made on the understanding that the members are free to replace their old trucks by multi axil trucks. There will be a direction to the Company and others to permit those multi axil trucks purchased by the members and provided with temporary numbers on or before 30th September, 2011 to be engaged for the transportation of the goods to and from the Company. It is made clear that no multi axil truck shall be permitted to carry load in excess of the permitted load as entered in the RC book.

There will be a direction to the RTO, Bilaspur and all the Districts through which the goods are carried and also the Superintendents of Police and all other Police personnel working in the Districts to periodically check the load to ensure that the multi axil trucks and other trucks carry the load only to the extent as entered in the RC book. To compensate the work as lost by the ordinary truck owners, the ration of two ordinary trucks to one multi axil truck shall be maintained in the matter of distribution of work. In other words, in place of one multi axil truck, two ordinary trucks shall be permitted to ply for the transportation of goods. In the case of the ordinary trucks also, they shall be permitted to carry only the load as entered in the RC book. The load that is carried by those ordinary trucks shall also be verified periodically by the Motor Vehicle Authorities and the Police, as referred to above and appropriate action shall be taken to ensure that the ordinary and multi axil trucks carry only the load to the extent permitted and as entered in the RC book.

In case after the distribution of work as above, among the multi axil trucks and ordinary trucks from amongst the members of the Cooperative Society, the Company finds that there is still work left, it is open to the company to engage the tucks owned by the affected-non-members. In the distribution of work, as above, also the ratio of 1:2 between multi axil trucks and the ordinary trucks shall be maintained.

There will be a direction to the Company to ensure that only the permitted load is put on the trucks and if not they shall also be liable for prosecution and penal consequences. In case, there is any difficulty with regard to the implementation of the orders, as above, all the parties concerned shall seek appropriate clarification from this Court only. It is further made clear that in case there is any obstruction from any quarter with regard to working arrangement, as above, there will be a direction to the Superintendents of Police of all the Districts to see that adequate and effective protection is granted to the company and the trucks plying with the load as above.

All the previous orders passed with regard to the transportation of goods to and from the ACC Barmana will stand modified to this extent.

We make it clear that this order will not stand in the way of the general body of the Society deciding to induct new members. Needless to say that the previous Resolution of the general body shall not stand in the way of the general body of the Society taking fresh decisions.

Post the case for further orders on 29th December, 2011.

All the impleadment applications are allowed and disposed of in both the writ petitions.

Authenticated copy."

4. Subsequently, other petitioners, as captioned herein above, by way of CWP's No. 7862 of 2012, 7882 of 2012 and 7901 of 2012, approached this court with almost similar relief. Main reliefs as sought in CWP No. 7862 of 2012 titled **Rania Ram and others** v. **State of Himachal Pradesh and others**, are being extracted herein below:

"i) Issue a writ of certiorari to quash proceedings dated 18-08-2012 i.e. annexure P-6 and resolution dated 31-08-2012 i.e. annexure P-7 to the extent thy debar multi-axle trucks purchased prior to 30-09-2011 which had been functioning/operating in the society in question to be no longer used in the society in question.

ii) Issue a writ of mandamus directing the respondents not to give effect to proceedings dated 18-08-2012 i.e. annexure P-6 and resolution dated 31-08-2012 i.e. annexure P-7 to the extent they debar multi-axle trucks purchased prior to 30-09-2011 which had been functioning/operating in the society in question to be no longer used in the society in question.

iii) Issue a writ of mandamus directing the respondent No.4 to permit multi-axle trucks purchased prior to 30-09-2011 which had been functioning/operating in the society in question to be used if in case the society in question does not permit the same to function/operate."

5. On 19.9.2012, this court having taken note of averments contained in CWP's No. 7862, 7882 and 7901 of 2012, passed following order:

"The Bilaspur District Truck Operators Cooperative Transport Society Ltd. Barmana has taken a Resolution dated 31.8.2012 to the effect that there shall be no use of multi axil trucks for the transportation and that the multi axil trucks purchased prior to 30th September, 2011 shall also not be permitted to operate. The petitioners in these cases have filed the writ petition aggrieved by the said Resolution. The issue has a chequered history and to some extent, we have referred the history in detailed interim order passed by this Court on 24.11.2011. It is a common order in two cases, namely, CWP No. 9665/2011 and CWP No.10142/2011. Only CWP No. 9665 of 2011 was disposed of. CWP No. 10142 of 2011 is still pending. Therefore, interim order dated 24.11.2011 is still in force. In the said order, this Court issued a direction as follows:

"There will be a direction to the Company and others to permit those multi axil trucks purchased by the members and provided with temporary numbers on or before 30th September, 2011 to be engaged for the transportation of the goods to and from the Company. It is made clear that no multi axil truck shall be permitted to carry load in excess of the permitted load as entered in the RC book."

2. As far as distribution of work, it was made clear in the order that the ratio of 1:2 between multi axil trucks and the ordinary trucks shall be maintained. Still further, it was ordered that " in case, there is any difficulty with regard to the implementation of the orders, as above, all the parties concerned shall seek appropriate clarification from this Court only." That

order is still in force. As far as CWP No. 10142 of 2011 is concerned, the Society is a party to the said writ petition. Only CWP No. 9665 of 2011 was disposed of by judgment dated 1st May, 2012 reserving liberty to the Society in its General Body to take appropriate decision in accordance with law.

3. So long as the interim order, referred to above, in CWP No. 10142 of 2012 is still in force, all the parties, including the Company and the Society and Operators are bound by the said order. In that view of the matter, there will be stay of operation of the implementation of the Resolution dated 31st August, 2012 taken by the Society with regard to dis-continuance of multi axil trucks.

4. Post these writ petitions along with CWP No. 10142 of 2011 on 28th September, 2012."

6. After passing of order dated 19.9.2012, all the petitions, captioned herein above, are being heard together. Subsequently, applicant/respondent No. 5 i.e. Bilaspur District Truck Operators Cooperative Transport Society Ltd., filed CMP No. 7198 of 2015 under Rule 4, Part C of the HP High Court Writ Rules, 1997 for modification of order dated 24.11.2011, which came up for consideration before this court on 11.12.2015, when this court passed following order:

**"CMP No. 7198 of 2015 in CWP No. 10142 of 2011**

Heard for sometime. In this application applicant-respondent No. 5, The Bilaspur District Truck Operators, Cooperative Transport Society Limited has sought the permission to replace its existing fleet of old trucks with new multi axle trucks, in modification of the interim order passed in the writ petition on 24.11.2011 whereby the petitioner-Company has been directed to allocate temporary numbers to multi axle trucks, around 100 in number purchased by the members of the applicant-Society prior to 30th September, 2011 and to engage the same for transportation of its goods to and fro, subject to the condition that these trucks should not carry load in excess of the permitted load as per entries in the RC book. Applicant-Society intends to replace its old fleet of trucks more than 2000 in number as per list attached to the supplementary affidavit filed by Sh. Ramesh Thakur, its President on 9.12.2015.

2. This writ petition has been filed by one of the Companies i.e. ACC Limited which has installed its cement plant under the name and style 'Gagal Cement Works' at Barmana in District Bilaspur. There are two more cement plants, namely; Ambuja Cement Plant installed at Darlaghat, and Jaypee Himachal Cement Plant at Bagga, in District, Solan, H.P. The trucks engaged by Ambuja Cement Plant for transportation of its goods to and fro from Darlaghat are being plied to its destination on Shimla-Bilaspur road and connects national highway No. 21 at Nauni, a place approximately 7-8 kilometers behind Bilaspur. The trucks carrying goods from Jaypee Himachal Cement Plant are also being plied from Bagga to Nauni via Jukhala and Brahmpukhar in District Bilaspur. As a matter of fact, the trucks carrying goods from the cement plants at Darlaghat and Bagha joins each other at Brahmpukhar junction and thereafter being driven to Nauni and take diversion there to Punjab and Haryana side and other destinations. Similarly, the trucks carrying goods of the petitioner herein are also being driven from Barmana towards Punjab, Haryana and other destinations via Bilaspur. The trucks carrying goods from the petitioner Company also joins

the trucks carrying goods of the two cement plants as aforesaid at Nauni. As a matter of fact, the trucks carrying goods from all the three cement plants join at Nauni and then can be seen being driven in the form of a convoy. Mostly, the drivers of the trucks due to lack of sensitization, particularly qua traffic rules, not allow the other users of the road to overtake the trucks being driven by them and as a result thereof the people traveling in public transport vehicles/private transport vehicles are forced to bear with smoke and dust being emanated by plying of these trucks. The plight of other users of the road, therefore, is becoming bad to worse particularly when the roads in the State mostly pass through hilly terrain. Therefore, the anxiety and concern of the Court is to protect the safety and comfort of other users of the road.

3. One should, therefore, not lost sight of the fact that allowing to ply multi axle trucks in such a large number on hilly terrain would obviously result in human problems multifarious in nature. This Court feels that before hearing this application any further, not only the applicant-respondent Society but also the petitioner Company as well as the respondent-State to come forward with their suggestions on the following:

i) The ways and means which can be resorted to, to ensure safe, comfortable and pollution free journey by the citizens traveling in their own vehicles, public transport vehicles and private transport vehicles.

ii) The ways and means which can be resorted to, to ease out the congestion/traffic jam on the roads being used by the trucks carrying the goods of the petitioner-Company.

iii) Uniform procedure to be followed by the applicant-Society qua engagement of Drivers efficient, sensitive and having good knowledge of traffic rules to drive the trucks and the necessity of holding workshops/seminars to impart training to them periodically, particularly to sensitize them about the problems being faced by other users of the road i.e. the people traveling in public transport vehicles/private transport vehicles.

iv) The protection of environment from pollution emanates on account of driving of the trucks in such a large number.

v) How to ensure the maintenance of the roads being used for plying the trucks carrying goods to and fro from the cement plants.

vi) The possibility of fixation of time schedule day i.e. in 24 hours to ply the trucks on the road and no entry thereof after the time so fixed is over.

vii) The construction of separate bay for being used by the trucks carrying goods to and fro from the cement plants.

Besides, the above, respondent-State also to apprise this Court about the steps, if any, taken to regulate the movement of the trucks carrying goods to and fro from the cement plants to ensure the safety and comfort of the people traveling through public or private transport vehicles and other users of the road.

List on 18th December, 2015.

The Ambuja and Jaypee Industries having its cement plants at Darlaghat and Bagga though are not party in the present writ petition, however, Mr. K.D. Sood, learned Senior Advocate who generally represents these Companies in this Court is requested to supply a copy of this order to the said Companies also and ensure that their suggestions on the above points are also placed on record on the date already fixed.

An authenticated copy to learned Additional Advocate General, Mr. K.D. Sood, learned Senior Advocate and Mr. Ramakant Sharma, learned Senior Advocate for compliance."

7. This court, after having taken note of the averments contained in the aforesaid application, formulated certain points and directed the parties concerned to place on record suggestions qua the same.

8. Today, during the proceedings of the case, learned counsel representing the parties on instructions of their respective clients, stated before this court that it has been amicably resolved *inter se* parties that prayer made in CMP No. 7198 of 2015 having been filed by respondent No.5, may be accepted. Mr. Ramakant Sharma, learned Senior Advocate stated that as per settlement *inter se* parties, old trucks in the existing fleet of the society would be permitted to be replaced by new multi-axle trucks i.e. one multi-axle truck will replace two ordinary trucks, which shall not harm or prejudice any party to the *lis* rather the same would help ensure the very existence and continuation of M/s Bilaspur District Truck Operators Cooperative Transport Society Ltd.

9. Mr. K.D. Sood, learned Senior Advocate, representing the ACC, states that the Company has no objection to aforesaid arrangement but M/s Bilaspur District Truck Operators Cooperative Transport Society Ltd. may be directed to strictly comply with the aforesaid agreement, because, on account of non-adherence, company shall suffer irreparable loss and injury. He also stated that all the stake-holders may be directed to do the needful within stipulated time, failing which liberty be granted to the ACC Cement Company to make alternative arrangement for transportation of cement so that no undue hardship/financial loss is caused to the company.

10. Consequently, in view of the statement made by the learned counsel representing the parties, on the instructions of their respective clients, CMP No. 7198 of 2015 in CWP No. 10142 of 2011, having been filed by the respondent No. 5, praying therein for modification of order dated 24.11.2011, is allowed and order is modified to the extent that M/s Bilaspur District Truck Operators Cooperative Transport Society Ltd. is permitted to replace its existing fleet of old trucks by means of new multi-axle trucks in the following manner, as agreed:

(a) Two ordinary trucks engaged with the Society shall be replaced by one multi-axle truck.

(b) In the cases, where one ordinary truck has been replaced by one multi-axle truck, the work to be allotted shall be reduced to half.

(c) In the case as referred to above, where one multi-axle truck has replaced one ordinary truck, option may be given to the owner/members to remove another old /ordinary truck, to maintain equal distribution of work.

11. However, it is made clear that to avoid inconvenience and financial loss to the ACC Company Limited, needful shall be done by all the stake-holders, especially M/s Bilaspur District Truck Operators Cooperative Transport Society Ltd., expeditiously within a period of two months.

12. Accordingly, in view of the above, all the petitions having been rendered infructuous, are accordingly, disposed of alongwith all pending applications.

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

Shankar Dass ...Petitioner
Versus
State of Himachal Pradesh and others ...Respondents

CrMMO No. 262 of 2016
Decided on: November 26, 2018

**Code of Criminal Procedure, 1973-** Section 482- **Himachal Pradesh Panchayati Raj Act,1994 (Act) –** Section 32 –Transfer of case- After investigating FIR lodged by petitioner, Investigating officer holding commission of offences punishable under sections 323, 341 and 504 of Indian Penal Code, 1860 and sending record to Panchayat since offences exclusively triable by it under Act- Petitioner filing petition in High Court for direction for registration of case against respondents under sections 307, 326, 341, 504, 506 and 34 Indian Penal Code, 1860. Also praying for cancelling summons issued by Gram Panchayat. Facts revealing that investigating officer had obtained medical opinion about nature of injuries suffered by petitioner- Injuries found simple in nature and not dangerous to life- Petition dismissed. (Paras 4 to 6)

For the petitioner: Mr. Sushant Veer Singh Thakur and Mr. Parshotam Chaudhary, Advocates.

For the respondents: Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General with Mr. Amit Kumar, Deputy Advocate General, for respondents No.1 to 3.
Mr. Suresh Kumar, Advocate, for respondent No.4.
None for respondent No.5.
Ms. Leena Guleria, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

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

By way of instant petition filed under S.482 CrPC, petitioner has sought direction to respondent No. 2 i.e. Superintendent of Police, Hamirpur, for registering a case against respondents No. 6 and 7, under Ss. 307, 326, 341, 504, 506 and 34 IPC. Petitioner has also prayed that summons dated 1.8.2016 issued by respondent No.5-Gram Panchayat Putdiyal, Tehsil Nadaun be cancelled/stayed and consequential proceedings arising out of FIR No. 59 dated 25.6.2016 may also be stayed.

2. In nutshell, case of the petitioner, as emerges from the record is that on 25.6.2016, he was given merciless beatings by respondents No. 6 and 7, as a consequence of which, he suffered simple as well as grievous injuries. Petitioner has alleged that respondents No. 6 and 7, who allegedly gave him beatings, have been protected by the Police as well as Medical Officer, who medically examined him. Petitioner has alleged that he

suffered grievous injuries on his head, as a consequence of which he received eight stitches on his forehead, but the Medical Officer, while issuing MLC only stated that the petitioner suffered simple injuries on account of alleged beatings given by accused. Petitioner further alleged that the report of Medical Officer, Government Hospital, Hamirpur has been issued under the influence of the accused as well as Station House Officer. At the time of lodging of FIR, case under Ss.341, 323, 504, 506 and 34 IPC was registered against respondents No. 6 and 7, but while presenting *Challan* under S.173 CrPC, in the competent Court of law, Investigating Officer purposely and knowing fully well, placed wrong facts before the court below and has wrongly stated that case under Ss. 341, 323 and 504 IPC is made out against respondents No. 6 and 7 and same falls within the cognizance of the Gram Panchayat. In the aforesaid background, petitioner has approached this court in the instant proceedings, seeking therein direction to stay the proceedings pending before the Gram Panchayat concerned.

3. Having heard the learned counsel representing the parties and perused the reply having been filed on behalf of respondents No.1 to 3, this court finds that the FIR was lodged on the basis of statement of petitioner Shankar Dass, under Ss. 341, 323, 504, 506 and 34 IPC, but for the purpose of inserting other Sections i.e. 325 and 307 IPC, Investigating Officer sought opinion of Medical Officer, who had medically examined the injured/petitioner. Investigating Officer moved an application dated 25.6.2016 (Annexure R-1) to the Medical Officer, requesting therein to give his opinion with regard to injuries allegedly suffered by petitioner on account of beatings given by respondents No. 6 and 7. Careful perusal of opinion of the Medical Officer (Annexure R-2) clearly suggests that injuries suffered by petitioner were simple in nature and as such, there was no occasion for the Investigating Officer to incorporate Ss. 325 and 307 IPC as argued by the learned counsel representing the petitioner. Medical Officer has specifically opined that, "*Injury No. (1), (2) and (3) are simple and not dangerous for live.* (Page-69 of the paper-book)"

4. Similarly, this court finds that as per Schedule III provided in Himachal Pradesh Panchayati Raj Act, 1994, (Annexure R-3), offences under Ss. 341, 323 and 504 IPC, are triable by Gram Panchayat and as such, this court sees no illegality or infirmity in the action of Gram Panchayat in as much as issuance of summons to respondents No. 6 and 7 is concerned, rather, S.32 of the Himachal Pradesh Panchayati Raj Act, 1994, makes it mandatory that the offences, which exclusively falls within the cognizance of the Gram Panchayat, should be tried by the Panchayat only. S.32 of the Act *ibid* is reproduced hereunder:

> "32. Offences cognizable by Gram Panchayat.-
>
> (1) Offences mentioned in Schedule-III or declared by the State Government to be cognizable by a Gram Panchayat, if committed within the jurisdiction of a Gram Panchayat, and abetment of and attempts to commit such offences shall be cognizable by such Gram Panchayat.
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> (2) Application for maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974), shall be heard and decided by the Gram Panchayat. A Gram Panchayat may grant a maintenance allowance not exceeding five hundred rupees per month on such application without prejudice to any other law for the time being in force in this behalf"

5. Similarly, careful perusal of statements of Shankar Dass and Kuldeep Singh, Annexures R-5 and R-6, respectively, suggests that the accused, while leaving the spot had

not threatened the petitioner with dire consequences to his life. Kuldeep Singh, who happened to be the eye witness, categorically stated before the Investigating Officer that the accused persons have not threatened the petitioner with dire consequences and the petitioner (Shankar Dass) himself, in his statement recorded on 26.6.2016, stated before the Investigating Officer that the accused persons did not threaten him with dire consequences and as such, there appears to be no illegality or infirmity in the action of Investigating Officer in not incorporating the offences punishable under Ss. 506 IPC, while presenting *Challan* under S.173 CrPC, in the competent Court of law. Though, there are vague allegations levelled in the petition with regard to collusion of Investigating Officer and Medical Officer, who had issued the MLC, but there is no convincing evidence/material placed on record to substantiate such allegations, as such, same can not be made basis to reject the report submitted under S.173 CrPC.

6. Consequently, in view of above, this court sees no reason to entertain the present petition, which is dismissed being devoid of merit, alongwith pending applications, if any. Interim directions, if any, are vacated. Record, if any received, be sent back forthwith. Gram Panchayat concerned is directed to proceed with the proceedings.

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

Parkash Chand .. Petitioner

Versus

State of Himachal Pradesh and others .. Respondents

CMPMO No. 185 of 2017
Decided on: November 27, 2018

**Constitution of India, 1950-** Article 227- **Himachal Pradesh Panchayati Raj Act, 1994 (Act) -** Sections 11, 12, 13, 41, 71, 180 and 228 – Encroachment over private land- Removal of- Whether Panchayat has jurisdiction to order its removal? Gram Panchayat taking cognizance on complaint, getting lands demarcated and finding respondent having encroached land- Panchayat directing respondent to remove construction- Order attaining finality- In execution Panchayat asking respondent to remove construction with in specific time- Petition against- Held- Gram Panchayat had no authority or jurisdiction to determine private dispute *inter se* parties with regard to immovable property. Petition allowed-Order set aside. (Paras 22 & 23).

***Cases referred:***

Chandrika vs. Bhaiyalal AIR 1973 SC 2391

The Rajasthan State Industrial Development and Investment Corporation Vs. Subhash Sindhi Cooperative Housing Society Jaipur & Ors., 2013 (2) Civil Court Cases 766

For the petitioner : Mr. Romesh Verma, Advocate.

For the respondents : Mr. Dinesh Thakur, Additional Advocate General with Mr. Amit Kumar, Deputy Advocate General, for respondents No.1 and 2.

None for respondent No.3.

Mr. Sunny Dhatwalia, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

**Sandeep Sharma, Judge**:(oral)

By way of present petition filed under **Art. 227 of the Constitution of India**, petitioner, while raising an important question with regard to competence of a Gram Panchayat to adjudicate a dispute *inter se* two individuals with regard to encroachment over private land, has laid challenge to order dated 18.10.2016 (Annexure P-5) passed by the learned Sub Divisional Magistrate, Tehsil Barsar, District Hamirpur, Himachal Pradesh, in Case No. 5 of 2015 and order dated 7.7.2010 (Annexure P-1) passed by the Gram Panchayat, Sour, Tehsil Barsar, District Hamirpur, Himachal Pradesh.

2. For having a bird's eye view, facts in brief, as emerge from the record are that respondent No.3, Gram Panchayat, Sour, taking cognizance of a complaint having been filed by respondent No.4, to the effect that the petitioner has encroached upon certain portion of his private land, initiated proceedings for encroachment against the petitioner, under the provisions of Himachal Pradesh Panchayati Raj Act, 1994. Careful perusal of order dated 7.7.2010, passed by Gram Panchayat, Sour, respondent No.3, suggests that the demarcation of the land in dispute was got conducted by the Panchayat itself in the presence of the parties, wherein, allegedly, petitioner agreed to vacate the land encroached upon by him. Since, despite assurance having been given by petitioner, he failed to vacate the encroachment, Gram Panchayat, Sour passed an order dated 7.7.2010, whereby it directed the petitioner to remove *Palli* from the land of respondent No.4, within a period of 30 days. Perusal of impugned order referred to herein above, further reveals that the Gram Panchayat imposed a penalty of Rs. 10/- under Ss. 180 and 228 of the Act *ibid*.

3. Aggrieved with the passing of order dated 7.7.2010, petitioner preferred an appeal in the court of learned Judicial Magistrate 1st Class Barsar, District Hamirpur, Himachal Pradesh under S.67 of the Act, however, the fact remains that the same was partly allowed, whereby order dated 7.7.2010 passed by Gram Panchayat, Sour, to the extent of imposition of fine to the tune of Rs. 10/- upon the petitioner, was set aside, whereas remaining order was upheld. It is also not in dispute that against aforesaid order passed by the Judicial Magistrate 1st Class, Barsar, petitioner has not filed any appeal or any other proceedings in any court of law.

4. In the year 2015, respondent No.4 filed an application (Annexure P-3) under S.71 of the Act *ibid* in the court of learned Sub Division Collector-cum-Sub Divisional Magistrate, Barsar, District Hamirpur, Himachal Pradesh, praying therein for execution/implementation of order dated 7.7.2010 passed by the Gram Panchayat Sour, Tehsil Barsar, District Hamirpur, Himachal Pradesh. Learned Sub Divisional Magistrate, Barsar, vide order dated 18.10.2016 (Annexure P-5) allowed the aforesaid application and directed the Gram Panchayat concerned to execute the order dated 7.7.2010. In the aforesaid background, petitioner has approached this court in the instant proceedings, praying therein for setting aside order dated 7.7.2010 passed by Gram Panchayat Sour (Annexures P-1), order dated 4.1.2012(Annexure P-2) passed by Judicial Magistrate 1st Class Barsar in Panchayat Appeal No. 04/2010 and order dated 18.10.2016(Annexure P-5) passed by Sub Divisional Magistrate, Barsar, District Hamirpur, Himachal Pradesh in Case No. 05/2015, being illegal, without any jurisdiction and contrary to the provisions of law.

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

6. Having heard the learned counsel representing the parties and perused the various provisions contained under the Act *ibid*, this court is persuaded to agree with the contention of Mr. Romesh Verma, learned counsel representing the petitioner that order dated 7.7.2010 (Annexure P-1) passed by Gram Panchayat Sour on the complaint of respondent No.4, is without any jurisdiction or authority. There appears to be no provision under the Act *ibid* authorizing the Gram Panchayat to adjudicate a private dispute of land *inter se* parties. At this stage, following provisions of the Act *ibid*, can usefully be extracted hereunder:

**"11. Functions of Gram Panchayat.-**

[(1) The Gram Panchayat shall perform the functions specified in Schedule-I.]the functions specified in Schedule-I.]

(2) Notwithstanding anything contained in this Act the State Government may, by general or special order, entrust to the Gram Panchayat preparation of plans and implementation of schemes for economic development and social justice [including those matters specified in Schedule-II and the Gram Panchayat shall perform such functions.]

(3) The State Government may, by general or special order, add to any of the functions of the Gram Panchayat or withdraw the functions and duties entrusted to such a Gram Panchayat, when the State Government under takes the execution of any of the functions entrusted to the Gram Panchayat, the Gram Panchayat shall not be responsible for such functions so long as the State Government does not re-entrust such functions to the Gram panchayat.

(4) The Government may, by notification and subject to such conditions as may be specified therein ,-

(a) transfer to any Gram Panchayat the management and maintenance of a forest situated in the Gram Sabha area ;

(b) make over the Gram Panchayat the management of waste lands, pasture lands or vacant lands belonging to the Government situated within the Gram Sabha area ;

(c) transfer to the Gram Panchayat the protection of any irrigation work and its execution and the regulation/distribution of water from any such work ;

(d) transfer to the Gram Panchayat any public property situated within the jurisdiction of the Gram Sabha ;

(e) entrust the gram Panchayat with the collection of land revenue on behalf of the Government and the maintenance of such records as are connected therewith; and

(f) entrust such other functions as may be prescribed:

Provided that when any transfer of the management and maintenance of a forest is made under clause (a) or the transfer of any irrigation work is made under clause (c), the Government shall direct that any amount required for such management and maintenance or an adequate portion of the income from such forest or irrigation work be placed at the disposal of the Gram Panchayat.

(5) A Gram Panchayat shall have powers to do all acts necessary for or incidental to the carrying out of the functions entrusted, assigned or

delegated to it and, in particular, and without prejudice to the foregoing powers, to exercise all powers specified under this Act. 1

[(11-A). Registration of cattle and maintenance of record therefor.-

(1) Head of every family shall be responsible to give or cause to be given, either orally or in writing, the details of cattle owned by his family to the concerned Pradhan or the Panchayat Secretary of the Gram Panchayat, within a period of one month from the commencement of the Himachal Pradesh Panchayati Raj (Amendment) Act, 2006, and thereafter every time as and when any change in the number of cattle takes place by any reasons.

(2) On receipt of the details of cattle under sub-section (1), the Gram Panchayat shall register cattle and shall maintain records thereof in such form as may be notified by the State Government:

Provided that the Gram Panchayat may charge registration fee at such rate as may be fixed by the Gram Panchayat.

(3) It shall be the duty of the Gram Panchayat to assist the officials or persons engaged by the Animal Husbandry Department for applying appropriate identification mark on each cattle and to maintain the record of identification.

(4) It shall be the duty of every Gram Panchayat to assist the officials or representatives of the Animal Husbandry Department in identifying the stray cattle within its jurisdiction.

(5) If any cattle with identification mark is found stray, the owner of the cattle shall be identified by the Gram Panchayat from the record maintained by it and such owner shall be liable to a fine of 2 [five hundred] rupees for the first offence and 3 [seven hundred] rupees in the event of second or subsequent offence, which shall be imposed by the Gram Panchayat.

(6) If the Gram Panchayat fails in identifying such stray cattle due to tampering with identification mark or mutilation thereof, it shall report the matter to the In-charge of the nearest Animal Husbandry Dispensary who shall lodge the stray cattle to the nearest Gosadan or Goshala.]

12. Power of removal of encroachments and nuisance.-

(1) A Gram Panchayat, on receiving a report or other information and on taking such evidence, if any, as it thinks fit, may make a conditional order requiring, within a time to be fixed in the order-

(a) The owner or the occupier of any building or land-

(i) to remove any encroachment on a public street, place or drain;

(ii) to close, remove, alter, repair, cleanse, disinfect or put in good order any latrine, urinal, water closet, drain, cesspool or other receptacle for filth, sullage-water, rubbish or refuse or to remove or alter any door or trap or construct any drain for any such latrine, urinal or water closet which opens on to a street, drain or to shut off such latrine, urinal, water closet by a sufficient roof and wall or fence from the view of persons passing by or dwelling in the neighborhood;

(iii) to cleanse, repair, cover, fill up, drain off, deepen or to remove water from a private well, tank, reservoir, pool, pit,

ditch, depression or excavation therein which may appear to the Gram Panchayat to be injurious to health or offensive to the neighborhood;

(iv) to remove any dirt, dung, night soil, manure or any noxious or offensive matter therefrom and to cleanse the land or building;

(b) the owner of any wall or building which is deemed by the Gram Panchayat to be in any way dangerous, to remove or repair such wall or building;

(c) the owner or occupier of any building or property to keep his building or property in a sanitary state;

(d) the owner of any dog or other animal suffering or reasonably suspected to be suffering from rabbis or which is dangerous, to destroy or confine or cause to be destroyed or confined such dog or animal;

(e) the owner or occupier of any agricultural land to destroy harmful weeds from such land;

(f) the owner or occupier concerned to reclaim an unhealthy place;

(g) the owner or occupier of any building or land to maintain in proper repair the level and surface of any road or street passing in front of the building or through his land; and

(h) the owner or person-in-charge of a private water channel to keep it in a state of reasonable repair;

or, if he objects so to do, to appear before it, at a time and place to be fixed by the order and to move to have the order set aside or modified in the manner hereinafter provided. If he does not perform such act or appear and show cause, the order shall be made absolute. If he appears and shows cause against the order, the Gram Panchayat shall take evidence and if it is satisfied that order is not reasonable and proper, no further proceedings shall be taken in the case. If it is not so satisfied, the order shall be confirmed or modified as it deems fit.

(2) if such act is not performed within the time fixed, the Gram Panchayat may cause it to be performed and may recover the costs of performing it from such person in the prescribed manner.

(3) Any person aggrieved by an order under sub-section (1) may file an appeal within thirty days of the passing of such order before the Sub Divisional Officer who after holding such enquiry as he may deem fit, may set aside, modify or confirm the said order and his decision thereon shall be final.

13. Power to make general orders.- A Gram Panchayat may by general order to be published in the manner prescribed, -

(a) prohibit the use of water of a well, pond or other excavation suspected to be dangerous to the public health;

(b) regulate or prohibit the watering of cattle or bathing or washing at or near wells, ponds or other excavations reserved for drinking water;

(c) regulate or prohibit the steeping of hemp or any other plant in or near ponds or other excavations within two hundred and twenty metres of the residential area of a village;

(d) regulate or prohibit the dyeing or tanning of skins within four hundred and forty meters of the residential area of a village;

(e) regulate or prohibit the excavation of earth or stone or other materials, within two hundred and twenty meters of the residential area of a village:

Provided that nothing shall be done under this clause to prevent excavations meant to be filled by the foundation of buildings or other structures;

(f) regulate or prohibit the establishment of brick kilns and charcoal kilns within eight hundred and eighty meters and pottery kilns within two hundred and twenty metres of the residential area of a village;

(g) direct that the carcasses of all animals dying within the village, except animals slaughtered for consumption shall not be disposed of within a radius of four hundred and forty metres of the residential area of the village;
(h) regulate the construction of new buildings or the extension or alterations of any existing building or the abadi;

(i) regulate with the previous permission of the Government, the parking of public vehicles;

(j) regulate such matters as may be necessary for the general protection of standing trees and trees on common land and the planting of such trees;

(k) regulate the observance of sanitation and taking curative and preventive measures to remove and prevent the spread of epidemics;

(l) regulate the maintenance of water courses meant for irrigation purposes;
(m) regulate the killing of stray dogs;

(n) regulate the slaughter of animals;

(o) prohibit beggary; (p) direct the taking of measures for the prevention of water-logging;

(q) regulate the flaying and disposal of dead animals;

(r) prohibit the sale of harmful eatables within the Sabha area; and

(s) regulate offensive and dangerous trades or practices; 1

[(t) protect public property such as sign boards, mile-stones on public roads, paths, irrigation and water supply schemes, public taps, public wells, hand pumps, community centres, mahila mandal bhawans, school buildings, Health/Veterinary/Ayurvedic Institution buildings.]

41. Extent of jurisdiction.-

(1) The jurisdiction of a Gram Panchayat shall extend to any suit of the following description if its value does not exceed two thousand rupees:-

(a) a suit for money due on contract other than a contract in respect of immovable property;

(b) a suit for the recovery of movable property or for the value there of;

(c) a suit for compensation for wrongfully taking or damaging a moveable property;

(d) a suit for damages caused by cattle trespass; and

(e) a suit under clauses (f) and (i) of sub-section (3) of section 58 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (8 of 1974).

(2) Notwithstanding anything contained in sub-section (1), the State Government or the prescribed authority may, by notification in the Official Gazette, extend the pecuniary jurisdiction of Gram Panchayat to five thousand rupees in respect of any or all the suits of the description mentioned in subsection (1).

71. Execution of decrees.-

(1) A decree or order passed by a Gram Panchayat shall be executed in such manner as may be prescribed. If the property of the defendant [or respondent, as the case may be,] is situated outside the jurisdiction of the Gram Panchayat passing such order or decree, it may transfer the decree or order for execution in the prescribed manner to the Gram Panchayat within whose jurisdiction the property may be situated and if there be no such Gram Panchayat then to the court of the Sub-Judge [or the Judicial Magistrate] within whose jurisdiction it may be situated and the said Gram Panchayat or the Sub-Judge 3 [or the Judicial Magistrate], as the case may be, shall execute the decree or order as if it were a decree or order passed by it or him.

[(2) If a Gram Panchayat finds any difficulty in executing a decree or order, it may forward the same to the Sub-Judge or the Judicial Magistrate concerned and the Sub-Judge or the Judicial Magistrate, as the case may be, shall than execute the decree or order as if it were a decree or order passed by him.]

(3) An order under the Himachal Pradesh Land Revenue Act, 1953 (6 of 1954), shall, as far as possible, be executed as provided in sub-sections (1) and (2). Sub-section (2) shall be read and construed as if for the word "Sub Judge" the words "Collector concerned" were substituted.

7. Careful perusal of aforesaid provisions of law, especially Ss. 11 and 12, nowhere suggests that the Gram Panchayat is competent or empowered to take cognizance of a private dispute *inter se* parties qua the land or immovable property falling in the territorial jurisdiction of the Gram Panchayat concerned. Though S.12 empowers a Gram Panchayat to order for removal of encroachment after receiving report or other information, but it clearly speaks of encroachment over government land/Panchayat land. Similarly, S.13 empowers a Gram Panchayat to make general orders to regulate use of water bodies, regulate watering of cattle or bathing or washing, steeping of hemp, dying/tanning of skins, excavation of earth, establishment of brick kilns, disposal of carcasses, parking of public vehicles, protection of trees, sanitation, irrigation etc. S.14 authorises a Gram Panchayat to have a check on unauthorized construction in its area. As per S.14, construction, if any, can be raised within the limits of Gram Panchayat strictly as per plan approved by the Gram Panchayat. This court, was unable to lay its hand to any provision of law in the aforesaid Act, suggestive of the fact that Gram Panchayat has power to determine rights of private parties especially encroachment over private land.

8. At this stage it would be relevant to refer to S.41, which has been otherwise reproduced herein above. Save and except under S.44, there is no specific mention, if any, with regard to kind/nature of litigation Gram Panchayat can have/entertain, while exercising powers vested in it under various provisions of law contained under the Act. As

per S.41, following suits can be tried by Gram Panchayat, that too, subject to the condition that its value should not exceed Rs. 2000/-:

> "(a) a suit for money due on contract other than a contract in respect of immovable property;
>
> (b) a suit for the recovery of movable property or for the value there of;
>
> (c) a suit for compensation for wrongfully taking or damaging a moveable property;
>
> (d) a suit for damages caused by cattle trespass; and
>
> (e) a suit under clauses (f) and (i) of sub-section (3) of section 58 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (8 of 1974)."

9. Careful perusal of aforesaid provision of law i.e. S.41, nowhere provides that a suit, if any, qua dispute with regard to immovable property can be tried/entertained by a Gram Panchayat. Under S.44 of the Act *ibid*, Gram Panchayat has been specifically barred to take cognizance of following suits:

> "a suit for a balance of partnership account;
>
> (b) a suit for a share or part of a share under intestacy or for a legacy or part of legacy under a will;
>
> (c) a suit by or against the State or a public servant for acts done in his official capacity; and
>
> (d) a suit by or against a minor, or a person of unsound mind"

10. Argument having been raised by the learned counsel representing the respondent No.4 that since suit with regard to immovable property triable by Gram Panchayat has not been specifically excluded under S.44, it can be safely inferred that the Gram Panchayat has/had jurisdiction to entertain suit with regard to immovable property, is not at all tenable because, under S.41, legislation, while determining the extent of jurisdiction, has nowhere specifically included the suit qua immovable property. Once, suit for immovable property has not been included in the jurisdiction of the Gram Panchayat as provided in S.41 of the Act, there was no occasion for the legislation to specifically provide/mention the same, in the exclusion clause in the Act i.e. under S.44.

11. Having carefully perused the various provisions contained under the Act and heard the learned counsel representing the parties, this court is not persuaded to agree with Mr. Dinesh Thakur, learned Additional Advocate General appearing for respondents No.1 and 2 and Mr. Sunny Dhatwalia, learned counsel representing respondent No.4 that the Gram Panchayat was well within its right to determine private rights of the parties, while exercising powers vested in it under the Act.

12. At the cost of repetition, it may be observed that it has been nowhere provided under the functioning of the Gram Panchayat i.e. Ss. 11, 12, 13 and 14 that the Gram Panchayat shall have the jurisdiction to adjudicate the dispute, if any, *inter se* parties with regard to immovable property. Leaving everything aside, this court having carefully gone through order dated 7.7.2010 (Annexure P-1), is not able to decipher, under which provision of law/Act, Gram Panchayat Sour proceeded to initiate proceedings against the petitioner. Similarly, there is no mention that for the infraction of which provision of the Act, penalty came to be imposed upon the petitioner.

13. In view of the discussion made herein above as well as provisions of law as reproduced herein above, this court has no hesitation to conclude that the Gram Panchayat

under the Act *ibid*, had no power to adjudicate upon the private dispute *inter se* parties with regard to immovable property.

14. Now, the question, which remains to be decided by this court is, whether the order dated 7.7.2010, which otherwise has attained finality as far as main order is concerned, can be set aside in the present proceedings, especially when petitioner failed to lay challenge to the same, for almost eight years? Similarly, yet another question, requiring adjudication in the present proceedings is that whether the petitioner, after having availed remedy of appeal can be allowed to raise question with respect to jurisdiction/authority of the Gram Panchayat to pass the order dated 7.7.2010.

15. As has been held herein above, the Gram Panchayat Sour, had no authority or jurisdiction to determine private dispute *inter se* parties, with regard to immovable property as such, one thing can be safely concluded that the order dated 7.7.2010 is without jurisdiction.

16. Question, whether the order passed without jurisdiction/ authority is required to be assailed or laid challenge, is no more *res integra*. Hon'ble Apex Court and this court have repeatedly held in a catena of judgments that an order passed without jurisdiction is not required to be laid challenge, being a nullity in the eye of law.

17. Reliance is placed upon decision of the Hon'ble Apex Court in **Chandrika** v. **Bhaiyalal** AIR 1973 SC 2391, wherein it has been held as under:

> "6. It is from this Order that the present appeal has been filed by special leave. It is to be noticed that the suit had been filed in a Civil Court for possession and the Limitation Act will be the Act which will 'govern such a suit. It is not the case that U.P. Act No. 1 of 1951 authorises the filing of the suit in a Civil Court and prescribes a period of limitation for granting the relief of possession superseding the one prescribed by the Limitation Act. It was, therefore, perfectly arguable that if the suit is one properly entertainable by the Civil Court the period of limitation must be governed by the provisions of the Limitation Act and no other. In that case there would have been no alternative but to pass a decree for possession in fayour of the Plaintiffs. But the unfortunate part of the whole case is that the Civil Court had no jurisdiction at all to entertain the suit. It is true that such a contention with regard to the jurisdiction had not been raised by the defendant in the Trial Court but where the court is inherently lacking in jurisdiction the plea may be raised at any stage, and, it is conceded by Mr. Yogheshwar Prasad, even in execution proceedings on the ground that the decree was a nullity. If one reads sections 209 and 331 of the U.P. Act No. 1 of 1951 together one finds that a suit like the one before us has to be filed before a Special Court created under the Act within a period of limitation specially prescribed under the rules made under the Act and the jurisdiction of the ordinary civil Courts is absolutely barred. Section 209 so far as we are concerned reads as follows
>
> > "209 Ejectment of persons occupying land without title
> >
> > (1) A person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force, and-
> >
> > (a) where the land forms part of the holding of a bhumidhar, sirdar or asami, without the consent of such bhumidhar, sirdar or asami, and

(b).....

shall be liable to ejectment on the suit in cases referred to in clause (a) above, of the bhumidhar, sirdar or asami concerned, and shall also be liable to pay damages.

(2) To every suit relating to a land referred to in clause (a) of sub-section (1) the State Government shall be impleaded as a necessary party."

In the present case it has been held that the defendant has been re that the land is bhumidhari land and the plaintiffs are bhumidhars. taining possession of the land contrary to law being a trespasser; Therefore, the suit was of a description falling under section 209. Section 331 so far as it is relevant is as follows :

"331. Cognizance of suits, etc., under this Act.

(1)...Except as provided by or under this Act no Court than a Court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908, take cognizance of any suit, application, or proceedings mentioned in column 3 thereof."

Schedule II at serial no. 24 shows that a suit for ejectment of persons occupying. land without title under section 209 should be filed in the court of the Assistant Collector, First Class, which is described as the Court of Original Jurisdiction. In view of Section 331 (1) quoted above it is evident that the suit made cognizable by a special court i.e. the Court of the Assistant Collector, First Class, could not be filed in a Civil Court and the Civil Court was, therefore,, inherently lacking in Jurisdiction to entertain such a suit. it is unfortunate that this position in law was not noticed in the several Courts through which this litigation has passed, not even by the High Court which had specifically come to the conclusion that the period of limitation was the one laid down by the rules under U.P. Act No. 1 of 1951. Since the Civil Court which entertained the suit suffered from an inherent lack of jurisdiction, the present appeal filed by the plaintiffs will have to be dismissed."

18. Reliance is also placed upon judgment rendered by the Hon'ble Apex Court in **The Rajasthan State Industrial Development and Investment Corporation** Vs. **Subhash Sindhi Cooperative Housing Society Jaipur & Ors.**, 2013 (2) Civil Court Cases 766, wherein it has been held as under:

"8. Thus, in the instant case, the respondent-society, and its members, have to satisfy the court as regards their locus standi with respect to maintenance of the writ petition on any ground whatsoever, as none of the original khatedars has joined the society in subsequent petition.

9. In Smt. Kalawati v. Bisheshwar, AIR 1968 SC 261, this Court held:

"Void means non-existent from its very inception."

10. In State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) & Ors., AIR 1996 SC 906, this Court held:

"The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be

> avoided. There are degrees of invalidity, depending upon the gravity or the infirmity, as to whether it is, fundamental or otherwise."
>
> 11. The word, "void" has been defined as: ineffectual; nugatory; having no legal force or legal effect; unable in law to support the purpose for which it was intended. (Vide: Black's Law Dictionary). It also means merely a nullity, invalid; null; worthless; sipher; useless and ineffectual and may be ignored even in collateral proceeding as if it never were. The word "void" is used in the sense of incapable of ratification. A thing which is found non-est and not required to be set aside though, it is sometimes convenient to do so.
>
> There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because no one can continue a nullity. (Vide: Behram Khurshid Pesikaka v. State of Bombay, AIR 1955 SC 123; Pankaj Mehra & Anr. v. State of Maharashtra & Ors., AIR 2000 SC 1953; Dhurandhar Prasad Singh v. Jai Prakash University & Ors., AIR 2001 SC 2552; and Government of Orissa v. Ashok Transport Agency & Ors., (2002) 9 SCC 28).

19. It is quite apparent from the aforesaid exposition of law that an order passed without any jurisdiction/authority need not be laid challenge to, being a nullity in the eye of law because it would become automatically null and void, without much ado.

20. True it is that in the instant case, petitioner after having suffered order dated 7.7.2010, which was a nullity in the eye of law, filed an appeal under S.67 of the Act *ibid* in the court of Judicial Magistrate 1st Class, Barsar, but that cannot be a ground to outrightly reject the plea having been raised by the petitioner in the instant petition that the order dated 7.7.2010 passed by the Gram Panchayat, Sour, deserves to be quashed and set aside being void because, as has been categorically held in aforesaid judgments, there is no need to lay challenge to such an order, which is passed without any jurisdiction.

21. Thus, order dated 7.7.2010 (Annexures P-1) passed by Gram Panchayat Sour, can not be allowed to sustain, being without jurisdiction. Consequently, the order dated 4.1.2012(Annexure P-2) passed by Judicial Magistrate 1st Class Barsar in Panchayat Appeal No. 04/2010 and order dated 18.10.2016(Annexure P-5) passed by Sub Divisional Magistrate, Barsar, District Hamirpur, Himachal Pradesh in Case No. 05/2015 have also become null and void.

22. Though this court has no second thought about the competence and jurisdiction of a Gram Panchayat to try/entertain the suit with regard to immovable property but there is yet another aspect of the matter i.e. in the instant case, respondent No.4, after three years of passing of the order dated 4.1.2012 by Judicial Magistrate 1st Class, Barsar, in the appeal having been filed by petitioner, preferred an execution petition under S. 71 of the Panchayati Raj Act, 1994, in the court of Sub Division Collector-cum-Sub Divisional Magistrate Barsar for the execution and implementation of order dated 7.7.2010 passed by the Gram Panchayat, which, in my considered view, was not maintainable because careful perusal of S.71 suggests that a decree/order passed by a Gram Panchayat is to be executed /implemented by the Gram Panchayat, within whose jurisdiction property is situate. S.71 provides that if the property of the defendant is situate outside the jurisdiction of Gram Panchayat, which passed such an order, it can transfer the order/decree for execution to the Gram Panchayat within whose jurisdiction, it may be situate. In the case at hand, it is not the case of the respondent No.4 that the order dated 7.7.2010 passed by Gram Panchayat Sour could not be executed/implemented by Gram Panchayat, Sour itself. Similarly, it is not the case of respondent No.4 that the property in dispute is/was not situate within the

jurisdiction of Gram Panchayat and as such, it is not understood, how execution petition came to be filed in the court of Sub Divisional Magistrate, Barsar, which had no authority to take cognizance of the execution petition, which was otherwise triable by Gram Panchayat, Sour, which had passed the order sought to be implemented/ executed.

It has also been brought to the notice of this court that a civil suit is also pending between the private parties qua the same land.

23. Consequently, in view of the discussion made herein above, this court sees substantive force in the present petition and deems it fit to accept the same. Accordingly, the petition is allowed and order dated 7.7.2010(Annexure P-1) passed by the Gram Panchayat, Sour, Tehsil Barsar, District Hamirpur, Himachal Pradesh, is quashed and set aside. Consequently, the order dated 4.1.2012(Annexure P-2) passed by Judicial Magistrate 1st Class Barsar in Panchayat Appeal No. 04/2010 and order dated 18.10.2016(Annexure P-5) passed by Sub Divisional Magistrate, Barsar, District Hamirpur, Himachal Pradesh in Case No. 05/2015 are also quashed and set aside.

24. The petition stands disposed of accordingly. All pending applications stand disposed of. Interim directions, if any, are vacated. Record, if any received, be sent back forthwith.

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

Chanchal Kumar ... Petitioner
Versus
Prem Parkash and another ... Respondents

CMPMO No. 522 of 2017
Decided on: November 29, 2018

**Constitution of India, 1950-** Article 227**- Code of Civil Procedure, 1908-** Order XXXIX Rules 1 and 2 – Temporary injunction- Grant of- Plaintiff seeking temporary injunction against defendant for stopping from raising construction over suit land- Trial Court directing parties to maintain status quo but District judge allowing appeal and vacating Trial Court's order- Petition against- Plaintiff and other co sharers also found making construction over suit land- Held- Once, plaintiff himself raising construction over portion of suit land, he cannot raise objection, if any, qua construction of defendants over same land when admittedly they are co-owners to the extent of half share– Plaintiff not approaching court with clean hands and thus not entitled for equitable relief of injunction- Order modified to extent that no cosharer would raise construction over path situated on suit land. (Paras 6 and 7)

For the petitioner : Mr. Naveen K. Bhardwaj, Advocate.
For the respondents : Mr. Balwant Singh Thakur, Advocate.

The following judgment of the Court was delivered:

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**Sandeep Sharma, Judge**:(oral)

Being aggrieved and dissatisfied with the judgment dated 31.10.2017, passed by learned District Judge, Kullu, Himachal Pradesh in Civil Misc. Appeal No. 01/2017 having been filed by the defendants, whereby order dated 10.11.2016 passed by the learned Civil Judge (Senior Division), Kullu in CMA No. 239-vi/2014 came to be reversed, petitioner-plaintiff (hereinafter, 'plaintiff') has approached this court in the instant proceedings filed under Art. 227 of the Constitution of India, praying therein to restore the order passed by trial court, after setting aside the judgment dated 31.10.2017, as referred to herein above.

2. Facts, as emerge from the record are that the plaintiff filed a suit for permanent prohibitory injunction, restraining the respondents-defendants (hereinafter, 'defendants') from interfering in the suit land bearing Khasra Nos. 482 and 483 situate in Phati and Kothi Kais, Tehsil and District, Kullu, Himachal Pradesh. Plaintiff also filed an application under Order 39 Rule 1 and 2 CPC, praying therein for interim relief restraining the respondents from interfering in the peaceful possession of the plaintiff and from raising construction over the suit land, till the final disposal of the suit. Learned trial Court, vide order dated 10.11.2016, directed both the parties to maintain status quo qua nature, possession and construction over land in Khata Khatauni No. 222/264 Khasra No. 483 and from encroaching over existing path over Khata Khatauni No. 200/233 Khasra No. 482, situate in Phati and Kothi Kais, Tehsil and District, Kullu, Himachal Pradesh. Being aggrieved and dissatisfied with the order passed by learned trial Court, defendants preferred an appeal under Order 43 Rule 1 CPC, in the court of learned District Judge, which came to be allowed vide judgment dated 31.10.2017, whereby learned District Judge, while setting aside order dated 10.11.2016 passed by the Civil Judge (Senior Division), vacated the status quo order passed by the learned trial Court. In the aforesaid background, plaintiff has approached this court in the instant proceedings, praying therein to restore order dated 10.11.2016 passed by learned Civil Judge, after setting aside impugned judgment dated 31.10.2017 passed by the learned District Judge, Kullu.

3. Having heard the learned counsel representing the parties and perused the material available on record, this court is not persuaded to agree with the contention of Mr. Naveen K. Bhardwaj, learned counsel representing the plaintiff that the learned District Judge, while upsetting status quo order dated 10.11.2016, passed by learned Civil Judge (Senior Division), Kullu, has failed to appreciate the evidence adduced on record by the respective parties in its right perspective, rather, this court finds that the plaintiff concealed material facts with regard to pendency of earlier suit, while filing suit at hand, which admittedly came to be dismissed during the pendency of the present suit.

4. Similarly, this court finds that the suit land is still joint between the parties and same has not been partitioned by metes and bounds. Record further reveals that during the pendency of the application filed under Order 39 Rules 1 and 2, CPC, plaintiff moved an application under S.151 CPC, seeking therein police help, whereafter, land was demarcated by local commissioner. Status report filed by the police discloses that there is one under construction building consisting of six pillars/columns and RCC slab abutting to *Pakka* road. Status report further reveals that the construction material was found stacked under the slab and persons namely Prem Parkash (respondent No.1) and Deep lal (respondent No.2) were found raising construction. However, as per report, construction was raised on Khasra No. 483. On the other hand, Assistant Collector, who was appointed as local commissioner, in his report, stated that there are two under construction buildings on Khasra Nos. 483, 482, 480 and 479, one belongs to the plaintiff and other to the defendants. It has been categorically stated by the Assistant Collector in the report that both the constructions are on *Abadi Deh* land, which is admittedly joint between the parties.

Interestingly, aforesaid fact never came to be incorporated by the plaintiff in his plaint or application filed under Order 39 Rules 1 and 2 CPC, whereby he prayed for interim injunction against the defendants, as such, learned District Judge, while vacating status quo order passed by learned Civil Judge, rightly observed that since plaintiff has not approached the court with clean hands, he is not entitled for equitable relief of injunction.

5. In the case at hand, plaintiff who is one of the cosharers over the suit land, raised construction, whereas he has filed suit for prohibitory injunction restraining the respondents from raising construction on the vacant portion of land. Once, plaintiff himself raised construction over one portion of the land, it is not understood, how he could raise objection, if any, qua the construction on the other portion of land, by the defendants, who are admittedly co-owners of suit land to the extent of half share. Needless to say, applicant, while seeking relief of injunction is required to show that he/she has a prima facie case in his/her favour and balance of convenience also lies in his/her favour, but, in the instant case, aforesaid basic ingredients/conditions are totally missing, rather, very conduct of the plaintiff suggests that he wants to take advantage of the situation.

6. Leaving everything aside, this court finds that the plaintiff has repeatedly filed suits against the defendants on one pretext or the other but he himself, in his plaint, has admitted that the suit property is joint *inter se* parties and as per family arrangement, Khasra No. 483 has been given to him whereas, Khasra No. 485 has been given to the respondents. Plaintiff has further averred in the application that Khasra No. 482, over which motorable path exists, is still joint *inter se* parties. Record reveals that the plaintiff was not able to prove such family arrangement in the previous suits having been filed by him. Otherwise also, revenue record placed on record by the parties clearly suggests that the suit land is joint between the parties. Since plaintiff, while filing suit, suppressed material facts from the court, learned District Judge, rightly vacated the status quo order passed by the learned Civil Judge.

7. Though, this court, finds no illegality or infirmity in the impugned judgment dated 31.10.2017 passed by the learned District Judge, and the same is upheld, but, having taken note of the reply filed by the respondents to the application under Order 39 Rules 1 and 2 CPC, (para-1) wherein it has been categorically admitted that land comprising of Khasra No. 483 Khata Khatauni No. 222/264 and Khasra No. 482 in Khata Khatauni No. 200/233 situate in Phati and Kothi Kais, Tehsil and District, Kullu, Himachal Pradesh, over which motorable path is constructed, is joint, this court is inclined to modify the judgment of the learned District Judge to the extent that no construction would be carried out by either of the parties on Khasra No. 482, on which motorable road exists. Respondents in the said para of reply to application, have categorically admitted that motorable path over Khasra No. 482 has been constructed by the parties jointly, meaning thereby that factum with regard to existence of motorable path over Khasra No. 482 is not disputed by the respondents, as such, this court, while disposing of the present petition deems it fit to modify the judgment passed by the learned District Judge to the extent that the parties to the *lis*, shall not raise any construction of any kind, over Khasra No. 482, over which motorable path exists. Judgment dated 31.10.2017, passed by learned District Judge, Kullu, Himachal Pradesh in Civil Misc. Appeal No. 01/2017 stands modified accordingly.

8. The petition stands disposed of accordingly. All pending applications stand disposed of. Interim directions, if any, are vacated. Record, if any received, be sent back forthwith.

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

State of Himachal Pradesh and another ...Objectors/Applicants
Versus
Shri Harbinder Singh ...Respondent

Arb. Case No. 36 of 2014
Reserved on: November 15, 2018
Decided on: November 29, 2018

**Arbitration and Conciliation Act, 1996 -** Section 34 – Objections to award- Maintainability- Dispute inter se parties pertaining to non-payment of bills of contractor qua deviated items- Arbitrator awarding sum of Rs.36,24,639/- in his favour – Objections thereto – Objectors leveling general allegations in their pleadings that Award being against express terms of contract but nowhere averring as how Award is against public policy of India nor it is clarified as to which finding made by Arbitrator is against public policy. Held- Award neither against public policy of India nor passed in violation of principles of natural justice- Objections dismissed- Award upheld. (Paras 21 & 22).

***Cases referred:***
Hindustan Tea Company vs. M/s K. Sashikant & Company & another, AIR 1987 SC 81
M/s Sudarsan Trading Company vs. The Government of Kerala & another, AIR 1989 SC 890
McDermott International Inc. vs. Burn Standard Company Limited & others (2006) 11 SCC 181
Oil & Natural Gas Corporation Limited vs. Western Geco International Limited (2014) 9 SCC 263

For the Objectors : Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General.
For the Respondent : Mr. B.P. Sharma, Senior Advocate with Mr. Arun Kumar, Advocate.

The following judgment of the Court was delivered:

**Sandeep Sharma, Judge.**

Being aggrieved and dissatisfied with the Award dated 16.12.2013 passed by the learned Arbitrator in respect of dispute pertaining to non-payment of bills qua deviated items to the respondent-claimant (hereinafter, 'claimant'), whereby learned Arbitrator while allowing the claim of the claimant, awarded a sum of Rs. 36,24,639/- in his favour, objectors-applicants (hereinafter, 'objectors') have approached this Court by way of objections filed under Section 34 of the Arbitration & Conciliation Act.

2. Undisputed facts, as emerges from the record are that vide letter dated 29.4.1993, work i.e. "C/O I&PH Circle office building Kasumpti, Shimla-9, (SH: Building portion only)" was awarded by the objectors in favour of the claimant, for Rs. 14,06,204/-. The time for completion of the work was six months, to be counted from the 15th day of issuuance of award letter. As per above letter, work was to commence from 14.5.1993 and was to be completed on 13.11.1993. It is also borne out from the record that the work was

in fact started in April, 1994 and was completed on 15.9.1998. Claimant was paid all the bills except for the deviated items, which were to be paid after due approval of the competent authority. Claimant raised a dispute and accordingly, Superintending Engineer, Arbitration Circle, Solan, was appointed as an Arbitrator by the Chief Engineer (South) on 23.6.2007. Learned Arbitrator entered into arbitration on 3.7.2007 and after holding 18 hearings, announced the Award on 16.12.2013. Learned Arbitrator awarded Rs. 13,27,672/- for deviation on enhanced rates, and Rs. 7,14,821/- on account of prolongation charges alongwith interest at the rate of 8% on the amount of Rs. 13,47,214/- amounting to Rs. 15,62,768/- thus totaling to Rs. 36,24,639/-. In this background, the objectors have approached this court by way of instant proceedings filed under S.34 of the Arbitration & Conciliation Act (hereafter, 'Act') praying therein to set aside the Award passed by the learned Arbitrator.

3. Mr. Dinesh Thakur, learned Additional Advocate General, vehemently argued that the impugned Award is against facts on record, as such, deserves to be quashed and set aside. While referring to the findings returned by the learned Arbitrator, learned Additional Advocate General made a serious attempt to persuade this Court to agree with his contention that the same are perverse and contrary to law and facts on record as the same have been recorded in a most mechanical manner, as a consequence of which, great prejudice has been caused to the objectors. Learned Additional Advocate General further contended that since the learned Arbitrator while passing the Award ignored the material evidence adduced on record and proceeded to pass the Award completely ignoring the terms and conditions contained in the contract inter se parties, impugned Award deserves to be set aside being against public policy of India. Learned Additional Advocate General further argued that the learned Arbitrator has colluded with the claimant. It is further argued on behalf of the objectors that sufficient opportunity to lead evidence has not been granted to the objectors despite an application having been made in this regard, on which no order has been passed by the learned Arbitrator. Mr. Thakur, learned Additional Advocate General contended that the learned Arbitrator has based the Award on tampered documents i.e. agreement, which bears cuttings and manipulations, which have not been approved/initialed. It is further argued by the learned Additional Advocate General on behalf of the objectors that the deviation limit has been shown in the agreement produced by claimant as 00% whereas in the standard format of agreement, same is 25% and even the claimant himself has offered 20% deviation limit, which was withdrawn by him during negotiations. It is further argued by the learned Additional Advocate General that the learned Arbitrator has ignored Clause 12(VI) of the agreement, where there is clear provision for deviation limit of upto 50% on individual items. It is also argued by the learned Additional Advocate General that the amount of Rs. 7,14,821/- on account of prolongation charges has wrongly been awarded by the learned Arbitrator in favour of the claimant, for which otherwise there is no provision in the agreement itself, as such, learned Arbitrator has travelled beyond the agreement. Mr. Thakur further averred that the claimant has been duly compensated for prolongation since volume of work increased from initial amount of Rs. 14,06,204/- to Rs. 52,62,328/-, for which prevailing market rates were paid to the claimant hence, impugned Award being in conflict with public policy of India is liable to be quashed and set aside.

4. On the other hand, the claimant, while filing reply to the petition filed by the objectors, argued that the word, "nil" was not attested, for which the objectors themselves are responsible. It is further argued on behalf of the claimant by Mr. B.P. Sharma, learned Senior Advocate that since 19 hearings were given by the learned Arbitrator, it can not be said that sufficient opportunity of hearing has not been given to the objectors. It is admitted by the claimant that the work though was awarded on 29.4.1993, but same was started in

the month of April, 1994 only and was completed on 15.9.1998, due to non-availability of the site. It is further averred that though wild allegations have been levelled against the learned Arbitrator, but he has not been arrayed as respondent in the present petition. It is further averred on behalf of the claimant that the objectors, themselves are responsible for prolongation of the work and arbitration proceedings have also been prolonged due to which, the claimant is yet to receive his dues despite more than twenty years having passed since the date of completion of work. It is averred on behalf of the claimant that volume of work had increased manifold. While controverting the averment made on behalf of the objectors that the tampered document i.e. agreement has been made basis for passing the impugned Award by the learned Arbitrator, it is vehemently argued on behalf of the claimant that the objectors have themselves supplied copy of agreement to the claimant as well as to the learned Arbitrator, and they can not come out of the same by saying that the same is tampered or manipulated one and as such, objections as filed by the objectors are liable to be dismissed.

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

6. Before ascertaining correctness of aforesaid submissions having been made by the learned counsel for the parties vis-à-vis impugned Award passed by the learned Arbitrator, it would be apt to take note of judgment passed by Hon'ble Apex Court in Oil & Natural Gas Corporation Limited versus Western Geco International Limited (2014) 9 Supreme Court Cases 263, wherein Hon'ble Apex Court taking note of the judgment passed by the Hon'ble Apex Court in Oil & Natural Gas Corporation Limited versus Saw Pipes Limited (2003) 5 Supreme Court Cases 705, has held as under:-

> "34. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India" a ground recognized under Section 34(2)(b)(ii) (supra). The expression "Public Policy of India" fell for interpretation before this Court in ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words: (SCC pp.727-28)
>
> > "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case 1994 Supp(1) SCC 644, it is required to be held that the award could be set aside if it is patently illegal. The result would be — 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, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

35. What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in Saw Pipes Ltd. (supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact that so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge."

7. It clearly emerge from the aforesaid judgment that the concept of "public policy" connotes some matter which concerns public good and the public interest. Similarly, award/judgment/decision likely to adversely affect the administration of justice has been also termed to be against "public policy"

8. Reliance is also placed upon a judgment passed by Hon'ble Apex Court in Hindustan Tea Company v. M/s K. Sashikant & Company and another, AIR 1987 Supreme Court 81; wherein it has been held as under:-

"Under the law, the arbitrator is made the final arbiter of the dispute between the parties. The award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts.

Where the award which was a reasoned one was challenged on the ground that the arbitrator acted contrary to the provisions of Section 70 of the Contract Act, it was held that the same could not be set aside."

9. Similarly, Hon'ble Apex Court in M/s Sudarsan Trading Company v. The Government of Kerala and another, AIR 1989 Supreme Court 890, has held as under:-

> "It is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator as to what impelled him to arrive at his conclusion. In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the award. In the absence of any reasons for making the award, it is not open to the Court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisement of evidence by the arbitrator is never a matter which the Court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator."

10. Reference is also made to the judgment passed by the Hon'ble Apex Court in McDermott International Inc. v. Burn Standard Company Limited and others (2006) 11 Supreme Court Cases 181. The relevant paras of the judgment are reproduced as under:-

> "In terms of the 1996 Act, a departure was made so far as the jurisdiction of the court to set aside an arbitral award is concerned vis-a-vis the earlier Act. Whereas under Sections 30 and 33 of the 1940 Act, the power of the court was wide, Section 34 of the 1996 Act brings about certain changes envisaged thereunder. Section 30 of the Arbitration Act, 1940 did not contain the expression " error of law…". The same was added by judicial interpretation.
>
> While interpreting Section 30 of the 1940 Act, a question has been raised before the courts as to whether the principle of law applied by the arbitrator was (a) erroneous or otherwise or (b) wrong principle was applied. If, however, no dispute existed as on the date of invocation, the question could not have been gone into by the Arbitrator.
>
> The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.
>
> The arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law;(b) the interests of India; (c) justice or morality; or (d) if it is patently illegal or arbitrary. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Lastly where the Arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of Section 34 of the Act.
>
> What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of

> the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular government.

11. It is quite apparent from the aforesaid exposition of law that scope of interference by Court is very limited while considering objections having been filed by the aggrieved party under S.34 of the Act. Award passed by the learned Arbitrator can be interfered with in case of a fraud or bias or violation of principles of natural justice. Interference, if any, on the ground of 'patent illegality' is only permissible, if the same goes to the root of the case. Violation should be so unfair and unreasonable as to shock the conscience of the Court. In the judgment referred herein above, it has been held by the Hon'ble Apex Court that what is to be constituted as 'public policy' is a matter dependent upon the transaction and nature of the statute, but the same should be so unfair and unreasonable as to shock the conscience of the Court, as has been observed herein above.

12. Similarly, there can not be any dispute, as has been repeatedly held by the Hon'ble Apex Court as well as this Court that Courts while deciding objections, if any, filed by the aggrieved party under S.34 of the Act, against the Award passed by an Arbitrator, does not sit in appeal over the findings returned by the learned Arbitrator and there can not be any reappraisal of evidence on the basis of which learned Arbitrator has passed the Award. Otherwise also, in terms of S. 34 of the Act, objections, if any, filed by the aggrieved party can be considered by the Court, if the Award is in any manner against the public policy, which certainly has to be liberally interpreted in view of the facts of the case.

13. Now, this court shall proceed to consider the facts of the instant case in light of the law discussed herein above and determine whether the impugned award is against the public policy of India as claimed on behalf of the objectors.

14. In nutshell, case of the objectors as projected and pleaded by the learned Additional Advocate General is that the learned arbitrator colluded with the claimant, as he failed to provide sufficient opportunity to the objectors to lead evidence and in this way, he mis-conducted himself, as such, award passed by the learned arbitrator, being against the public policy of India, can not be allowed to sustain. Objectors have further averred that the Award is based upon a tampered document i.e. agreement which bears cuttings and manipulations. Aforesaid assertion having been made on behalf of the objectors is not tenable in view of the record made available to this court. Careful perusal of the agreement placed on record by the claimant suggests that it was duly attested by Assistant Engineer Irrigation and Public Health, Sub Division No. 1, Shimla-9 and on each and every page, Executive Engineer has appended his signatures.

15. True it is that there are no initials on the alleged cuttings but record of the learned Arbitrator reveals that the objectors, despite sufficient opportunities, failed to place on record the original DNIT. Learned Arbitrator, while adjudicating claim Nos. 1, 2 and 4, has specifically recorded as under:

> "(A). Before adjudicating , the deviation limit of the agreement requires to be studied. As per the copy of the agreement supplied to this tribunal as well as the claimant/contractor by the respondent/EE, the deviation limit stipulated in form No.PW-8 at para (ii) at page 3 in the agreement form is nil whereas in the agreement with respondent/ EE it is 25%. The respondent/EE failed to produce the approved DNIT to this tribunal"

Learned Arbitrator has further returned the following finds under aforesaid claims:

"ADJUDICATION OF CLAIM No. 1, 2&4:

15. Both the claims 2 & 4 are identical in nature and hence have been clubbed together alongwith claim 1.

"(A). Before adjudicating , the deviation limit of the agreement requires to be studied. As per the copy of the agreement supplied to this tribunal as well as the claimant/contractor by the respondent/EE, the deviation limit stipulated in form No.PW-8 at para (ii) at page 3 in the agreement form is nil whereas in the agreement with respondent/ EE it is 25%. The respondent/EE failed to produce the approved DNIT to this tribunal

(B). The dispute regarding deviation limit has also been recorded in the Technical note (attached with the deviation statement of the case) enclosed with the Chief Engineer letter No.2934-37 dated 5-6-2008. The point 1 of the said technical note reads as under:-

"The work was awarded to Sh. Harvinder Singh Govt. Contractor for Rs.14.06.204/-. The total work executed , as per final measurements is Rs.45,68,003/- which is 224.85 % above the awarded amount against nil deviation limit as per agreement. Whereas the revised A/A & E/S accorded for Rs.68,86,275/- only during March,2008. Moreover the quantity and rates have been derived as per 25% of the deviation limit. Cutting in the deviation limit has been made in the agreement. No initial in the cutting has been made by Executive Engineer, which may clearly be mentioned alongwith actual deviation limit in the agreement".

From the above it is clear that the Chief Engineer noticed and pointed out this insertion in deviation limit's column of the contract agreement in 2008.

(C). In the course of execution of this work, drawings and design were changed as a result of which there was abnormal increase of the quantity of work to such an extent that the applicability of the rates fixed under the contract seize to have any binding effect. (Reliance is placed on the judgment dated 10-11-1995 of Hon'ble Supreme Court of India in the state of U.P. Vs. Ram Nath International Construction Pvt. Ltd.) In the present case quantity has deviated to such an extent that work awarded for Rs.14.06,206/- was final as per 24th running bill for 52.88 lacs. The deviation limit in the contract has loss its relevance.

From the considerations, A, B & C mentioned above, I hold that deviation limit be considered as nil. When the deviation limit is considered Nil , the deviated, extra and substituted items become payable at market rates."

16. It is quite apparent from the bare reading of the aforesaid finding returned by the learned Arbitrator that the objectors were provided sufficient opportunity to produce and prove DNIT, so that factum with regard to tampering in Form PW-8, at para (ii), page-3 in the agreement, could be verified. Learned Arbitrator, after having perused the letter No. 2934-37 dated 5.6.2008 of the Chief Engineer, specifically concluded as under:

"The work was awarded to Sh. Harvinder Singh Govt. Contractor for Rs.14.06.204/-. The total work executed , as per final measurements is Rs.45,68,003/- which is 224.85 % above the awarded amount against nil

deviation limit as per agreement. Whereas the revised A/A & E/S accorded for Rs.68,86,275/- only during March,2008. Moreover the quantity and rates have been derived as per 25% of the deviation limit. Cutting in the deviation limit has been made in the agreement. No initial in the cutting has been made by Executive Engineer, which may clearly be mentioned alongwith actual deviation limit in the agreement".

From the above it is clear that the Chief Engineer noticed and pointed out this insertion in deviation limit's column of the contract agreement in 2008."

17. After having carefully perused the reasoning recorded by the learned Arbitrator qua the aspect of tampering, if any, made by the claimant, this court finds no force in the arguments raised by the learned Additional Advocate General and same are accordingly rejected.

18. Similarly, record of the learned Arbitrator reveals that in the 16th hearing held on 30.9.2013, learned Arbitrator granted more time to the objectors to scrutinize record for dates/rates of partly paid items, while adjudicating claims No. 1, 2 and 4. Careful perusal of proceedings of 17th hearing held no 14.10.2013 in the office of learned Arbitrator, suggests that the Executive Engineer of the objector-Department failed to submit desired information in terms of proceedings of 16th hearing held on 30.9.2013, however, learned Arbitrator granted last opportunity of four weeks to do the needful.

19. Vide communication dated 11.10.2013, Executive Engineer, representing the objector-Department, in compliance of 16th hearing held on 30.9.2013, made following submissions:

"Arb. Case No. 43/2007

HIMACHAL PRADESH

IPH DEPARTMENT

No. IPHDS-AB-Arb/(Harbinder Singh) 2013-14-11026-27

Dated: 11-10-2013

To

The Arbitrator-cum-
Superintending Engineer,
Arbitration Circle,
HPPWD, Solan.

Subject:- In the matter of Arbitration between Shri Harbinder Singh Vot. Contractor and Executive Engineer, I&PH Division No.1, Kasumpti Shimla-9, for the work C/o IPH circle office Building at Kasumpti, Shimla-9, Agr. No.1 for 1993-94.

Sir,

In compliance to 16th hearing held on 30.09.2013 in the office of Superintending Engineer, Arbitration Circle, HPPWD Solan, the submission is made as under:

Claim No. 1, 2 & 4: - Rates claimed by the contractor are not traceable in office record hence more time is required to trace the same. However and date/rates approved of item No. 1, 2 5(b), 5(c), 5(e) 6(b)1, 6(c) 8(b), 8(c), 9, 10,11 12, 15, 21(a),

21(b), 24, 25, 32, 33(a), 37(b)(i), 37(b)(ii),38, 39 & 49 are placed at Annexure A-1. More time is required to scrutinize the record for date /rates of partly paid items.

Claim No. 7:- The claim has already been closed during 10th hearing held on 21.9.2011 and the deduction is already on record.

Claim No. 9:- The record pertaining to time extension is not traceable in the office record as the claimant/contractor never applied for extension of time.

The CD containing the defence statement is enclosed please.

Further it is requested that permission be granted to produce the following officers as witness in the case as per Chapter V-27 of Arbitration and Conciliation Act, 1996.

1. Er. SK Singhal
2. Dr. GS Guleria

Sd/-
Executive Engineer
IPH Division No. I,
Shimla-9

DA: AS above.

Copy to Shri Harbinder Singh Govt. contractor C/O Bindra Store Kasumpti, Shimla-9, for information please.

Executive Engineer
IPH Division No. I,
Shimla-9"

20. By way of aforesaid communication, objector sought permission of the learned Arbitrator to produce officers as named in the communication dated 11.10.2013 (supra), as witnesses under Arbitration & Conciliation Act, 1996. However, careful perusal of proceedings of 18th hearing held on 19.10.2013, in the office of learned Arbitrator suggests that the Executive Engineer of the Objector-Department, while submitting response to the claims No. 1, 2 and 4, placed certain documents containing therein financial implications, if deviation limit is considered as zero and rates quoted by the contractor at the relevant time. Proceedings held on that day, suggest that the Executive Engineer as well as other party categorically stated on that day before the learned Arbitrator that they have nothing more to say on these claims and claims be closed for further discussion. In the aforesaid proceedings, it has been specifically recorded by the learned Arbitrator that both the parties stated that they have been given full opportunity to present their case and they have nothing more to say or add in this regard. Learned arbitrator has also recorded that the parties requested that the case be closed for further discussion and also requested that award be passed in due course of time. Proceedings held on 19.10.2013, nowhere suggest that the objectors-Department insisted during 18th hearing for accepting their prayer for examination of witnesses as named in the communication dated 11.10.2013, rather, proceedings held on 19.10.2013, clearly suggest that both the parties categorically stated before the learned Arbitrator that they have been given full opportunity to present their cases and they themselves requested to close the case for further discussion, as such, this court is not in agreement with the learned Additional Advocate General that the learned Arbitrator colluded with the claimant and purposely not decided the application having been made by the objectors for producing witnesses. This court, after having perused proceedings of 19th

hearing, is convinced and satisfied that both the parties on that day were satisfied with the proceedings conducted by learned Arbitrator and they felt no necessity to lead evidence as such, representative of the objector-Department did not press his prayer for examination of witnesses, rather, he himself requested the learned Arbitrator to pass final award.

21. Having considered the facts of the case in light of the aforesaid exposition of law, this Court has no hesitation to conclude that the impugned Award, as has been assailed before this Court by way of objections under S.34 of the Act, is neither against public policy nor has been passed in violation of principles of natural justice. Perusal of the objections filed by the objectors suggests that neither there are any specific allegations that Award is against the public policy nor it has been clarified as to which finding or findings made by the learned Arbitrator is/are against the public policy, save and except general allegations that Award is against express terms of the contract, unjust, unfair and unsustainable and patently illegal.

22. In view of the detailed discussion made herein above, this Court sees no reason to interfere in the impugned Award, which otherwise appears to be based upon proper appreciation of evidence. Needless to say that jurisdiction of the Courts is limited and Award can be set aside only if it is against public policy of India, but, in the case at hand, neither any material has been placed on record, nor any arguments have been raised on behalf of the objectors to substantiate the fact that impugned Award is against public policy of India. Question of interpretation of agreement and its terms and sufficient evidence is /was well within domain of the learned Arbitrator as such, no grievance, if any, could be raised qua the same by either of the parties, as such, objections having been filed by the objectors deserve to be dismissed being unsustainable in the eye of law.

23. Consequently, in view of above, this Court sees no valid reason to interfere with well reasoned award passed by the learned Arbitrator, as such, present case is dismissed. Award passed by the learned arbitrator is upheld.

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

Keshwanand ...Petitioner
Versus
Lalman and others ...Respondents

CMPMO No. 509 of 2017
Decided on: November 30, 2018

**Constitution of India, 1950 -** Article 227**- Civil Procedure Code, 1908,** Section 151 – Police assistance- Availability – Defendants seeking police assistance in enforcing award passed by Lok Adalat which directed parties to maintain status quo qua suit property- Defendants praying such assistance for removal of lock put by plaintiff on a room- Trial Court dismissing application by holding that defendants not producing material qua their possession on date of award- Petition against- High Court remanded matter to Trial Court to decide application under S.151 of Code afresh after ascertaining factum of possession of parties. (Paras 3 to 5).

For the petitioner : Mr. Sanjeev Kuthiala, Advocate.

For the respondents : Mr. Neel Kamal Sharma, Advocate.

The following judgment of the Court was delivered:

**Sandeep Sharma, Judge**:(oral)

Being aggrieved and dissatisfied with the order dated 16.10.2017, passed by the learned Civil Judge (Junior Division), Court No.2, Ghumarwin, District Bilaspur, Himachal Pradesh, whereby an application under S.151 CPC, having been filed by the petitioner-defendant No.1 (hereinafter, 'defendant'), seeking therein police assistance to restrain the plaintiffs-respondents (hereinafter, 'plaintiffs') from causing any interference in his peaceful possession and for issuance of a direction to remove the lock allegedly put by the plaintiffs on the room possessed by the defendant, came to be dismissed, defendant has approached this court in the instant proceedings filed under Art. 227 of the Constitution of India.

2. Facts, as emerge from the record are that in a suit for declaration having been filed by the plaintiffs, *Lok Adalat* held on 23.11.2013, ordered the parties to maintain status quo qua nature and possession of the suit property, however, despite status quo order, plaintiffs forcibly put lock on the room in question. Since, despite repeated requests, plaintiffs failed to open the lock of the room, defendant was compelled to move the application referred to herein above, seeking therein police protection and direction to remove lock allegedly put by the plaintiffs, however, the fact remains that the application was dismissed by the learned Court below vide order dated 16.10.2017. Learned Court below, while passing order dated 16.10.2017, returned the finding that the defendant was unable to show that at the time of passing of order dated 23.11.2013, i.e. when status quo was ordered, he was in possession of the room in question.

3. Careful perusal of communication dated 31.8.2017, which has been otherwise taken note of by the learned Court below in the impugned order, suggests that till 31.7.2017, room in question was in possession of the Anganwari Centre and on 31.7.2017, same was vacated and till then rent was being paid to the defendant, as has been stated by Ms. Reena, in the aforesaid communication. Since in the aforesaid communication, Ms. Reena, has categorically stated that she did not know that who was owner of the room in question when she vacated the premises, court below ought to have afforded an opportunity to the parties to lead evidence to prove their possession. But, in the case at hand, learned Court below, without assigning any cogent and convincing reason, proceeded to arrive at a conclusion that no document has been placed on record by the defendant to prove that at the time of passing of the status quo order on 23.11.2013, he was in possession of the room in question, whereas, communication dated 31.8.2017, which has been discussed herein above suggests otherwise.

4. Consequently, in view of above, this court, without going into the merits of the order passed by learned Court below, deems it fit to remand the case back to the learned Court below to decide the application afresh. Learned Court below, while deciding the matter afresh, would frame issue with regard to possession and thereafter shall afford an opportunity to the parties to lead evidence. However, it is made clear that the entire exercise would be completed within a period of one month from the date of receipt of a copy of this judgment so that no unnecessary delay is caused in final conclusion of trial, which is hanging fire since 2014.

5. Accordingly, in view of above, order dated 16.10.2017 passed by the Civil Judge (Junior Division), Court No. 2 Ghumarwin, District Bilaspur, Himachal Pradesh in CMA No. 433-6 of 2017 is quashed and set aside. The petition stands disposed of

accordingly. All pending applications stand disposed of. Interim directions, if any, are vacated. Record, if any received, be sent back forthwith.

6. Learned counsel for the parties undertake to cause presence of their clients on **10.12.2018**, before learned Court below, on which date, learned Court below shall frame issues and afford an opportunity to the learned counsel representing the parties to lead evidence and thereafter matter would be decided by it, within the time frame set herein above.

7. Registry to send a copy of this judgment to the learned trial Court forthwith enabling it to comply with the same.

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

Future General India Insurance Company Ltd. ....Appellant.
Versus
Ms. Bharti and others ....Respondents.

FAO No. 86 of 2017.
Reserved on : 22nd November, 2018.
Decided on : 30th November, 2018.

**Motor Vehicles Act, 1988-** Sections 56 and 166 – Motor accident – Claim application- Defences- Claims Tribunal allowing application and imposing liability on insurer- Appeal against- Insurer arguing that offending vehicle being a transport vehicle, was used without fitness at time of accident- Owner of offending vehicle though did not place on record fitness certificate but all other documents like valid driving license, insurance policy duly proved on record. Insurance company also not made any endeavor to summon record of RLA to prove that offending vehicle did not have fitness certificate at time of accident- Held- Plea of insurance company that vehicle was being plied without fitness, not proved- Appeal dismissed. (Paras 4 to 6).

For the Appellant: Mr. Chandan Goel, Advocate.
For Respondent No.1/Cross-objector: Mr. P.S. Goverdhan, Advocate.
For Respondent No.2: Mr. Anirudh Sharma, Advocate.
Respondent No.3 to 5 already ex-parte.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal stands directed by the aggrieved insurer/appellant herein, against the award pronounced by the Motor Accidents Claims Tribunal-I, Solan, H.P, upon, Claim Petition No. 17-S/2 of 2011, (i) whereunder, vis-a-vis, the compensation amount, as stood determined qua the claimant/respondent No.1 herein, the, apt indemnificatory liability thereof, hence stood fastened, upon, it.

2. The liability, for, liquidating the compensation amount, as, assessed under the impugned award, stands fastened, upon, the insurer of the offending vehicle. The

learned counsel appearing for the insurer/appellant herein has contended with much vigour, before, this Court, that, (i) the affirmative findings recorded by the learned Tribunal, upon, the issue appertaining to the relevant mishap, being a sequel of rash and negligent manner of driving of the offending truck, by respondent No.3, rather suffering from, a, gross infirmity, (ii) given the learned tribunal concerned, mis-appraising hence the apposite evidence, as, adduced, in respect thereof. However, the afore submission, cannot be accepted, as in consonance with the pleadings appertaining to the afore issue, and, in pleading whereof, a graphic and pointed averment is reared, vis-a-vis, (a) the injured along with his mother going to a shop located at Chambaghat, for taking medicine, (b) given, the prescription slip being left at home, hence, hers making, a, telephonic call to her sister, one Sheetal, wherethrough, she requested her to come along, with, the prescription slip, and, meet them, on the main road, (c) and, thereafter Sheetal proceeding on motorcycle bearing No. HP14A-4320 towards, Chambaghat, whereat the two roads i.e. road from Police line, and, National Highway, hence, conjoin, at, a Katcha road, (d) and, also upon the afore motorcycle being stopped, on the katcha portion of the road, whereat the injured/claimant, Bharati, sister of Sheetal was standing, and, awaiting, the, handingover, to, her of a medical prescription slip, (e) and, thereat, the, offending truck bearing No. HP-68-1116, rather coming from the front side, and, striking against the motor cycle, driven by one Rakesh Thakur. Since, the claimant during the course of her examination-in-chief, has, tendered her affidavit, borne in Ex. PW3/A, affidavit whereof, carries averments, bearing, consonance, with, the afore averments, cast in the apposite petition, (f) and, during the course her cross-examination, hers remaining unscathed, (g) besides when, the, other ocular witnesses to the occurrence, PW-4, PW-5, and, PW-6 also supporting the testification rendered qua the ill fated occurrence, by PW-3, (h) significantly also when during the course of their respective cross-examination(s), their testimonies comprised in their respective examination(s)-in-chief, rather remained unshattered, (i) thereupon, with, evident inter se corroboration rather erupting inter se, the, testifications rendered by PW-3, and, by PW4 to PW-5, and PW-6, thereupon, it is to be concluded, that, the ill-fated mishap, was a sequel, of rash and negligent manner of driving, of, the offending vehicle by its driver, (j) conspicuously, when, the, FIR lodged qua the occurrence, and, borne in Ex.PW2/A, firmly echoes therein qua an incriminatory role, being fastened upon the driver of the offending truck, hence, the affirmative findings hence recorded by the learned tribunal, vis-a-vis, the afore factum, do not suffer, from any infirmity.

3. Be that as it may, the learned counsel appearing for the insurer has proceed to contend with much vigour before this Court (i) that with, the, permit issued, vis-a-vis the offending truck, and, embodied in Ex.RW1/A, and, it remaining alive w.e.f. 25.8.2008 to 24.08.2009, hence, apparently, though, the ill-fated mishap, occurred prior thereto, and, though hence the afore permit was alive, in contemporaneity therewith, (ii) yet the mere factum of its being in vogue, in contemporaneity, vis-a-vis, the ill-fated occurrence, rather not befittingly rendering it, to also, engender a further inference qua the offending truck, in contemporaneity, vis-a-vis, the ill fated mishap also carrying, the relevant fitness certificate, (iii) whereupon, alone it was rendered both, roadworthy, and, also fit to ply on the road. He submits that hence there was a dire necessity cast, upon, the owner of the offending truck, to, place on record, the apt fitness certificate. He submits that the necessity, of, the offending truck, throughout and all times hence possessing a valid fitness certificate, to, hence render fully efficacious both the apposite permit, and, the registration certificate, is, a sequel, of, the mandatory statutory provisions, borne in Section 56, of, the Motor Vehicles Act, provisions whereof stand extracted hereinafter:-

> "56. Certificate of fitness of transport vehicles.—

> (1) Subject to the provisions of sections 59 and 60, a transport vehicle shall not be deemed to be validly registered for the purposes of section 39, unless it carries a certificate of fitness in such form containing such particulars and information as may be prescribed by the Central Government, issued by the prescribed authority, or by an authorized testing station mentioned in sub-section (2), to the effect that the vehicle complies for the time being with all the requirements of this Act and the rules made thereunder:
>
> Provided that where the prescribed authority or the "authorized testing station" refuses to issue such certificate, it shall supply the owner of the vehicle with its reasons in writing for such refusal.
>
> (2) The "authorized testing station" referred to in sub-section (1) means a vehicle service station or public or private garage which the State Government, having regard to the experience, training and ability of the operator of such station or garage and the testing equipment and the testing personnel therein, may specify in accordance with the rules made by the Central Government for regulation and control of such stations or garages.
>
> (3) Subject to the provisions of sub-section (4), certificate of fitness shall remain effective for such period as may be prescribed by the Central Government having regard to the objects of this Act.
>
> (4) The prescribed authority may for reasons to be recorded in writing cancel a certificate of fitness at any time, if satisfied that the vehicle to which it relates no longer complies with all the requirements of this Act and the rules made thereunder; and on such cancellation the certificate of registration of the vehicle and any permit granted in respect of the vehicle under Chapter V shall be deemed to be suspended until a new certificate of fitness has been obtained:
>
> 1[Provided that no such cancellation shall be made by the prescribed authority unless such prescribed authority holds such technical qualification as may be prescribed or where the prescribed authority does not hold such technical qualification on the basis of the report of an officer having such qualifications.]
>
> (5) A certificate of fitness issued under this Act shall, while it remains effective be valid throughout India."

The afore submission addressed before this Court, has vigour, and, is supported by a judgement rendered, by the Full Bench of Kerala High Court, in *MACA No.2030 of 2015, and, other connected cases*, the relevant paragraphs Nos. 16 and 17, whereof stand extracted hereinafter:-

> "16. Importance of the fitness/road worthiness of a vehicle, right from the time of registration of the vehicle, is further discernible from Rule 47 of the Central Motor Vehicles Rules 1989 [referred to as Central Rules]. The said Rule deals with application for registration of motor vehicles, which, among other things, stipulates that it shall be accompanied by various documents. Under sub-rule (1) (g), it is mandatory to produce road worthiness certificate in Form 22 from the manufacturers [Form 22A from the body builders]. On completing the formalities/procedures, 'Certificate of Registration' is to be issued in terms of Rule 48 of the Central Rules in Form 23/23A, as the case may be. The said Rule contains a proviso, insisting that, when Certificate of Registration pertains to a transport vehicle, it shall be handed over to the registered owner only after recording the Certificate of Fitness in Form 38. Validity of the Certificate of Fitness is only to the extent as envisaged under Rule 62 of the Central Rules, which mandates, as per the proviso, that the renewal of a Fitness Certificate

shall be made only after the Inspecting Officer or authorised Testing Station as referred to in sub Section 1 of Section 56 MACA No. 2030 of 2015 and connected cases of the Act has carried out the test specified in the table given therein.

17. The stipulations under the above provisions clearly substantiate the importance and necessity to have a valid Fitness Certificate to the transport vehicle at all times. The above prescription converges on the point that Certificate of Registration, existence of valid Permit and availability of Fitness Certificate, all throughout, are closely interlinked in the case of a transport vehicle and one requirement cannot be segregated from the other. The transport vehicle should be completely fit and road worthy, to be plied on the road, which otherwise may cause threat to the lives and limbs of passengers and the general public, apart from damage to property. Only if the transport vehicle is having valid Fitness Certificate, would the necessary Permit be issued in terms of Section 66 of the Act and by virtue of the mandate under Section 56 of the Act, no transport vehicle without Fitness Certificate will be deemed as a validly registered vehicle for the purpose of Section 39 of the Act, which stipulates that nobody shall drive or cause the motor vehicle to be driven without valid registration in public place or such other place, as the case may be. These requirements are quite 'fundamental' in nature; unlike a case where a transport vehicle carrying more passengers than the permitted capacity or a goods carriage carrying MACA No. 2030 of 2015 and connected cases excess quantity of goods than the permitted extent or a case where a transport vehicle was plying through a deviated route than the one shown in the route permit which instances could rather be branded as 'technical violations'. In other words, when a transport vehicle is not having a Fitness Certificate, it will be deemed as having no Certificate of Registration and when such vehicle is not having Permit or Fitness Certificate, nobody can drive such vehicle and no owner can permit the use of any such vehicle compromising with the lives, limbs, properties of the passengers/general public. Obviously, since the safety of passengers and general public was of serious concern and consideration for the law makers, appropriate and adequate measures were taken by incorporating relevant provisions in the Statute, also pointing out the circumstances which would constitute offence; providing adequate penalty. This being the position, such lapse, if any, can only be regarded as a fundamental breach and not a technical breach and any interpretation to the contrary, will only negate the intention of the law makers."

(I) and, when the afore purported want of fitness certificate, vis-a-vis, the offending vehicle, imperatively in contemporaneity, to, the accident, dehors its possessing, a, valid route permit or, a, valid registration certificate, rather stands pronounced therein, hence, to constitute, a, fundamental breach of the insurance policy, (ii) thereupon, the counsel, for the the insurer espouses that, on afore anvil, he is facilitated to rear a valid and, tangible exculpatory plea.

4. Even though, the afore submission has immense vigour. However, despite, the owner not placing on record, the apt fitness certificate, vis-a-vis, the offending vehicle, (i) conspicuously, the, one issued in contemporaneity, vis-a-vis, the issuance of the afore permit, (ii) yet the counsel appearing for the insurance before the tribunal, who intended to therefrom, hence, derive, the apt exculpatory benefit, was rather enjoined, to, seek adduction from the records, of, the RLA concerned, the apt fitness certificate, issued in contemporaneity, vis-a-vis, the issuance, of the afore permit, qua the offending vehicle.

However, the learned counsel appearing for the insurer, before the learned tribunal, omitted to make the aforesaid endeavour, hence, for wants thereof, an adverse inference, is drawable against the insurer, (iii) whereupon, the insurer is estopped to rear the aforesaid contention before this Court, nor the insurer can escape, from, the apt indemnificatory liability, as, stands hence fastened, upon, it.

5. The driving licence of the driver of the offending vehicle, is, borne in Ex.R1, and, upon its perusal, it is evident qua its being valid, from 14.08.2007 to 10.05.2010, hence, the validity of the driving licence also visibly covered the period, whereat, the relevant mishap occurred. The learned counsel appearing fo the insurer has contended (i) that with RW-2, the clerk concerned of the RLA concerned, wherefrom the afore driving licence stood hence issued, rather during, the course of his cross-examination hence making an admission, that, the endorsement made thereon, vis-a-vis, the holder thereof, being authorised to drive HTV, hence not existing in the apt register maintained, in, the RLA concerned, (ii) thereupon, the afore endorsement occurring in Ex. R-1, being belied, (iii) and, thereupon, the driver concerned was not authorised, to, drive the offending vehicle. However, the afore submission cannot be accepted, (iv) as no further evidence stands adduced qua Ex.R-1, not carrying, the authentic seal(s), and, signatures of the RLA concerned, nor evidence stand adduced qua it not standing issued from the RLA concerned, (v) rather with RW-2 making a clear testification qua Ex.R-1 standing issued, from, their office. In aftermath, for want of adduction, of, the aforesaid evidence, thereupon, merely upon, the apposite endorsement, made in EX.R-1, whereunder, its holder stood hence authorised to drive a HTV, hence not occurring, in the register maintained with the RLA concerned, (vi) yet, cannot render the aforesaid endorsement hence being construable to be false. (vii) Contrarily, the afore want of, any, compatible entry therewith being borne in the apt register, can be construable to be merely a ministerial omission, wherefrom, no capital hence can be derived by the insurer.

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

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

Mansa Ram .....Appellant/ Plaintiff.
Versus
Kehsav Ram & others .....Respondents/defendants.

RSA No. 171 of 2018 along
with RSA No. 172 of 2018.
Reserved on : 14th November, 2018.
Decided on : 30th November, 2018.

**Specific Relief Act, 1963-** Section 34- Suit for declaration and injunction- Adverse possession- Plaintiff claiming himself to have become owner of suit land by way of adverse possession and seeking prohibitory injunction against defendant's interference- Defendants denying plaintiff's possession and filing counter claim against him for permanent prohibitory injunction - Trial Court dismissing suit and decreeing counter claim- Appeal of plaintiff dismissed by District Judge- Regular Second Appeal- On facts, plaintiff's possession over

suit land not proved- Defendants found in its actual possession- Their possession also recorded in revenue record- Held- Plaintiff not being in actual possession of suit land, his suit and counter claim were rightly decided. (Paras 8, 9 and 11).

For the Appellant(s): Mr. G.R. Palsra, Advocate.
For Respondents No.1 to 7: Mr. H.S Rangra, Advocate.
Respondents No.8 to 15 already ex-parte.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

Both the aforesaid appeals are being disposed of, by a common verdict, since, they arise, from, verdict(s) rendered by the learned First Appellate Court, (i) whereunder, it upheld the verdict rendered by the learned trial Court, whereunder, the latter had declined, vis-a-vis, the plaintiff, the reliefs of permanent prohibitory injunction, (ii) besides the relief of declaration, (iii) and, rather decreed, the defendants' counter claim, for rendition of a decree, for, permanent prohibitory injunction. Reiteratedly, through RSA No.171 of 2018, and, through RSA No. 172 of 2018, as arise, from, the verdicts pronounced by the learned First Appeal Court, respectively, upon, Civil Appeal No. 25 of 2017, and, upon Civil Appeal No.26 of 2017, the plaintiff concerned, hence, a challenge, upon, the afore rendered decrees, as, rendered in affirmation, to the apt verdict, and, decree rendered by the learned trial Court.

2. Briefly stated the facts of the case are that the plaintiff had filed a suit for declaration with consequential relief of injunction with respect to land bonre in Khewat No. 74/74, Khatauni No. 108/108, Khasra No.27, measuring 0-19-06 bighas, situated in Muhal Okhali/665, Illaqua Dahar, Sub Tehsil Bali Chowki, District Mandi H.P. The plaintiff's case is that the suit land is coming in his peaceful and physical possession for the last about 42 years. It is averred that the suit land has been wrongly recorded in the names of the defendants. His predecessor-in-interest, namely, Kesru was coming in possession of the suit land, who died about 42 years ago. Thereafter, his father namely Sh. Saran Dass was coming in possession of the suit land. Both of them died. At the time of death of Kesru, he was about 6 years old. |The suit land remained barren for about 8-9 years. He developed the same. His grand father was rustic villager, but his uncles were very clever. They manipulated revenue entries during settlement operation. This fact came to his knowledge in May, 2013, when the defendants claimed themselves to be the owners of the suit land. They were asked to get the revenue entries corrected but in vain. Hence the suit.

3. Defendants No.1 to 7 and 13 contested the suit and filed composite written statement,a nd counter claim, wherein they have taken preliminary objections qua maintainability, cause of action and locus standi. On merits, it is submitted that the revenue entries are correct. Sh. Kesru was not coming in possession of the suit land. Sh. Kesru had no right over the suit land. The suit land was in actual possession of Gosru and Manghru. Their possession was duly recorded in revenue record. They were conferred proprietary rights of the suit land. It is denied that the plaintiff is in continuous, peaceful and hostile possession. It is alleged that plaintiff since first week of July, 2014 has started threatening to dispossess them from the suit land in an illegal manner. It is therefore prayed that the suit of the plaintiff is liable to be dismissed and counter claim may be decreed.

4. The plaintiff filed replication to the written statement(s) of the defendant(s), as well as, written statement to the defendants' counterclaim, wherein, he denied the contents of the written statement(s) as well as of counter claim, and, re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled for the decree of declaration to the effect that the plaintiff is in exclusive possession of the suit land since the times immemorial and is entitled to the absolute title of ownership by way of long-long possession, as alleged? OPP.
2. Whether the plaintiff is further entitled for the decree of declaration to the effect that the defendants have got no right, title and interest over the suit land and the revenue entries existing in the name of defendants are exclusive owner in possession of the suit land are wrong, illegal, null and void and is liable to be corrected in the name of the plaintiff by declaring him to be owner in possession of the suit land, as alleged? OPP.
3. Whether the defendants are liable to be restrained from causing any interference over the suit land through a decree of permanent prohibitory injunction as a consequential relief, as prayed for? OPP.
4. Whether the plaintiff has no enforceable cause of action and right to sue against the defendants, as alleged? OPD.
5. Whether the present suit is not legally maintainable and competent against the defendants, as alleged? OPD.
6. Whether the plaintiff has no locus tandi to file the present suit against the defendants, as alleged? OPD.
7. Whether defendants/counter claimants are owner in possession of the suit land, as alleged? OPD/CC
8. Whether the defendants/counter claimants are entitled for the decree of permanent prohibitory injunction, as alleged? OPD/CC.
9. Whether the defendants/counter claimants are entitled to decree of possession, as alleged? OPD/CC
10. Whether the suit of the plaintiff is not valued for proper court fees and jurisdiction, as alleged?OPD
11. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the plaintiff's/appellant's herein suit, whereas, it decreed the defendants' counterclaim. In appeals, preferred therefrom by the plaintiff/appellant herein, the latter Court hence dismissed both the appeals, and, affirmed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, now has instituted the instant Regular Second Appeals, before, this Court, wherein he assails the findings, recorded in its impugned judgment(s) and decree(s), by the learned first Appellate Court.

8. Even though, a catena of verdicts pronounced by the Hon'ble Apex Court, renders, the plaintiff defacilitated, to, in the affirmative claim rendition, of, a declaratory

decree qua his acquiring title, by prescription, sparked, by elapse, of, the statutorily mandated period of time, and, vis-a-vis, the suit khasra number(s), (i) yet, dehors the afore bar, against, the afore plea being raised in the affirmative by the plaintiff, even evidence, adduced qua therewith, is, for the reasons ascribed hereinafter, rather both frail, and, weak. The plaintiff, though pleaded qua his grand father hence holding possession of the suit land, (ii) yet his omitting, to, voice categorically, and, with specificity, the time of commencement, of, possession thereon, by his afore predecessor-in-interest, (iii) rather his proceeding to render a testification qua his afore predecessor-in-interest, rather possessing about 70 years ago, hence government land, and, his also omitting to obviously voice rather with explicity qua his afore predecessor-in-interest, hence, holding possessing, vis-a-vis, the suit khasra number, (iv) thereupon, the effect thereof, when combined, with, similar therewith testifications, rendered by the plaintiff's witnesses, who, respectively stepped into the witness box, as PW-3, and, as PW-4, (v) is, qua an inference being bolstered qua the trite canon, for the plaintiff may be, succeeding in his endeavour, of his being declared, to, acquire title to the suit land, conspicuously, by prescription, sparked, by efflux, of, the statutorily mandated period of time, (vi) rather when hence enjoined him, to, also render a clear testification qua the precise time, of, commencement of possession thereof, and, the apt possession, existing, and, remaining continuously, and, uninterruptedly hence alive, specifically vis-a-vis, the suit khasra number, (vii) whereas, the afore evidence remaining unadduced, thereupon, the afore requisite canon, hence, ingraining the principle, of, acquisition, of, title by adverse possession, remains wholly unsatisfied, (viii) with, a further corollary, that, the declaratory decree, on anvil aforesaid rather being unrenderable, vis-a-vis, the plaintiff. Contrarily, the defendants, for proving theirs assuming title, vis-a-vis, the suit khasra number, hence, depending, upon, a copy of missal hakiyat bandobast jadid, borne in Ex.DW1/B, and, upon an order of mutation borne in EX.DW1/C, (ix) wherethrough, the apt title, vis-a-vis, suit kahsra number, in substitution, of the prior thereto title, vesting in the State Government, rather stood vested, on 27.05.1006, vis-a-vis, the predecessor-in-interest, of, the defendants. Conspicuously, the afore order borne in the afore exhibits hence acquires firm conclusivity, (x) given it remaining unchallenged, by the plaintiff, and, also obviously no evidence standing adduced qua in its rendition, the officer concerned, recording it, in utter disregard, to, the rules and procedures, as, appertaining therewith. The apt sequel thereof, is , qua with the defendants hence proving qua theirs validly assuming title, vis-a-vis, the suit khasra numbers, (xi) thereupon, the verdict rendered by the learned trial Court, and, affirmed by the learned First appellate Court, qua theirs being entitled, to retain the possession of the suit khasra numbers, and, concomitant therewith, rendition of a decree of permanent prohibitory injunction, is both tenable and apt.

9. Be that as it may, the learned counsel appearing for the plaintiff contended, that, the concurrent pronouncement, as, made by both the learned Courts below (i) qua the defendants being entitled for possession, vis-a-vis, the suit khasra number, being beyond the domain, of, pleadings borne in the counterclaim, as, reared by the defendants, hence, the afore decree being unrenderable. However, the aforesaid contention is illusory, (ii) and, it is reared, on a sheer misreading of the concurrent decrees, pronounced by the learned Courts below, (iii) whereunders, the learned courts below rather held, that, with the defendants acquiring title, vis-a-vis, the suit land, under valid entries recorded in their favour, and, borne in the revenue record, (iv) hence, on anvil thereof theirs standing entitled to retain possession of the suit land, and, thereupon theirs being entitled for possession, vis-a-vis, the suit kahsra numbers. Consequently, the defendants, cannot, as, untenably construed by the learned counsel, for the plaintiff, be construed qua theirs being not entitled, for, rendition of a decree for retention, of, possession, vis-a-vis, the suit khasra number, nor hence it can be argued, that, the afore relief, is beyond the domain,

of,pleadings, and, was unaffordable vis-a-vis, the plaintiff. Contrarily, the afore rendered decree qua entitlement of the defendants, to, retain possession of suit khasra numbers, and, the concomitant therewith relief of permanent prohibitory injunction, as, pronounced against the plaintiff, and, vis-a-vis, the suit khasra numbers, is well founded, upon, the pleadings apposite therewith, as stand, reared in the counterclaim, preferred by the defendants.

10. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, no substantial question of law much less a substantial question of law arise for determination in these appeals.

11. In view of the above discussion, there is no merit in both the Regular Second Appeals, and, they are dismissed accordingly. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Rakesh Thakur .....Appellant.
Versus
Ram Lal and others objectors ....Respondents/Cross-

FAO No.181 of 2018 along with
Cross objections No. 103 of 2018.
Reserved on : 22nd November, 2018.
Decided on : 30th November, 2018.

**Motor Vehicles Act, 1988 –** Sections 166 & 173- Motor accident- Claim application- Compensation- Assessment- Tribunal assessing monthly income of deceased at Rs.3,600/- and granting compensation accordingly after fastening liability on insurer- Appeal and cross objection- Claimants praying enhancement in compensation by arguing that income of deceased was Rs.7500/- per month- In cross objection, insurer taking plea that in absence of evidence that offending vehicle was insured with it, liability ought to have been fastened on owner of vehicle – On facts income of deceased proved to be Rs.7500/- per month- Insurance policy/ Certificate not filed in evidence by insurer- Held- Insurer intentionally avoided to place on record insurance cover issued by it for escaping indemnificatory liability to get it fastened upon owner. Appeal and cross objection partly allowed. Indemnificatory liability fastened upon insurer. (Paras 3 to 6)

For the Appellant: Mr. P. S. Goverdhan, Advocate.
For Respondent No.1/Cross-objector: Mr. Anirudh Sharma, Advocate.
For Respondent No.2: Mr. Chandan Goel, Advocate.
For Respondent No.3: Nemo.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed by the claimant/appellant herein, against the award pronounced, upon, M.A.C. Petition No. 12-FTC/2 of 2010, by the learned Motor Accident Claims Tribunal-III, Solan, wherethrough, he seek enhancement of compensation, as assessed, vis-a-vis, him, (ii) whereas, respondents No.1 herein/cross-objector, also prefer cross-objections, vis-a-vis, the impugned award, whereunder, vis-a-vis, the compensation amount, as stood determined qua the claimant/appellant herein, the, apt indemnificatory liability thereof, hence stood fastened, upon, him.

2. The learned counsel appearing, for the claimant/appellant herein, has contended with much vigour (i) that with rather ample evidence existing on record, and, its making upsurgings qua the claimant/appellant herein, hence, drawing a minimum salary of Rs.7,500/- per mensem, from his avocation, as Supervisor under PW-2, factum whereof remains uneroded of its efficacy, (ii) thereupon, he has contended with much vigour before this Court, that, the learned tribunal, in, taking the per mensem income of the claimant, to stand, borne in sum of Rs.3,600/-, has committed, a, gross illegality. He further contends that the rearing, of, afore sum, of, Rs.7,500/- per mesem by the claimant, was enjoined to borne in mind, by the learned tribunal concerned, (v) whereas, the learned tribunal concerned, for want of adduction, of, documentary proof, qua therewith, rather discarding the afore apposite claim, has under-assessed, compensation, vis-a-vis, the claimants. The afore submission has vigour, given PW-2, in his testification borne in his examination-in-chief, hence, categorically, voicing, that the claimant Rakesh Thakur, being employed, with him as Supervisor, and, his earning approximately Rs.30,000/- per mensem from his avocation. Though, the factum of the claimant, earning Rs.30,000/- per mensem, remained unproved on record, yet the claimant drawing a sum of Rs.7,500/- per annum, stands proven by Ex.PW2/A, exhibit whereof comprises, a certificate issued, vis-a-vis, the claimant by PW-2. Furthermore, PW-2 in his cross-examination, makes an echoing qua his making the apposite payment to PW-2, through cheque(s), and, also the claimant concerned, renders an apt testification, in, tandem therewith, (i) hence, the afore per mesem rearing of income by the claimant, was enjoined, to be borne in mind, by the learned tribunal concerned, (ii) whereas, the learned tribunal concerned, for want of adduction, of, documentary proof, qua therewith, rather discarding the afore apposite claim, has under-assessed, compensation, vis-a-vis, the claimant. Furthermore, the counsel for the insurer, while holding PW-2 to cross-examination, has, meted an affirmative suggestion, vis-a-vis, him, qua the salary of the deceased, being comprised, in, a sum, of, Rs.7,500/- per mensem, whereto an affirmative answer stood purveyed, by PW-2, (iii) thereupon, an inference is erectable qua the insurer, also accepting the afore echoings borne, in Ex.PW2/A, (iv) thereupon, it was inappropriate for the learned tribunal concerned, to, insist qua documentary proof, being adduced, vis-a-vis, the afore rearing, of, the afore per mensem income, by the deceased, (v) thereupon, the claimant is held to be earning, the, aforesaid sum of Rs.7,500/-, per mensem from his avocation. Consequently, the loss of monthly income is computed at Rs.7500x40%= Rs.3000/-, and, loss of annual income is computed at Rs.3000x12= Rs.36,000/-. Since, the injured/claimant at the time of accident was aged 32 years, hence, after applying the apt multiplier of 16, the total loss of future income computed at Rs.36,000/- x16=Rs.5,76,000/- (Rs.Five lakhs, seventy six thousand only).

3. Be that as it may, the learned counsel appearing for the appellant has proceeded to contend, that, the learned tribunal, has, made an under-assessment of the compensation, vis-a-vis, claimant, under the heads, pain and suffering, and, future loss of

amenities and discomfort etc. On an incisive perusal, and, reading of the award impugned before this Court, as also material existing on record, this Court, is, of the opinion, that, the assessment of compensation, as made, by the learned tribunal, under the various heads, is, just, and, adequate, and, does not warrant any interference by this Court. Consequently, the afore submission addressed before this Court by the learned counsel appearing for the claimant is rejected. Consequently, the appellant/claimant is held entitled to a total compensation in the hereinafter extracted manner:-

| | **Pecuniary damages** | |
|---|---|---|
| i | Loss of Future income | Rs.5,76,000/- |
| ii | Medical Expenses | Rs.60,749/- |
| iii | Transportation Charges | Rs.10,000/- |
| iv | Attendant charges | Rs.15,000/- |
| V | Special diet | Rs.20,000/- |
| | **Non Pecuniary damages** | |
| i | Pain and suffer | Rs.50,000/- |
| ii | Future loss of amenities, discomfort etc. | Rs.1,00,000/- |
| | **Total** | **Rs.8,31,749/-** |

4. The owner of the offending vehicle, respondent No.1, through, cross-objections bearing No. 103 of 2018 strived, to, exculpate the fastening of liability, vis-a-vis, compensation amount, upon, him. The learned tribunal for want of insurance policy, vis-a-vis, the offending vehicle, hence fastened the apt indemnificaotry liability, upon, the owner of the offending vehicle. The aforesaid fastening, of, the indemnificatory liability, upon, the owner of the offending vehicle is inapt, (i) as, subsequent to the afore impugned award, qua the afore occurrence, hence being rendered, the, learned tribunal concerned, also pronouncing awards, upon, Claim Petition No.16-S/2 of 2011, and, upon, Claim Petition No. 16-S/2 of 2011, both reared, vis-a-vis, the alike hereat accident, (ii) and, whereunder, the apt indemnificatory liability, stood, fastened, upon, the insurer, given the insurer therein placing on record, the insurance cover issued, by the insurer, with, respect to the offending vehicle. Consequently, the insurer intentionally, for, escaping the fastening, upon it, of, the apt indemnificatory liability, rather has hereat avoided to place on record, the, apt insurance cover, hence, the fastening, of, the apt indemnificatory liability, upon, the owner concerned, cannot be condoned, (iii) rather in consonance with the verdicts/awards pronounced, by this Court, upon, FAO Nos. 86 of 2017, and, upon, 85 of 2017, the, insurer shall indemnify the owner of the offending vehicle qua the liability of compensation amount, assessed, vis-a-vis, the claimant.

5. For the foregoing reasons, the appeal bearing FAO No.181 of 2018, as also, the Cross-objections No.103 of 2018, are, partly allowed, and, the impugned award is modified in the aforesaid manner. In sequel, the claimant/appellant herein is held entitled to total compensation of Rs.8,31,749/- along with interest at the rate of 9% per annum fro the date of filing of the petition, till realization thereof. The indemnificatory liability, vis-a-

vis, the afore amount shall be borne by the insurer of the offending vehicle. All pending applications also stand disposed of. Records be sent back forthwith.

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

Shama Devi alias Shayama and others .....Appellants.
Versus
Suresh Kumar & others .....Respondents.

FAO No. 161 of 2018
Reserved on : 27th November, 2018
Decided on : 30th November, 2018

**Motor Vehicles Act, 1988** - Sections 166 & 173- Motor accident- Claim application- Compensation- Assessment- Tribunal assessing monthly income of deceased at R.4500/- and granting compensation on its basis to claimants - Tribunal also granting Rs. One lack towards loss of consortium to widow- Appeal against by claimants - Deceased a Safai Karamchari, on contract basis at Rogi Kalyan Samiti, found drawing Rs.10,700/- per month as salary- Held- monthly income to be taken as Rs.10,700/- Compensation granted accordingly - Compensation under conventional heads also modified in tune with Pranay Sethi's case [JT 2017 (10) SC 450]- Appeal partly allowed- Award modified. (Paras 4 to 6).

***Case referred:***
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant: Mr. J. L. Bhardwaj, Advocate.
For Respondent No.1: Mr. Romesh Verma, Advocate.
For Respondent No.2: Mr. Vishal Panwar, Advocate.
For Respondent No.3: Mr. Bhupinder Pathania, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The claimants/appellants herein, has, instituted the instant appeal before this Court, wherethrough, they, seek enhancement of compensation, as assessed, vis-a-vis, them, under, the award pronounced by the learned Motor Accident Claims Tribunal-II, Shimla, H.P., upon, MAC Petition No. 12-S/2 of 2013.

2. The learned counsel appearing for the claimants/appellants herein has contended with much vigour (i) that despite the claimants hence averring, in, the petition qua their predecessor-in-interest, after, completing at 2.00 p.m., his duties, as a Safai Karamchari, on a contract basis at Rogi Kalyan Samiti, (ii) his thereafter performing part time job(s), of, sweeping, and, dish washing etc, in the cateens or hotels located at Shimla, and, his drawing therefrom per mensem salary, borne, in, a sum of Rs.4,500/-, (iii) AND also the claimant concerned, rendering an apt testification, in, tandem therewith, (iv) hence, the afore per mesem rearing of income of the deceased, was enjoined to borne in mind, by

the learned tribunal concerned, (v) whereas, the learned tribunal concerned, for want of adduction, of, documentary proof, qua therewith, rather discarding the afore apposite claim, has, rather under-assessed, compensation, vis-a-vis, the claimants. The afore submission, has, merit, as pleadings apposite therewith besides testification(s), in consonance therewith, comprised in the apt affidavit borne in Ex.PW1/A, rather exist(s) on record, (vi) and, when the counsel for the insurer while holding PW-1 to cross-examination, has omitted to put apposite suggestion, to, her for rather negating, the effect(s) thereof, (viii) thereupon, an inference is erectable qua the insurer, accepting the echoings borne, in Ex.PW1/A, (ix) thereupon, it was inappropriate for the learned tribunal concerned, for insisting qua adduction, of, documentary proof, vis-a-vis, the afore rearing, of, the afore per mensem income, by the deceased, (x) conspicuously, qua his, after his, at 2.00 p.m., hence, completing his duties as a Safai Karamchari, on a contract basis, his, thereafter performing part time job(s), in, the canteens or hotels located at Shimla, (xi) wherefrom, hence he earned Rs.4,500/- per mensem, thereupon, the aforesaid sum of Rs.4,500/-, is enjoined to be added, vis-a-vis Rs.6,200/-, given the latter sum uncontrovertedly, hence, constituting the salary drawing by the deceased, from his contractual job, as, a Safai Karmachari.

3. The learned counsel appearing, for the claimants/appellant, has (a) depended upon Ex.PW1/B, issued on 24.12.2016, with graphic descriptions carried therein qua co-employees, with the deceased being ordered to be regularized w.e.f. March, 2016, and, concomitant therewith hikes in their salary, being also meted qua them, (b) and, he thereafter further contends that the afore hike in the per mensem salary of the co-employees of the deceased, being also enjoined to be bestowed, by the learned tribunal concerned, in assessing the per mensem income, of the deceased, also, thereafter, it, stood enjoined to mete hikes, towards future prospects. However, the aforesaid submission cannot be accepted, as only the income last drawn, by the deceased, from, his relevant employment, is enjoined to be recokned, and, contrarily, with Ex.PW1/B, being issued much subsequent, to the demise of the deceased, (c) and, hence its belated issuance, since the demise of the deceased, renders it to be, a, mere expectation or a remote possibility, thereupon, also no credence can be meted, vis-a-vis, Ex.PW1/B. Consequently, the per mensem income of the deceased is calculated at Rs.10,700/-.

4. The deceased, is, in the postmortem report, is reflected to be aged 48 years, at the relevant time. With the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.61, extracted hereinafter:

> "61. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case

the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years. ”

expostulating (i) that where the deceased concerned, is a permanent employee, as is, the apt employment, of, the deceased, (a) thereupon, hikes or accretions, on anvil of future incremental prospects, vis-a-vis, the salary drawn by him, at the time contemporaneous, to, the ill fated mishap, from his employer, being also meteable thereto. However, before applying the mandate of the aforesaid relevant paragraph, borne in the judgment supra, it is significant to also bear in mind, the age of the deceased, (ii) since the postmortem report reflects, the deceased being aged 48 years, at the relevant time, hence with the afore extracted paragraph, mandating, of, accretions towards future incremental prospects, vis-a-vis, the salary last drawn by the deceased, being pegged upto 30% thereof, besides being tenably meteable, vis-a-vis, the apposite last drawn salary. Consequently, after meteing 30% increase(s), vis-a-vis, the apposite last drawn salary, thereupon, the relevant last drawn salary, of, the deceased, is recoknable to be Rs.13910/-, [Rs.10,700/-(last drawn salary of the deceased)+Rs.3,210/-(30% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, three, hence, 1/3rd deduction is to be visited, upon, a sum of Rs.13910/-, hence, after making, the, apt aforesaid deduction, vis-a-vis, the afore some, the per mensem dependency, comes to Rs.9,274/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is computed, at Rs.9,274x12=Rs.1,11,288/-. After applying the apposite multiplier of 13, the total compensation amount, is assessed in a sum of Rs.1,11,288/- x13=Rs.14,46,744/- (Rs. Fourteen Lacs, forty six thousand, seven hundred forty four only).

5. However, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs vis-a-vis, the widow of deceased, (i) under the head, loss of consortium, (ii) and quantification, of compensation vis-a-vis, the claimants under the heads “ loss of estate and funeral charges, respetively borne in a sum of Rs.25,000/- and Rs.10,000/- is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium vis-a-vis the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis the widow of the deceased, as also, vis-a-vis the other claimants. Accordingly, in addition to the

aforesaid amount of Rs.14,46,744/-, the petitioners, are, entitled under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs.14,11,200 + Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.15,16,744/-(Rs. Fifteen lakhs, sixteen thousands and seven hundred forty four only).

6. For the foregoing reasons, the appeal filed by the claimants is allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants/appellants, are, held entitled to a total compensation of Rs.15,16,744/-, along with pending and future interest @9 %, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The aforesaid amount of compensation be apportioned in the manner as ordered by the learned tribunal. All pending applications also stand disposed of. Records be sent back forthwith.

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

Smt. Sumeeta Sood (since deceased) through her legal heirs
..Petitioner/landlord.

Versus

Sh. Naresh Kumar Sood .Respondent/tenant.

Civil Revision No. 148 of 2016.
Reserved on : 6th November, 2018.
Decided on : 30th November, 2018.

**Himachal Pradesh Urban Rent Control Act, 1987-** Section 14(2) (i) – Eviction of tenant- Arrears of rent- Non payment- Effect- Rent controller determining "amount due" and ordering tenant's eviction from suit premises on ground of his being in arrears of rent- However eviction order passed subject to condition that if tenant deposited amount due he was not to be evicted- Appellate Authority allowing appeal of tenant and dismissing rent suit- Revision- Held- On failure of tenant to deposit amount due within statutory period, he is liable to be evicted from premises- Revision allowed. Order of Appellate Authority set aside. (Para 11).

**Himachal Pradesh Urban Rent Control Act, 1987-** Section 14(2)(v) Eviction of tenant- ceased to occupy- meaning- Landlord alleging that tenant ceased to occupy premises from July, 2008 upto November, 2010- Evidence revealing consumption of electricity during this period-Held- Landlord failed to prove that tenant ceased to occupy premises for continuous period of twelve months before filing of petition. (Paras11 & 14).

***Case referred:***

Sanjay Kumar vs. Pushpa Devi, ILR 2016 (I) HP 283

For the Petitioner : Mr. Rajeev Lochan, Advocate.
For the Respondent: Mr. K.S. Thakur, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge**

The learned Rent Controller, upon, Rent Petition No.113/2 of 2010, rendered a verdict of eviction, vis-a-vis, the tenant, qua the demised premises, on proven grounds (a) of, the tenant falling, hence, in arrears of rent, w.e.f. 1.12.2007 to 14.03.2012 @ Rs.2000/- per month, (b) and, upon, the ground appertaining to the respondent/tenant, rather ceasing to occupy the demised premises, for a continuous period of two years. In, the, operative portion of the verdict, recorded by the learned Rent Controller, the hereinafter extracted, hence, apt portions, stands, borne therein:

> "In view of my findings on the issues No.1,2,3, 4 and 5 above, petition succeeds and the same is allowed and the petitioner is held entitled to recover amount to the tune of Rs.2,09,990/- i.e. arrears of rent at the rate of Rs.2,000/- per month plus statutory interest @9% per annum w.e.f. December, 2007 to 14.3.2012 and amended interest @ 12% per annum w.e.f. 15.3.2012 till today i.e. 18.3.2015, and respondent is directed to pay/deposit the aforesaid entire amount within a period of 30 days from today i.e. 18.3.2015, the date of passing of this order, falling which respondent shall be liable to be evicted from the demised premises."

The tenant being aggrieved aggrieved therefrom, hence, preferred an appeal, before the learned Appellate Authority, and, upon the apposite Rent Appeal No.13-S/14 of 2015, the learned Appellate Authority, hence, recorded a verdict, in disaffirmation, vis-a-vis, the verdict recorded by the learned Rent Controller. The landlord, being aggrieved therefrom, hence, assails the verdict pronounced by the learned Appellate Authority, upon, Rent Appeal No.13-S/14 of 2015.

2. Briefly stated the facts of the case, are ,that the petitioner/landlord has instituted the rent petition seeking eviction of the respondent/tenant from the premises i.e. one shop situated in ground floor of four storeyed building which stand built on the land comprised in Khasra No.667, Sanjauli Bazar, Shimla-6, H.P. It has been pleaded by the petitioner/landlord that the demised premises is situated in Municipal Corporation area and she is the owner of the demised premises. The demised premises is non residential. The respondent is tenant over the demised premises at monthly rent of Rs.2000/-, and, it was rented out in the year 1995 to the respondent. The respondent is in arrears of rent from 1.12.2007 to 30.11.2010 at the rate of Rs.2,000/- per mensem which come to Rs.72,000/-, and, the interest at the rate of 9% per annum which come to Rs.9,990/- and total arrears of rent Rs.81,990/-. The respondent has also ceased to occupy the demised premises for a continuous period of two years prior to the filing of the present petition without any reasonable cause. The shop in question was rented out for carrying out the business of service station of vehicles to the respondent. But, no work of business of service station of vehicles has been carried out for th last two years and the demised premises are lying locked which has impaired the value and utility of the demised premises. Hence the petition.

3. The respondent/tenant, in his reply, filed to the eviction petition, has taken preliminary objections qua non existence of relationship of tenant and landlord, maintainability, estoppel etc. On merits, the respondent has admitted that the demised premises is situated in Sanjauli Bazaar, within the Municipal area. But, the respondent has denied that the petitioner is the landlord and he is the tenant of the petitioner over the demised premises. The respondent has pleaded that Sh. Rakesh Kumar was his landlord to whom the rent was paid by him. However, the respondent has admitted that the demised premises is non residential and its monthly rent is Rs.2,000/ and it was rented out to him.

The respondent has pleaded that the shop in question was taken on rent by him from Sh. Rakesh Kumar for business and he has right too run business in the demised premises. The rent of the demised premises was offered to Sh. Rakesh Kumar, who had been receiving the rent previously and the rent was even tendered to him by way of cheque through registered letter. But the register letter was not received by Rakesh Kumar for the reasons best known to him and he is not liable to pay rent alongwith interest to Rakesh Kumar. Rakesh Kumar has not intimated him about the transfer of rights/attornment of the right in favour of the petitioner. Therefore, the petitioner has no right, title or interest to claim the rent along with interest from him. The respondent has also denied that the demised premises remained locked for a continous period of 12 months, prior to the filing of the present petition without reasonable cause. But the respondent has pleaded that the demised premises never remained closed. He has some dispute and difference with Swaraj Mazda Company which has to pay about Rs. Forty lakh to him. Therefor,e his business come to stand still. He had to bear loss in business and the shop is still open and it never remained closed for continuous period of 12 months.

4. The landlord/petitioner herein filed rejoinder to the reply of the tenant/respondent herein, wherein, he denied the contents of the reply and re-affirmed and re-asserted the averments, made in the petition.

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

1. Whether the respondent is in arrears of rent w.e.f. 1.12.2007 to 30.11.2010 @ Rs.2,000/- per month, as alleged? OPP.
2. If issue No.1, is proved in affirmative, whether the petitioner is entitled to recover the aforesaid amount along with statutory interest as alleged? OPP.
3. Whether the respondent has ceased to occupy the demised premises for continuous period of two years, as alleged? OPP
4. Whether Rakesh Kumar is the landlord of the demised premises, if so, its effect? OPR
5. Whether the petitioner is estopped by his acts and conduct from filing the present petition, as alleged? OPR.
6. Relief.

6. On an appraisal of evidence, adduced before the learned Rent Controller, the learned Rent Controller, hence, allowed the petition of the landlord/petitioner herein. In an appeal, preferred therefrom, by, the tenant/respondent herein, before, the learned Appellate Authority, the latter allowed the appeal, and, reversed the order(s) recorded by the learned Rent Controller.

7. Now the landlord/petitioner herein has instituted the instant Civil Revision Petition, before this Court, for hence assailing the findings recorded, in its impugned order, by the learned Appellate Authority.

8. The statutory ground, constituted, in the rent petition, as, filed before the learned Rent Controller, and, appertaining to the entitlement, of, the landlord to seek eviction, of, the tenant from the demised premises, on anvil, of the tenant falling, within, the mischief of sub-section(5) of Section 14, of, the Himachal Pradesh Urban Rent Control Act (hereinafter referred to as the Act), (a) imperatively, for ensuring qua validity, vis-a-vis, the afore espoused ground, hence being aptly determined, (b) enjoins existence of cogent

evidence, in tandem therewith being adduced by the landlord, (c) and, for, making the apt afore gaugings, this Court, is, constrained, to, ad verbatim, reproduce the phraseology thereof, sub-section (5) of Section 154 of the Act, is, cast in the hereinafter extracted phraseology:-

> "(5) Where a landlord who has obtained possession of the building or rented land in pursuance of an order under sub-section (3) does not occupy it himself or if possession was obtained by him for his family in pursuance of an order under sub-clause (iii) of clause (a) of sub-section. (3), his family does not occupy the residential building, or if possession was obtained by him on behalf of his son in pursuance of an order under clause (d) of sub-section (3) his son does not occupy it for the purpose for which the possession was obtained, for a continuous period of twelve months from the date of obtaining possession or if possession was obtained under sub-section (2) of section 15 he does not occupy it for personal use for a continuous period of3 months from the date of obtaining possession or where a landlord who has obtained possession of a building under clause (c) of sub-section (3) puts that building to any use other than that for which it was obtained or lets it out to any tenant other than the tenant evicted from it, the tenant who has been evicted may apply to the Controller for an order directing that he shall be restored to possession of such building or rented land and the Controller shall make an order accordingly."

9. Apparently, the hereinabove extracted phraseology, of, the aforesaid apt statutory ground, cast in sub-section(5) of Section 14 of the Act, (I) makes visible emergences, qua hence the landlord being enjoined to adduce cogent proof qua (a) the tenant ceasing to occupy the tenanted premises, (b) and the factum, of, afore cessor, of, occupation, of, the tenanted premises, by the tenant, enjoins eruption of clear, and, cogent proof qua hence it, rather, spanning over, a, continuous period of 12 months; (c) and the afore cessor, of, occupation, of, the demised premises, being without any reasonable cause. A deeper delving thereinto, is, necessary, for, rather garnering, the appropriate salient nuance thereof, and, thereafter this Court, is, enjoined, to mete, an, apt connotation, to, the statutory phrase "ceased to occupy", as occurs therein, and, also is hence enjoined, to, make ascription(s), vis-a-vis, the befittingly acquired connotation, by the further therein borne statutory phrase "for a continuous period of twelve months".

10. The statutory phrase "ceased to occupy" as, is, borne therein, has, a, grave, and, somber significance, (i) given the legislature, in its wisdom, in substitution, of, the coinage possession, rather engrafting therein, the afore statutory phrase, (ii) the legislative wisdom, behind engraftment, of the aforesaid statutory phrase therein, is to preclude, the tenant, to in the garb of his holding, symbolical possession, of the demised premises, and, despite, his locking the demised premises, hence, rear a ground, that, he hence yet holds rather symbolic possession, of, the demised premises, and, thereupon, is entitled, to, frustrate his eviction thereof, (iii) now given the afore legislative wisdom, existing behind, the engraftment, of, the statutory phrase "ceased to occupy", in sub-section (5) of Section 14 of the Act, (iv) thereupon, the natural eruption(s), of, the afore connotation rather, is, qua the tenant, being enjoined to adduce cogent proof, qua his, not leaving unattended, the demised premises nor his latching the demised premises, hence, reiteratedly leaving it unattended, (v) whereupon, it woud be befitting to hold qua his not holding, the, requisite *animus deserendi*. However, on, evident eruption, of, the afore *animus deserend*i, yet, the tenant would save his eviction from the demised premises, (vi) upon, his adducing evidence qua, a, reasonable cause besetting him, whereupon, he was led to hence fall within the statutory

mischief, borne in the opening part of sub-section (5) of Section 14 of the Act, (vii) wherewithin, a, mandate, is, enshrined that, upon, his ceasing to occupy the demised premises, for, a continuous period of 12 months, rather, his being entailed to suffer, an, order of eviction, therefrom. Furthermore, the afore proven *animus deserendi*, of, the tenant concerned, is to occur, for, a continuous period of 12 months, and, the afore phase, of, 12 months, naturally is to be ascribed, an apt import, of it, appertaining to 12 months, hence, preceding the institution of the eviction petition, dehors, the afore import, not standing, explicitly engrafted in sub-section (5), of, Section 14 of the Act.

11. Even though, the learned counsel appearing for the landlord has contended with vigour, that, the appreciation, of the evidence appertaining, to, the afore statutory ground, of, eviction rather suffers, from, a gross infirmity. However, the afore contention rather *ex-facie,* lacks hence legal strength, given the proven consumption of electricity, by the tenant, vis-a-vis, the demised premises, (i) commencing from July, 2008, and, ending upto November, 2010. The afore proven consumption of electricity, by the tenant, vis-a-vis, the demised premises, acquires an aura of conclusivity, qua no cogent evidence, for dislodging, the afore proven fact, being adduced by the landlord, (ii) comprised in the afore consumption being inefficacious, (iii) and, in, the landlord rather placing on record, the, best documentary evidence, qua the door of the tenanted premises, for the afore period or 12 months, prior, to the institution of the eviction petition, rather evidently carrying locks. However, when the aforesaid evidence remained unadduced by the landlord, and, when the petition, for eviction, cast upon the aforesaid statutory ground, stood presented before the learned Rent Controller concerned, on 19.11.2010, thereupon, with this Court, ascribing the afore connotation to the statutory phrase "continuously for a period of twelve months", reiteratedly qua it appertaining, to a phase 12 months prior to the institution, of, the eviction petition, (i) thereupon, when in open discord, with the afore connotation, as, ascribed to the afore statutory phrase, (ii) the tenant rather has proven qua his consuming electricity, vis-a-vis, the demised premises, upto, November, 2010, (iii) rather begets the apt corollary qua the tenant falling outside, the mischief of sub-section (5) of Section 14 of the Act, also, his proving qua his not carrying the requisite *animus deserendi,* comprised in his provenly, leaving the demised premises hence unattended or his locking the demised premises.

12. Be that as it may, the learned Appellate Authority, though, framed an issue appertaining, to the learned Rent Controller, falling in grave error, in ordering the eviction of the tenant, from, the demised premises, on anvil, of his falling into the arrears of rent, yet, the learned Appellate Authority rather failed to render specific findings, vis-a-vis, the afore ground, and, hence ex-facie has committed a gross illegality and impropriety. Nonetheless, bearing in mind the afore extracted apposite portion, of the verdict, pronounced by the learned Rent Controller, besides bearing in mind the provisions, of, the apposite third proviso, occurring in sub-section (2), of, Section 14 of the Act, proviso whereof ad verbetim extracted hereinafter:-

> "Provided further that the tenant against whom the Controller has made an order for eviction on the ground of non-payment of rent due from him, shall not be evicted as a result of his order, if the tenant pays the amount due within a period of 30 days from the date of order;"

(i) this court is constrained to form a firm conclusion qua the statutory phrase "if the tenant pays the amount due within a period of 30 days from the date of order" (ii) hence carrying the apt connotation qua the tenant, for rather saving his eviction, from the demised premises, his being ejoined to liquidate, the, judicially pronounced liability, appertaining, to his falling into arrears of rent, by his not depositing, the rent before the learned Rent

Controller, rather his proceeding to make the apt payment, directly hence to the landlord concerned, (iii) the afore conclusion falls in tandem, with, the verdict pronounced by this Court in ***CMPMO No.156 of 2015,*** titled as ***Sanjay Kumar vs. Pushpa Devi***, decided on 6th January, 2016, the relevant paragraph No.23 whereof stand extracted hereinafter:-

> "The expression used in the third proviso is "pays" and not deposit. The Section itself does not provide for depositing the amount in the Court after passing of the orders. AS such, the only meaning which can be given to the expression "pay" and "tender" is that the rent is to be directly paid to the landlady and not deposited in the Court. At this juncture it be only observed that the Act does provide a mechanism for depositing the rent in the Court. Section 20 and 21 of the Act deal with the same. But then in the given facts and circumstances, these provisions cannot be invoked, for there was neither any tender by the tenant nor any refusal by the landlady to accept the rent. Significantly, no intimation of deposit of rent was sent to the landlady within thirty days from the date of passing of the order."

13. Be that as it may, the tenant was also enjoined to adduce evidence in tandem therewith. However, a perusal of records, omits to make an apt disclosure qua the afore manner of liquidation, of, the apt judicially pronounced liability, being hence liquidated by the tenant, vis-a-vis, the landlord. Contrarily, upon, the aggrieved tenant rearing an appeal, against, verdict, of, eviction, pronounced qua him, by the learned Rent Controller, his, through CMP No. 4-S/6 of 2015, instituted on 21.04.2015, rather hence visibly beyond the period of one month, occurring in the third proviso, to sub-section (2) of Section 14 of the Act, hence making, a successful endeavour, to purportedly mete compliance with the verdict pronounced, by the learned Rent Controller, (i) whereunder, the latter concluded qua the tenant, falling in arrears of rent, (ii) and, thereafter in the operative portion, of the verdict, it, computed the afore quantum of arrears along with interest accrued thereon, (iii) thereupon, the tenant was obliged, for, hence saving his eviction, vis-a-vis, the demised premises, and,upon, the afore ground, hence, make direct payment of the afore quantum of rent, vis-a-vis, the landlord. However, apparently, he failed to do so, thereupon, with the tenant transgressing, the mandate of the afore apt 3rd proviso, he hence stands concluded to facilitate his eviction, from, the demised premises, and, thereupon, it is concluded that, vis-a-vis, the afore statutory ground, the tenant is enjoined, to, suffer eviction, from, the demised premises.

14. The above discussion unfolds qua the conclusions arrived by both the learned Appellate Authority with respect to the tenant/respondent herein being not entitled to be evicted from the demised premises on the ground of his being ceased to occupy the demised premises continuously, for a period two months, being based upon a proper and mature appreciation of evidence on record. However, the learned Appellate Authority has committed, a, gross error in its not rendering an affirmative finding on the ground of the respondent/tenant, being liable to be evicted from the demised premises, on account of his falling into the arrears of rent. .

15. In view of above discussion, the present petition is partly allowed, and, the impugned judgment rendered by the learned Appellate Authority, upon, Rent Appeal No.13-S/4 of 2015 is modified to the afore extent. All pending applications also stand disposed of. No order as to costs.

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

The New India Assurance Company Limited. .....Appellant.

Versus

Ms. Sheetanshu ....Respondents.

FAO No. 323 of 2018.
Reserved on : 28th November, 2018.
Decided on : 30th November, 2018.

**Motor Vehicles Act, 1988-** Sections- 166 & 173- Motor accident- Claim application- Permanent disability- Assessment- Claims Tribunal granting Rs. Rs.6,48,000/- towards future income by holding that claimant suffered permanent disability on account of injuries- Appeal by insurer- Held - In absence of adduction of disability certificate in evidence Tribunal not justified in granting compensation towards future income- Appeal partly allowed- Award modified. (Paras 4 to 6).

For the Appellant: Mr. Praneet Gupta, Advocate.
For Respondent No. 1 : Mr. Vipul Sharda, Advocate.
Respondents No.2 and 3 already ex-parte.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal, stands, directed by the insurer of the offending vehicle, against, the award pronounced by the Learned Motor Accident Claim Tribunal (IV), Kangra at Dharamshala, H.P, whereby, the learned Tribunal adjudged compensation, vis-a-vis, claimant. The quantum, of, compensation amount adjudged thereunder, vis-a-vis, the claimant, is, constituted in a sum of Rs.10,98,761/-,and, interest at the rate of 7.5% per annum, is, levied thereon, commencing, from, the date of petition uptill its deposit. Obviously indemnificatory liability thereof, has been fastened, upon the insurer/appellant herein. The Appellant/insurer is aggrieved therefrom, hence, has instituted the instant appeal before this Court.

2. The learned counsel appearing for the appellant/insurer, does not contest, the validity of findings rendered, upon, the issue appertaining to the relevant mishap being,a, sequel of rash and negligent manner, of, driving of the offending vehicle, by respondent No.3 herein, nor does he contest, the, validity of the findings rendered by the learned tribunal, upon, the issue appertaining to the fastening, upon, it, of the apt indemnificatory liability.

3. However, the learned counsel appearing for the insurer has with extreme tenacity, contended, that in the absence, of, the claimant placing on record, the apt disability certificate, pronouncing therein, (a) the imperative factum qua in sequel to the injuries sustained by the claimant, in, the ill-fated accident, 100% disability standing entailed, upon her person, (b) nor evidence being adduced qua hers earning any income of Rs.3000/- per mensem, from hers, performing domestic chores; (c) rather hers, on affidavit making an averment qua hers losing an academic year, in sequel, to the injuries being entailed upon her, (d) thereupon, he contends that the afore wants of peremptory evidence, for, hence, succoring, the afore computation, of, her per mensem earning, in a sum, of,

Rs.3,000/-, on anvil of it, constituting the value, of, the domestic chores performed by the claimant, (e) besides, the learned tribunal, thereafter concluding, that, given the disability suffered by her, being permanent in nature, hence also adding a multiplier of 18, to the afore figure of per mensem salary, has rather resulted in gross mis-computation, of, compensation by the learned tribunal, under the head "loss of future income".

4. The afore submission garners immense vigour (a) as the evidence on record, omits, to make a display qua any disability certificate, hence existing on record, with candid pronouncements being borne, therein qua 100% being entailed upon the claimant, thereupon, for want of the best evidence, (i) it was grossly insagacious for the learned tribunal, to conclude that, in sequel to the afore purported magnitude, of disability entailed, upon, the claimants hence permanent loss, of, income being encumbered upon him, nor it was sagacious for the learned tribunal, to, assess or compute compensation, borne in a sum of Rs.6,48,000/-, vis-a-vis, the claimant, under the head "Loss of future income". Consequently, the afore sum as assessed, vis-a-vis, the claimant under the head of "loss of future income", is, set aside.

5. The learned counsel appearing for the insurer has further contended with much vigour, that, the sum of Rs.2,25,761/- assessed under the head "medical charges", also wanting interference, (i) given the afore computation, being made on anvil, of inadmissible photo copies, of, the medical bills, (ii) given theirs being not proven from their original, rather theirs being marked. However, the aforesaid submission, cannot be accepted, given the claimant in her affidavit, borne in Ex.PW1/A, rather purveying a good, sound and tangible reason, for not producing the originals of the medical bills, explanation whereof, is, comprised in the original, of, the medical bills being burnt in a fire, which, occurred in their house, (iii) factum whereof remained unrepulsed, rendering hence the afore ascription, of, utmost tenacity thereto, being apt.

6. For the foregoing reasons, the instant appeal is partly allowed, and, the impugned award is modified to the afore extent. Consequently, the claimant is held entitled to a total compensation of Rs.4,50,761/- only, amount whereof, shall carry interest at the rate of 7.5% per annum from the date of filing of the petition till its deposit. All pending applications also stand disposed of. Records be sent back forthwith.

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

United India Insurance Company Limited .....Appellant.
Versus
Chander Rekha & others ....Respondents.

FAO No. 397 of 2018.
Reserved on: 21st November, 2018.
Decided on : 30th November, 2018.

**Motor Vehicles Act, 1988-** Section 6- Restriction on simultaneously holding two driving licenses- Applicability- Claims Tribunal allowing claim application and fastening liability on insurer- Appeal against- Insurer submitting that driver of offending vehicle had two driving licenses at time of accident and there was infraction of section 6 of Act- On facts, driver was having driving license issued by Licensing Authority Agra and Learner's license issued by

Licensing Authority Dharamshala- Held- Restriction on holding simultaneously two driving licenses is not attracted when one of licenses person possessing is a learner's license.(Paras 4 & 5).

**Motor Vehicles Act, 1988-** Section 9- Driving License- Issuance of- Jurisdiction- Requirement- Held- Licensing Authority has jurisdiction to issue driving license to person who is ordinarily residing or carrying on business within its jurisdiction – Permanent stay of person within its jurisdiction not necessary.(Para 6).

***Case referred:***

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

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| For the Appellant: | Mr. Vivek Negi, Advocate. |
| For Respondents No. 1 to 4: | Mr. Surinder Saklani, Advocate. |
| For Respondent No. 5 & 6: | Mr. Rajiv Rai, Advocate. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts a challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal(I), Kangra at Dharamshala, H.P., upon, Claim Petition bearing RBT MACP No. 32-K/II/14/2013, whereunder, compensation amount comprised, in, a sum of Rs.20,91,528/-, and, along with interest accrued thereon, at the rate of 7.5% per annum, from, the date of petition, till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer.

2. The learned counsel appearing for the insurer has contested (i) the returning, of, affirmative findings, upon, issue No.1, by the learned Tribunal, issue whereof, appertains, to the relevant mishap being, a, sequel of rash, and, negligent manner of driving of the offending vehicle, by respondent No.6 herein, one Munish Rai. In sequel to the afore mishap, one Sansar Chand met his end, factum whereof, stands, echoed, in, postmortem report, borne in Ex.PW5/A. The afore submission addressed before this Court, is, entirely surmisal (ii) as the only eye witness to the occurrence, who stepped into the witness box, for, lending proof qua the relevant mishap, being a sequel of rash and negligent manner, of, driving of the offending motorcycle, by respondent No.6 herein, rather, in his deposition, comprised in his examination-in-chief, hence making clear bespeakings, qua respondent No.6 herein, while being atop, on, the offending motorcycle, his driving it in a rash, and, negligent manner, (iii) and, without his adequately ensuring that the deceased, who was, at the relevant stage, attempting to cross the other side, of, the road, hence not colliding, with the afore motorcycle, whereon he was atop, (iv) rather striking his person, hence, leading to his falling onto the road, (v) and, in sequel whereof, fatal injuries, stood entailed, upon, his person. The afore evidence of PW-2, borne in his examination-in-chief, stood, not concerted, to be repulsed, by the learned counsel for the insurer, by his meteing apposite suggestions to him, while his holding him, for cross-examination, (vi) suggestions whereof stood comprised, in theirs holding echoings qua his being not an ocular witness, to the occurrence, (vii) nor suggestions stood meted to him, that given the sudden appearance thereat, of, the deceased, rather respondent No.6 herein, hence his being disabled, to, appropriately maneuver the motorcycle, and, hence, it colliding against the deceased, (viii) nor his meteing any apposite suggestion to him, qua, respondent No.6 herein, not, being

negligent in driving, the, offending vehicle. The absence of meteing, of, afore suggestion(s), by the learned counsel for the insurer, while holding PW-2 to cross-examination, and, conspicuously rather when a suggestion, in, the affirmative stood put to him, by the counsel, for the insurer, while holding him, to, cross-examination, with candid disclosures, therein, qua the road, at the relevant site hence being straight, (ix) thereupon, it is to be firmly concluded that, respondent No.6 herein, had a reasonable opportunity, to, sight the arrival of the deceased, onto the road, and, also could hence mete adherence, to the standards of due care, and, caution by rather slowing down the speed of the motor cycle, and, also by applying brakes thereof, whereas, he visibly omitted, to do so. Furthermore, an affirmative suggestion, stood meted, to PW-2, qua that, there being no zebra crossing, on the road, at the relevant site, and, whereon rather the deceased could take, to, trudge, whereto, also alike reply, stood evinced, (x) and, wherefrom, also it could be garnered that in the deceased, trudging elsewhere, his rather not adhering to the standards of due care, and, caution, and, also his hence contributing to the accident. Contrarily, the, meteing, of, the afore suggestion, to, the witness concerned, by the counsel for the insurer, constrains, an inference qua the insurer, being barred to rear, the afore plea in the affirmative.

3. Be that as it may, the learned counsel for the insurer has proceeded to contend with much vigour before this Court that (i) with respondent No.6 herein holding a learner's licence, issued by RLA Dharamshala, and, with, at the relevant time, the pillion, of, the motor cycle, hence, remaining uncontrovertedly unoccupied, by a trained instructor, (ii) whereas, the occupation of the pillion, of, the motor cycle, by a trained instructor, was statutorily mandated, for enabling, the instructor to hence control or stop the vehicle, (iii) thereupon, with the mandate of Rule 3, of the Central Motor Vehicles Rules, 1989, provisions whereof stand extracted hereinafter:-

> “3. General.—The provisions of sub-section (1) of section 3 shall not apply to a person while receiving instructions or gaining experience in driving with the object of presenting himself for a test of competence to drive, so long as—
>
> (a) such person is the holder of an effective learner's licence issued to him in Form 3 to drive the vehicle;
>
> (b) such person is accompanied by an instructor holding an effective driving License to drive the vehicle and such instructor is sitting in such a position to control or stop the vehicle; and
>
> (c) there is painted, in the front and the rear or the vehicle or on a plate or card affixed to the front and the rear, the letter "L" in red on a white background Note.—The painting on the vehicle or on the plate or card shall not be less than 18 centimeters square and the letter "L" shall not be less than 10 centimeters high, 2 centimeters thick and 9 centimeters wide at the bottom:
>
> Provided that a person, while receiving instructions or gaining experience in driving a motor cycle (with or without a side-car attached), shall not carry any other person on the motor cycle except for the purpose and in the manner referred to in clause (b).

hence standing infracted, (i) reiteratedly given PW-2 testifying, in his cross-examination qua the pillion of the apposite motor cycle hence remaining un-occupied by any person, thereupon, the fastening, of, the apt indemnificatory liability, upon, the insurer of the offending vehicle, hence, being rendered grossly flawed.

4. However, the validity of the afore submission, would be determined, only when, this Court, comes to a conclusion, that, the driving licence(s), as, produced by

respondent No.6 herein, before the learned tribunal, and, borne in Ex.RW1/A, and, in Ex.RW2/A, rather, as, contended by the learned counsel for the insurer, falling within, the prohibition, engrafted in Section 6 of the Motor Vehicles Act, 1988, provisions whereof stand extracted hereinafter:-

> **"6. Restrictions on the holding of driving licences.**—(1) No person shall, while he holds any driving licence for the time being in force, hold any other driving licence except a learner's licence or a driving licence issued in accordance with the provisions of section 18 or a document authorising, in accordance with the rules made under section 139, the person specified therein to drive a motor vehicle.
>
> (2) No holder of a driving licence or a learner's licence shall permit it to be used by any other person.
>
> (3) Nothing in this section shall prevent a licensing authority having the jurisdiction referred to in sub-section (1) of section 9 from adding to the classes of vehicles which the driving licence authorises the holder to drive."

(i) whereunder a statutory interdiction, is, contemplated against a person holding, two driving licence(s), (ii) and, also this Court hence proceeding to test the validity, of, the further submission, that, the afore exhibited driving licence(s), borne, in Ex.RW2/A rather also infracting the mandate borne in Section 9, of, the Motor Vehicles Act, provisions whereof stand extracted hereinafter:-

> **"9. Grant of driving licence.**—(1) Any person who is not for the time being disqualified for holding or obtaining a driving licence may apply to the licensing authority having jurisdiction in the area—
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> (i) in which he ordinarily resides or carries on business, or
>
> (ii) in which the school or establishment referred to in section 12 from where he is receiving or has received instruction in driving a motor vehicle is situated. for the issue to him of a driving licence.
>
> (2) Every application under sub-section (1) shall be in such form and shall be accompanied by such fee and such documents as may be prescribed by the Central Government. 1[(3) If the applicant passes such test as may be prescribed by the Central Government, he shall be issued the driving licence: Provided that no such test shall be necessary where the applicant produces proof to show that—
>
> (a) (i) the applicant has previously held a driving licence to drive such class of vehicle and that the period between the date of expiry of that licence and the date of the application does not exceed five years, or
>
> (ii) the applicant holds or has previously held a driving licence to drive such class of vehicle issued under section 18, or
>
> (iii) the applicant holds a driving licence to drive such class of vehicle issued by a competent authority of any country outside India, subject to the condition that the applicant complies with the provisions of sub-section (3) of section 8,
>
> (b) the applicant is not suffering from any disability which is likely to cause the driving by him to be a source of danger to the public; and the licensing authority may, for that purpose, require the applicant to produce a medical certificate in the same form and in the same manner as is referred to in sub-section (3) of section 8: Provided further that where the application is for a driving licence to drive a motor vehicle (not being a transport vehicle), the

licensing authority may exempt the applicant from the test of competence to drive a vehicle prescribed under this sub-section, if the applicant possesses a driving certificate issued by any institution recognised in this behalf by the State Government.]

(4) Where the application is for a licence to drive a transport vehicle, no such authorisation shall be granted to any applicant unless he possesses such minimum educational qualification as may be prescribed by the Central Government and a driving certificate issued by a school or establishment referred to in section 12. 2[(5) Where the applicant does not pass the test, he may be permitted to re-appear for the test after a period of seven days: Provided that where the applicant does not pass the test even after three appearances, he shall not be qualified to re-appear for such test before the expiry of a period of sixty days from the date of last such test.]

(6) The test of competence to drive shall be carried out in a vehicle of the type to which the application refers: Provided that a person who passed a test in driving a motor cycle with gear shall be deemed also to have passed a test in driving a motor cycle without gear.

(7) When any application has been duly made to the appropriate licensing authority and the applicant has satisfied such authority of his competence to drive, the licensing authority shall issue the applicant a driving licence unless the applicant is for the time being disqualified for holding or obtaining a driving licence: Provided that a licensing authority may issue a driving licence to drive a motor cycle or a light motor vehicle notwithstanding that it is not the appropriate licensing authority, if the licensing authority is satisfied that there is good and sufficient reason for the applicant's inability to apply to the appropriate licensing authority: Provided further that the licensing authority shall not issue a new driving licence to the applicant, if he had previously held a driving licence, unless it is satisfied that there is good and sufficient reason for his inability to obtain a duplicate copy of his former licence.

(8) If the licensing authority is satisfied, after giving the applicant an opportunity of being heard, that he—

(a) is a habitual criminal or a habitual drunkard; or

(b) is a habitual addict to any narcotic drug or psychotropic substance within the meaning of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(c) is a person whose licence to drive any motor vehicle has, at any time earlier, been revoked, it may, for reasons to be recorded in writing, make an order refusing to issue a driving licence to such person and any person aggrieved by an order made by a licensing authority under this sub-section may, within thirty days of the receipt of the order, appeal to the prescribed authority.

(9) Any driving licence for driving a motor cycle in force immediately before the commencement of this Act shall, after such commencement, be deemed to be effective for driving a motor cycle with or without gear."

wherein in clause (i) to sub section (1) thereof, a mandate stands cast, upon, a seeker of the driving licence, and, also upon the licencing authority concerned, to, ensure that the apt seeker ordinarily resides or carries business, within, the jurisdiction of the apposite licencing authority, wherebefore, an application, is, instituted.

5. The initial submission, addressed by the learned counsel appearing for the insurer, on anvil, of, the mandate enshrined in Section 6 of the Act, wherein exists a statutory bar, against, respondent No.6 herein, to contemporaneously, holding two driving licences, and, (i) whereas, his holding a learner's driving licence, and, also his holding, the, afore exhibited licence(s), to, drive the offending vehicle, hence, mandate thereof, being infracted, rather is, frail, and, is founded, upon, a gross mis-perusal, of, the provisions of sub-section (1), of Section 6 of the Act, (i) wherein though there occurs, a, statutory bar against any person contemporaneously, holding, two driving licence(s), yet, the afore bar stands excepted, vis-a-vis, the apt learner's licence, (ii) licence whereof, respondent No.6 herein, rather held at the relevant time, along with his holding the afore exhibit(s).

6. Nowat, the submission, anvilled, upon, infraction, of, the mandate of clause (i) to sub-section (1) of Section 9 of the Act, hence, emerging, would assume validation, upon, adduction of evidence, by the insurer, that respondent No.6 herein, at the time of its issuance, rather not ordinarily residing or carrying business, within the territorial limits, of, the licencing authority concerned, located at Agra. The afore phrase "ordinary residence or carrying of business" by respondent No.6 herein, within, the territorial limits, of, the licencing authority located at Agra, does not, on a reading of clause (i), to, subsection (1), of, Section 9 of the Act, neither carries any restricted or tramelled connotation, nor enjoins, upon, respondent No.6 herein, to, for certain specified duration of times, to hence, reside thereat, nor also prohibits, him, to temporarily hold, a, makeshift residence, within, the territorial limits, of, the licencing authority located at Agra, nor hence rather forbids respondent No.6 herein, to seek a licence, from, the licencing authority located at Agra. Conspicuously also the afore statutory provisions, do not, contemplate perpetuity, of, residence or carrying of business, by the applicant, within the territorial limits of jurisdiction of the RLA concerned. Corollary thereof, upon, hence making a liberal connotation thereof, is, qua with the afore evidence, rather wanting, thereupon, it is to be concluded that at the time, of issuance, of the afore exhibits, by the licencing authority located at Agra, its seeker, respondent No.6 herein, may be temporarily residing, within, the territorial limits thereof, and, may be carrying temporary business thereat, hence, there appears, no, gross infraction, of, the mandate, of, clause (i) to sub-section(1) of Section 9, of, the Act. Consequently, the fastening, of, the indemnificatory liability, upon, the insurer is both apt and tenable.

7. The learned counsel appearing for the appellant/insurer has contended with much vigour, before this Court, that, when uncontrovertedly, after, the retirement of the deceased Sansar Chand, he was doing agency work, and, also he was an authorised agent, for collecting, small savings from the aspirants concerned, (a) yet with there being no evidence qua his earning Rs.15,000/-, per mensem, from his afore avocation, (b) consequently, the learned counsel appearing, for the insurer has contended, that, the addition of the afore income, vis-a-vis, the last drawn income, of, the deceased, from, other proven heads, by the learned tribunal, hence, being patently, flawed. The aforesaid submission, has, no vigour, as the returns filed by the deceased, before the income tax department, return(s) whereof, occur at page 159, of, the file of the learned tribunal concerned, (c) disclose, qua the deceased rather declaring his yearly business income, borne in a sum of Rs.84,952/-, from his avocation, of his collecting small savings, from, the aspirants, given his being an authorised agent. Consequently, the assessment by the learned tribunal qua the deceased rearing an income of Rs.15,000/-, from his avocation, as an authorised agent, suffers from, a, gross illegality. Consequently, the rearing of income by the deceased from his avocation as an authorised agent, is, assessed at Rs.7000/- per month. Consequently, the total income of the deceased at the time of relevant mishap computed at Rs. 23,056/-. Significantly, the number of dependents, of, the deceased, are,

four, hence, 1/4th deduction is to be visited upon a sum of Rs.23,056/-, hence, after making aforesaid apt deduction vis-a-vis Rs.23056/-, the per mensem dependency, comes to Rs.17292/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.17,292/-x12=Rs.2,07,504/-. After applying the apposite multiplier of 7, the total compensation amount, is assessed in a sum of Rs.2,07,504 x 7=Rs.14,52,528/- (Rs. Fourteen Lacs, fifty two thousand, five hundred twenty eight only).

8. The learned counsel appearing for the insurer has contested, the, computation of compensation made by the learned tribunal, upon, the dependents, of, the deceased, under heads, namely, "Loss of consortium vis-a-vis spouse/wife", comprised in a sum of Rs.1,00,000/- and under the head "Funeral charges", a sum of Rs.25,000/-, and, under the head of "transporation Charges", comprised in a sum of Rs.10,000/-, on anvil, of its being in conflict with the verdict of the Hon'ble Apex Court rendered in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, whereupon, hence, he contends that the learned tribunal has committed, a, gross error in assessing a sum of Rs. One lacs, under, the head "loss of consortium, to, petitioner No.1", and, Rs.25000/-, under, the head "Funeral Expenses" and Rs.10,000/- under the head "transportation charges". Consequently, the assessment of compensation, under, the head "funeral expenses" in a sum of Rs.25,000/-, vis-a-vis, the petitioner, is, reduced to Rs.15,000/-, as also the quantification of compensation, under, the head "loss of consortium, to, petitioner No.1", and, borne in a sum of Rs.one lac, is, reduced to Rs.40,000/-, whereas, the awarding of compensation in a sum of Rs.10,000/- , under the head of "transportation charges" is set aside. Consequently, the petitioners are held entitled to total compensation amount borne in a sum of Rs. 15,07,528/-(Rs. Fifteen lacs, seven thousand, five hundred and twenty eight only).

9. For the foregoing reasons, the instant appeal is partly allowed and the impugned award is modified to the above extent only. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.15,07,528/-, along with pending and future interest @7.5%, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants as ordered by the learned tribunal. The insurer of the offending vehicle, appellant, herein shall indemnify the aforesaid liability of compensation. All pending applications also stand disposed of. Records be sent back forthwith.

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

United India Insurance Company Ltd. .....Appellant.

Versus

Sahib Singh and others ....Respondents.

FAO No. 500 of 2017.
Reserved on : 22nd November, 2018.
Decided on : 30th November, 2018.

**Motor Vehicles Act, 1988-** Sections 166 & 173- Award by tribunal of sum of Rs.6,87,000/- along with interest @ 9% per annum from date of petition till its deposit on account of

injuries to claimant in road accident- Award challenged by insurer on ground that original medical bills not produced before tribunal and claimant got reimbursement from his department, secondly Rs. two lacs awarded by Tribunal under head "loss of future income" not proper. Held- Rs. two lacs awarded by Tribunal under head "loss of future income" set aside. Impugned award modified to amount of Rs.6,87,000/- with interest @9% from date of petition till date of deposit. (Paras 4 to 6).

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| For the Appellant: | Mr. P. S. Chandel, Advocate. |
| For Respondent No. 1: | Mr. Naveen Awasthi, Advocate. |
| For Respondent No. 2: | Ms. Anjali Soni Verma, Advocate. |
| Respondent No.3 already ex-parte. | |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-IV, Kangra at Dharamshala, District Kangra, H.P., upon, MACP No. 1-D/II/2011, whereunder, compensation amount comprised, in, a sum of Rs.6,87,000/- alongwith interest accrued thereon, at the rate of 9% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimant, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing or the appellant/insurer, does not contest, the validity of affirmative findings, rendered by the learned tribunal, upon, issue No.1, appertaining to the relevant accident, being, a, sequel of rash, and, negligent manner, of, driving of the offending vehicle, by one Ramesh Kumar, respondent No.3 herein. In sequel, to the afore mishap, injuries, were entailed, upon, the person of the claimant, and, concomitantly, the apposite claimant, stood, entailed hence with 75% disability of the apt portion of his body, disability whereof, stands, pronounced in disability certificate, borne in Ex.PW2/A.

3. Be that as it may, the learned counsel appearing for the insurer, has contended with vigour before this Court, that with Ex.Ry and Ex. Rz, making candid display(s), (a) that, vis-a-vis, the expenditure incurred by the complainant, towards, his purchasing, hence medicines, for, enabling, his recuperation, from, the injuries, entailed upon his person, in the relevant mishap, rather standing disbursed qua him; (b) thereupon, with mark A-1 to A-207, obliviously, comprising, only the photo copies, of, the bills, reflective, of, expenses incurred for purchasing the medicines, hence, when the afore marked bills, remained rather not proven, from, originals thereof, (c) thereupon, any, inter se difference, vis-a-vis, the apposite amount(s) reimbursed to the claimant, and, the amounts comprised, in, the afore marked bills, rather not being amenable, for being ordered to be compensated to the claimant. However, for the reasons to be ascribed hereinafter, the afore submission is extremely fragile, (a) given, the afore marked exhibits, hence, making open pronouncements, qua, rather expenditure, as, incurred towards purchase, of medicines, being reimbursed to him, (b) and, with the insurer failing to adduce into evidence, the original bills qua wherewith, the apposite expenses, as, incurred by the claimant, hence stood reimbursed, vis-a-vis, him, (c) whereas, upon adduction, of, the afore bills, obviously, submitted in original, to the department concerned, by the claimant, (d) would rather make

a display qua the afore marked bills, being not amongst, the originals, as submitted by the claimant, vis-a-vis, the department concerned, (e) and, when thereupon, it was open to the insurer to contend that the afore marked bills, for, want of theirs being proven, from originals thereof, hence were neither admissible nor readable, for the relevant purpose, (f) consequently, for afore wants of the counsel, for the insurer, rather beget an inference that the original(s), of, the afore marked bills, stood submitted before the department concerned, (g) and, the department concerned, within the rules hence permitting the reimbursement, of, expenses, vis-a-vis, only some medicines, rather proceeded, to, in consonance therewith, thereupon permit apposite reimbursement, vis-a-vis, the claimant, (h) and hence, it proceeding not to, reimburse expenses, towards purchase, of, some medicines, in respect whereof rules, forbid apt reimbursements, to the claimant. Corollary thereof, being qua the learned tribunal, being, competent, to, even with respect to the expenses, incurred by the claimant, towards his purchasing medicines in respect whereof, the department concerned, did not mete, apt reimbursement to the claimant, hence order, for the claimant being compensated. More so, when no evidence stand placed on record, that, the afore medicines, stood, never prescribed by the doctor concerned, for, enabling the claimant to recuperate, from, the injuries suffered by him, in, the relevant accident.

4. Furthermore, the learned counsel appearing for the insurer, has also contended with vigour, (i) that the amount of two lacs assessed, as compensation, by the learned tribunal, vis-a-vis, the claimant, assessment whereof, being towards loss of future income, arising from, (ii) the claimant losing his chances to be promoted, to the post higher than the one, he was donning, at the stage, when the disability befall upon him, also hence, suffering from, a, gross infirmity. The afore submission has vehemence, and, vigour, (iii) given though, the, claimant making the afore pleading in the afore petition, yet his not making any deposition in tandem therewith, (iv) nor his adducing any evidence comprised, in, adduction into evidence, of, the relevant record, of the department concerned, (v) with firm echoings, borne therein qua subsequent, to the entailment, of, the apt injuries, and, concomitant therewith entailment, of, disability, upon, his person, the department concerned, hence convening any DPC, (vi) and, his not being considered for promotion, to the higher post, especially given the befallment, of, a disability upon him. Consequently, the computation of compensation, borne in a sum of Rs.two lacs, under, the head "loss of future income", warrants, it being quashed and set aside.

5. Even though, the learned counsel for the insurer has also contended, that, the validity of assessment, of compensation, borne in a sum of Rs.50,000/- under the head" Special Diet", and, assessment, of, a further sum of Rs. 10,000/-, towards attendant charges, being likewise ridden with infirmity, (i) hence, he contends that the computation, of, afore amount(s) of compensation, vis-a-vis, the afore heads, being also amenable for theirs being quashed and set aside. However, the afore submission of the learned counsel appearing for the insurer, is not amenable, to acceptance, given the prolonged duration of hospitalization of the claimants, for hence his recuperating, from, the injuries beset upon his person, and, the prolonged duration, of, his hospitalization also necessarily hence enjoining his obviously, expending a sum of Rs.50,000/- towards special diet, and, a further sum of Rs.10,000/- towards attendant charges.

6. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimant, is, held entitled to a total compensation of Rs.4,87,000/- (Rs.four lacs and eighty seven thousand only), along with pending and future interest @9 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the

time of final payment. All pending applications also stand disposed of. Records be sent back forthwith.

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**BEFOR HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.**

United India Insurnace Company ltd. ....Appellant.
Versus
Smt. Jasbir Kaur and others .....Respondents.

FAO No. 329 of 2017.
Reserved on : 22nd November, 2018.
Decided on : 30th November, 2018.

**Employees Compensation Act, 1923-** Appeal by insurer against award by learned Commissioner under Employees Compensation Act, 1923. Compensation of sum of Rs.2,36,950 along with interest with effect from 3.3.2002 to 25.4.2017 amounting to Rs.4,30,405/- assessed to successors-in-interest of deceased. Substantial question of Law- Whether the owner/insured was entitled to claim indemnification of award amount from insurer when insured vehicle at time of accident was plied by driver without a valid driving licence and insured vehicle which was registered and insured for agricultural purposes was being plied for non agricultural purposes? Held-Under section 4-A of the Act, mandatory injunction is cast upon the employer to pay compensation within one month when it became due. Appeal dismissed accordingly. (Paras 5 & 6).

For the Appellant: Mr. Ashwani Sharma, Senior Advocate with Ishan Sharma, Advocate.
For Respondent No.1: Mr. Karan Sharma, Advocate vice Mr. Tara Singh Chauhan, Advocate.
For other Respondents: Nemo.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal stands directed, against, the award pronounced, by, the learned Commissioner, under, the Employees Compensation Act, 1923, Una, District Una, H.P., upon, ECA RBT No. 9/11.2008, whereunder, compensation amount constituted in a sum of Rs.2,36,950, along with interest, with effect, from 3.3.2002 to 25.4.2017, and, amounting to Rs.4,30,405/-, stood assessed, vis-a-vis, the successors-in-interest of deceased Dharam Pal. The apposite indemnificatory liability, was, fastened upon the insurer.

2. The instant appeal was admitted, on, 10.08.2017, on the hereinafter extracted substantial questions of law :-

> "1. Whether the owner/insured was entitled to claim indemnification of award amount, from insurer when insured vehicle at the relevant time of accident was plied by the driver without a valid driving licence and the

insured vehicle which was registered and insured for agricultural purposes, but was plied for non agricultural purposes?

2. Whether vide the impugned award, liability of payment of interest on the compensation amount with effect from 3.3.2002 till 25.04.2017, which swelled to whopping Rs.4,30,405 was incorrectly fastened upon the insurer?"

3. The learned counsel appearing for the insurer/appellant herein, does not contest, the validity of the findings, rendered by the learned Commissioner, vis-a-vis, (a) the demise of one Dharam Pal, hence, occurring, during the course of his performing, his employment under his employer. However, the learned counsel appearing for the insurer, has contended, with much vigour before this Court, (i) that, the fastening of the apposite indemnificatory liability, upon, the insurer rather being grossly flawed, (ii) given, the, insurance cover embodied in Ex.RW3/C, and, in Ex.RW3/D, making trite display(s), qua the relevant offending vehicle, being issued under the farmer's package, (iii) thereupon, the ill-fated vehicle was enjoined to be plied, only, for agricultural purpose, (iv) whereas, with PW-3, the owner of the tractor concerned, during, the course of his cross-examination, acquiescing to a suggestion qua the tractor being deployed, with, a depot of, the, Indian Oil Corporation, hence for carrying debris in the trolley of the afore tractor, (v) thereupon, he contends, that, the afore manner, of, deployment, of the tractor, with, the depot of Indian Oil Corporation, and, with its, not, at the relevant time, obviously being deployed, for, the apt contracted agricultural operation(s), (vi) whereupon, breach of the terms, and, conditions of the insurance policy, also, making an evident surfacing, and, the fastening of the apt indemnificatory liability, upon, the insurer, was, hence grossly inapt.

4. Even though, the aforesaid submission, is, attractive on its facade, (a) but on an incisive and deeper reading, of, the testification, occurring in the cross-examination of PW-3, upsurgings hence erupt qua, it, rather omitting to unveil, the, trite factum, that, at the relevant time, in the trolley of the tractor, hence debris being carried therein or goods other than agricultural goods, rather being carried therein. Since, the test for determining, (b) qua whether at the relevant time, the apposite breach occurred, enjoined adduction, of, the afore firm evidence, (c) whereas, on an indepth, and, incisive reading, of the cross-examination of PW-3, it rather not emerging, (d), qua at the relevant time, or at the time, of, occurrence of the ill-fated, mishap hence involving the tractor, rather it being loaded with debris or it therein carrying non agricultural goods, (e), thereupon, it cannot be concluded, that, there hence occurs any evident palpable breach of the terms and conditions, of, the insurance policy, nor it can be concluded, that, the fastening, of, the apt indemnificatory liability upon the insurer, was, wholly flawed and erroneous.

5. Furthermore, the learned counsel appearing, for the insurer, has proceed to contend before this Court, (i) that the levying of interest on the principal amount, by the learned commissioner, and, commencing from 3.3.2002 to 25.4.2017 also warranting interference, given (a) the claimants previously availing, a, purported mis-constituted remedy, hence, before the Motor Accident Claims Tribunal, and, thereafter theirs, as unfolded, by Ex.P-2,exhibit whereof, comprises an order rendered by the learned MACT concerned, (b) whereunder, the claimants were permitted, to withdraw, the MACP petition concerned, and, to avail the appropriate statutory remedy, (c) thereupon, for, the, afore omissions, on the part of the claimants, hence renders the afore levying of interest, upon, the principal compensation amount, and, ordered to commence from 3.3.2002 to 25.4.2017, being construable to be rather both unbefitting, and, in sagacious. The aforesaid submission, cannot be accepted, in view of the mandate, occurring, in Section 4A of Act, provisions whereof stand extracted hereinafter:-

"**4A. Compensation to be paid when due and penalty for default.-**

(1) Compensation under section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner may direct that, in addition to the amount of the arrears, simple interest at the rate of six per cent. per annum on the amount due together with, if in the opinion of the Commissioner there is no justification for the delay, a further sum not exceeding fifty per cent. of such amount, shall be recovered from the employer by way of penalty."

(a) whereunder, a, mandatory injunction, is, cast, vis-a-vis, levying, of, interest upon the principal compensation, hence being bestowable thereon,on one month elapsing, since the occurrence, and, uptil the date of deposit. The strict mandatory language, wherewithin, the aforesaid mandate, is cast, hence, renders all its apt strictest rigor, and, without any deviations therefrom, rather being efficaciously complied, nor, the afore mis-endeavours, of, the claimants, rips, the effect, of, the statutorily entailed levying of interest, vis-a-vis, the compensation amount, rather, the apt levying falls in tandem therewith. Accordingly, substantial question(s) of law are answered in favour of the respondents, and, against the appellant.

6. For the reasons recorded hereinabove, there is no merit in the instant appeal, and, it is dismissed accordingly. Consequently, the award impugned before this Court is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Vishwajit Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 478 of 2010.
Reserved on: 20th November, 2018.
Date of Decision: 30th November, 2018.

**Indian Penal Code, 1860-** Section 448**- Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989**- Section 3(1)(v)- Appeal by the convict/ appellant against judgment of conviction by learned Special Judge. Dispute regarding ownership and possession of shops between complainant and accused- Accused took possession of shops by breaking locks and used foul language against complainant as accused belonged to Rajput community and complainant to Chamar community- FIR lodged and investigation by Dy. SP. Recovery of broken locks and rod from accused- On testimony of complainant and other PWs accused convicted by Trial court-Appeal filed by accused on ground of

misappropriation of evidence and discrepancies in statements of prosecution evidence- Held, Cross-examination by learned defence counsel stood omitted by statements of prosecution witnesses and recoveries affected from accused. No merit in appeal. Appeal dismissed accordingly. (Paras 10 & 11).

For the Appellant: Mr. Anup Rattan, Advocate.
For the Respondents: Mr. Hemant Vaid, Addl. A.G., with Mr. Vikrant Chandel and with, Mr. Y.S. Thakur, Dy. A.Gs.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal, is, directed by the convict/ accused/appellant, against, the pronouncement made by the learned Special Judge (Sessions judge), Una, H.P., upon SC/ST Case No. 2 of 2009, whereunder, he convicted, besides imposed consequent sentence, upon, the convict/accused, for, his committing offences punishable under Sections 448 IPC, and, under Section 3(1)(v), of, the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities)Act, 1989.

2. The facts relevant to decide the instant case are on 23.11.2000, PW-1 Waryam Singh, Complainant, through registered sale deed, had prucahsed 26/40 share (0-00-26 Hec. As also two Katcha shops situated therein) of land described in Khewat Khatauni No. 392/83, Khasra No.2934, measuring 0-00-40 hectare, FOR Pw-3. Premjit, PW1 was a member of scheduled community. His cast was Chamar. PW-1 had reconstructed and renovated the shops. RCCT roof had been laid on the shops in the year 2003-2004. Sh. Sanjiv, Nephew of PW-1, had been running a Maniary shop in one of the shops. Wooden cases of the value of Rs.40,000/- had been laid in the shops. Sh. Sanjiv had closed the shop. PW-1 had been in possession of both the shops. PW-2 Paras Ram was known to the complainant. PW-2 had been residing in the are of Amb. PW-1 had entrusted the keys of the shops to PW-2. PW-2 had been asked to look for tenants for the shops. On 6.2.2008, PW-2 had found the shops being white washed by the accused. PW-2 had contacted PW-1 and wanted to know if the shops stood sold. PW-1 had denied sale of the shops. He had rushed to business premises of the accused. The accused had been asked about the circumstances under which he had taken possession of the shops in dispute. The accused had informed PW-1 that he had purchased a portion of Khasra No.2933 abutting Khasra No.2934. The shops had been located in Khasra No.2933 at the time of demarcation obtained by the accused. As such the accused had rightly occupied the shops. PW-1 was offered Rs.20,000/- and got lost. The accused was a member of Rajput community. Hehad used foul language against PW-1. PW1 had instituted complaint Ex.PW1/A against the accused at Police Station, Amb on 8.2.2008, whereon FIR Ex.PW1/A stood registered in the police station concerned against the accused. PW15 Diwakar Sharma, Dy. S.P. and PW-13 Madan Lal, Dy. S.P. had looked into the complaint of PW-1. The police had collected pedigree tables of PW-1 and the accused person from the revenue department. Khasra No.2934 had been got demarcated. PW13 had taken into possession locks Ex.P-3 and P-4, iron rod Ex.P-5, from the accused under recovery memo Ex.PW6/A. PW-15 had taken into possession Keys Ex.P-1 and P-2 of locks from PW-2, thereafter carried and concluded all the investigation(s) formalities.

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

4. The accused/appellant herein stood charged, by the learned trial Court, for, his committing offences, punishable under Section 448 of the IPC, and, under Section 3 (1)(v), of, the Schedule Caste, and, Scheduled Tribes (Prevention of Atrocities) Act, 1989. In proof of the prosecution case, the prosecution examined 15 witnesses. On conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/ appellant herein, for his hence committing the aforesaid offences.

6. The appellant herein/accused, stands aggrieved, by the findings of conviction, recorded, by the learned trial Court. The learned counsel appearing, for, the appellant herein/accused, has concertedly and vigorously contended, qua the findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

7. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended qua the findings of conviction, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The complainant, in support of the averments made in his complaint, borne in Ex. PW1/A, rendered a testification hence bearing consonance therewith, (i) testification whereof, apparently, is, bereft of any contradictions therewith, (ii) nor his testification unveils qua his embellishing or contradicting his previous statement recorded in writing. Likewise, PW-2 and PW-3 rendered testifications rather bearing the completest harmony therewith. Consequently, the afore rendered testifications of PW-1 to PW-3, (ii) given theirs being free, from, any taint, of, any inter se or intra se contradictions, vis-a-vis, their respective testifications, occurring in their respective examinations-in-chief or cross-examinations, thereupon, credence is to be imputed, vis-a-vis, their respective testifications.

10. However, the learned counsel appearing for the convict/appellant herein has contended with much vigour before this Court, (i) that with the disputed premises rather existing on khasra No.2933, and, vis-a-vis, the aforesaid khasra number, the convict/appellant herein assuming, a, valid title, in consonance, with the registered deed of conveyance executed in his favour, by its previous owner, (ii)and with PW-13 in his deposition, borne in his cross-examination, hence making a clear echoing qua the disputed shops, occurring on khasra number 2933, (iii) thereupon, the testifications, of, the afore PWs, acquiring no tenacity, and, hence, the accused/convict when he holds, a, valid title or interest, vis-a-vis, the shops existing on khasra number 2933, thereupon, he had the absolute right hence to assume possession thereof. Nowat, it is to be determined whether the complainant held any, possession thereof, and, whether he stood forcibly dispossessed therefrom, by the accused/convict. The afore harmonious testifications, rendered by the afore Pws, do visibly succor the charge framed, against, the convict/accused. Corroboration

thereto, is, acquired, from, recovery(ies) of broken locks, Ex.P-3 and Ex.P-4, and, iron rod, Ex.P-5, effectuated under memo Ex.PW6/A. The afore memo, carryies the signatures, of, the accused, and, of, the witnesses thereto. Even if, PW-6, one of the witness thereto, has, in his testification, rendered, an echoing qua the accused, not, in his presence producing the items recovered thereunder, yet with his not denying, the occurrence thereon, of his signatures, (a) nor his making further disclosure qua his scribing, his signatures thereon, under coercion or exertion exercised upon him, by the Investigating Officer, (b) thereupon, with the statutory bar encapsulated in Section 91 and 92 of the Indian Evidence Act, rather estopping him, to depose in variance thereto, (c) thereupon, his oral deposition in contradiction, to, the recitals borne therein, and, rather with the recitals borne therein, being authored by him, hence renders, all the recitals borne therein, to carry tenacity, dehors, any, oral testification rendered in contradiction thereto. Furthermore, with hence efficacious proof standing lent, vis-a-vis, the afore memo, (d) thereupon, it is concluded that hence the accused, with, the user of iron rod, Ex.P-5, had broken the locks, Ex.P-3 and P-4, installed upon, the shutter of the disputed shop, by the complainant, (e) hence, thereupon it is concluded that the accused, had assumed, rather forcible possession of the disputed shop, (f) dehors his being owner thereof. Furthermore, with Ex.P-1 and P-2, comprising the keys of the broken locks, installed upon the shutter of the disputed shop, installation whereof thereon was made by the complainant, prior to theirs, being broken by the accused, and, keys whereof stood recovered, under memo Ex.PW2/A, (g) memo whereof stood proven by PW-2, (h) witness whereof, during the course, of, his being held, to, cross-examination by the learned defence counsel, rather stood omitted by the latter, to be, hence, meted appropriate suggestion, for, hence eliciting from him, rather echoings qua the afore memo rather being falsely prepared or the afore keys borne in Ex.P-1, and, in P-2, also not comprising the keys, of, the locks installed, on the shutter, of the disputed premises, by the complainant, (i) thereupon, it is concluded qua the accused/convict after breaking open the locks, installed, upon, the shutter, of, the disputed shop, by the complainant, conspicuously with the user of iron rod, hence his thereafter illegally assuming rather possession, of the disputed shops.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, not suffering from any gross perversity or absurdity of mis-appreciation and non appreciation of germane evidence on record.

12. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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**BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.**

Rahul ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CWP No. 2234 of 2018
Decided on: 03.12.2018

**Constitution of India, 1950- Article 226-** Public interest litigation- Shifting of site of proposed Industrial Training Institute (ITI)- Government shifting site of proposed ITI from place T to place K – Petitioner challenging shifting of site on ground that land was donated by petitioner and others at place T only for construction of Degree college and ITI- Petitioner also contending that site at place K though owned by government but being 'forest land' cannot be put to non forestry use without permission from Ministry of Environment and Forest- Held - Selection of site for establishment of public institution essentially entails policy decision - Unless there is some violation of statute or any other binding law in force, Writ Court would be reluctant to interfere with such policy decision-Petition disposed of with directions that in case new site has been notified in forest area, it shall not be used for non-forestry purpose unless prior permission of competent authority obtained. (Paras 15 to 17).

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| For the petitioner: | Mr. Shrawan Dogra, Senior Advocate, with Mr. Rupinder Singh, Advocate. |
| For the respondents: | Mr. Ashok Sharma, Advocate General, with Mr. J.K. Verma and Mr. Ashwani K. Sharma, Additional Advocate Generals. |

The following judgment of the Court was delivered:

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**Surya Kant, Chief Justice.** *(Oral)*

The writ petition, claimed to have been filed in public interest, lays challenge to the selection of site for setting-up the Government Industrial Training Institute, which is now being run from a private accommodation at Sarahan, District Sirmaur since the year 2007.

2. The case of the petitioner is that with a view to support educational avenues for the children of their area, the residents of the petitioner's village including his brother gifted the land fully described in para 4 of the writ petition situated in Village Tikker, P.O. Sarahan, Tehsil Pachhad, District Sirmaur, whereupon the State Government sanctioned construction of Industrial Training Institute and accorded Administrative Approval to bear the expenditure of ₹ 7,14,96,000/- vide letter, dated 14th September, 2016. The foundation stone was also laid down by the then Chief Minister on 20th February, 2017. Out of the above-stated sanctioned amount, a sum of ₹ 1,46,000/- was released to Public Works Department though no construction has been started at the site.

3. The State Government subsequently decided to shift the site of Industrial Training Institute to Village Kahan on the land owned by the State Government (Revenue Department).

4. The petitioner challenges the selection of the new site on the grounds, *inter alia,* that the land which was gifted by residents of Village Tikker was for two institutions, namely, the Government Degree College and the Industrial Training Institute. So far as the construction of Government Degree College is concerned, a substantial part of the building already stands completed, as may be seen from the photographs attached with the rejoinder but the construction of Industrial Training Institute building is yet to start.

5. It is pointed out that the selection of site for the Government Degree College at Village Tikker was challenged in CWP No. 1307 of 2016 which was dismissed by this Court by a self-speaking order dated 22nd September, 2016. While dismissing the writ petition, this Court took cognizance of the fact that the site at Village Kahan, namely, the

Government land where Industrial Training Institute is proposed to be constructed, was reported to be 'forest land' with 700 *cheel* trees standing on the site and in the absence of any forest clearance by the Ministry of Environment and Forest, the decision to shift the site of Government Degree College at Village Tikker was fully justified. On the same premise, it is urged that the Industrial Training Institute too cannot be constructed over the Government land at Kahan as there are 700 trees standing on the said land and it cannot be used for non-forestry purposes.

6. Respondents No. 1, 2 and 4 have filed their written statement/reply pointing out, *inter alia,* that in response to a letter received from Executive Engineer, Rajgarh Division, HPPWD, Rajgarh, dated 19th April, 2016, the Director, Technical Education, Vocational and Industrial Training, Himachal Pradesh, Sundernagar, made the following observations:

> ***"1. It will not be feasible to construct a road for providing entry to ground floor as the site is very steep and space for construction of road to ground floor entry as proposed in the proposal drawings is not available at site. It was also informed by the I.T.I. staff that the heavy machinery is to be installed at ground floor for which ground floor entry is essential to carry the workshop machinery.***
>
> ***2. Due to the steep slope of proposed site the construction of retaining walls of height 10 to 12 meters will be required for stability of the proposed building for which huge amount will be required."***

7. In addition, the Principal of Government Industrial Training Institute, Sarahan, has also vide letter dated 9th March, 2018, informed that the villagers alongwith local MLA have taken a stand that the site for Industrial Training Institute proposed at Village Tikker is not appropriate and suitable and it may be shifted at some other place.

8. The written statement/reply further refers to the norms laid down by the Director General of Training, Ministry of Skill Development and Entrepreneurship, Government of India (Annexure R/7) dated 9th January, 2018, according to which an Industrial Training Institute should not be set-up in the same premises/adjoining to any other institute. The site in Village Tikker being adjoining the Government Degree College, it is averred that the above-stated norms are violated.

9. The respondents have also appended photographs of both the sites, namely, at Village Tikker as also the new site at Village Kahan, to suggest that the present site is abutting the State road and it will be very convenient for the commuting students.

10. The petitioner has filed rejoinder controverting the stand taken in the written statement/reply, as according to him, there is no violation of the norms laid down by the Director General of Training, Ministry of Skill Development and Entrepreneurship, Government of India, in case the Industrial Training Institute is set-up at Village Tikker, for the site of the Industrial Training Institute will be separate from the Government Degree College as five bighas land has been exclusively donated by the villagers for Industrial Training Institute whereas twenty bighas were donated for the College.

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

12. Though it appears that there were pull and pressure of local politicians behind 'selection' as well as 'shifting' of the Industrial Training Institute site from Village

Tikker to Village Kahan, but ignoring these extraneous reasons, this Court is to keep in view the settled principle that the selection of site for establishment of a public institution essentially entails a policy decision and unless it is established that there is some violation of a Statute or any other binding law in force, a Writ Court would be reluctant to interfere with such policy decision.

13. The land at Village Tikker was no doubt gifted by the villagers for the establishment of two institutions, namely, Government Degree College as well as Industrial Training Institute, out of which one institute has already been set-up in that village. If the State Government, on account of the observations/objections raised by the Director, Industrial Training Institute, which are quite plausible and were raised in the year 2016 itself, has decided to shift the site without incurring any additional expenditure, for the site happens to be Government's own land, we see no reason to interfere with such decision, more so when the new site is abutting the main road, as can be seen from the photographs on record.

14. The petitioner's concern to the effect that there are '700 trees' at the site in Village Kahan or that the said land cannot be used for non-forestry purposes, surely, requires consideration.

15. Unfortunately, no specific plea has been taken in the writ petition that the subject site is a 'forest land'. Obviously, in the written statement/reply, the respondents have got no occasion to admit or controvert such plea. However, the facts regarding existence of trees at the site are referred to in the earlier decision of this Court dated 22nd September, 2016 passed in CWP No. 1307 of 2016 but we are not sure about the material to this effect placed on the record of that case.

16. There is a jamabandi for the year 2009-2010 (page 20) on record and we find therefrom that the ownership of the new site vests in the Government of Himachal Pradesh (Revenue Department), the land is *banjar kadeem* and is not recorded as forest land'. There is no other official document to suggest that there are '700 pine trees' at the site except that there is one 'Comparative statement of feasibility and suitability' of the land sent by Principal of Government Industrial Training Institute, Sarahan which refers to "some pine trees on the site for which NOC is required from the Forest Department". It is difficult to draw any positive inference from this document that the subject site has been declared as 'forest land' or any clearance for non-forestry purposes is required to be obtained from the Ministry of Environment and Forest. Nevertheless, we direct the official respondents that in case the new site has been notified, treated/included in the forest area/forest land, it shall not be used for non-forestry purposes unless prior permission of competent Authority is obtained. However, in case any such permission has been accorded, the official respondents shall be at liberty to proceed with the Project at the new site.

17. With these observations/directions, the writ petition is disposed of. The interim order stands modified/ vacated. Pending miscellaneous applications, if any, also 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.**

Balak Ram ....Appellan
Versus
State of Himachal Pradesh ....Respondent

Cr. Appeals No. 81 of 2017 & 170 of 2017
Judgment Reserved on 30th Nov.,2018
Date of Decision: 05 December, 2018

**Indian Penal Code, 1860 -** Sections 201, 323, 302, 326A, 452, and 506 read with 34- **Indian Evidence Act, 1872-** Section 32(1)- Learned Sessions Judge, vide impugned judgment, convicted one accused father in law of deceased under Section 302, 326A, 452 IPC and acquitted of offences punishable under Sections 201, 506 and 323 IPC after extending benefit of doubt in his favour and acquitted other accused- Appeal by accused- State also filling cross appeal against acquittal- Testing reliability of Dying Declaration keeping in view all relevant attending circumstances- Criminal jurisprudence- evidence has to be evaluated on touchstone of consistency and consistency with the account of other witnesses is keyword for upholding conviction of accused- Prosecution failed to prove charges against accused under Sections 302, 323, 326-A and 201 IPC, However, there is evidence on record proving beyond shadow of doubt that accused persons committed offences punishable under Sections 448 and 506 IPC-Accused charged for offence under Section 452 IPC which is an offence of higher degree than offence under Section 442/448 IPC. Accused convicted for offence under Section 442/448 IPC. (Paras 69 & 70).

***Cases referred:***
C.Magesh vs. State of Karnataka (2010)5 SCC 645
Dadu Lakshmi Reddy vs. State of A.P., AIR 1999 SC 3255
Gopal Singh and another vs. The State of Madhya Pradesh and another, AIR 1972 SC 1557
Kushal Rao vs. State of Bombay, AIR 1958 SC 22
Tapinder Singh vs. State of Punjab, 1971(1) SCR 599/(1970)2 SCC 113
Uka Ram vs. State of Rajasthan, AIR 2001 SC 1814
Suraj Singh vs. State of Uttar Pradesh, (2008) 16 SCC 686
Shama vs. State of Haryana, (2017)11 SCC 535

For the Appellant(s): Mr. Anup Chitkara Advocate with Ms.Sheetal Vyas, Advocate in Cr.Appeal No. 81 of 2017 and Mr.S.C.Sharma, Mr.Narinder Guleria, Additional Advocate General in Cr. Appeal No. 170 of 2017.

For the Respondent(s): Mr. S.C. Sharma, Mr.Narinder Guleria, Additional Advocate General in Cr. Appeal No. 81 of 2017 and Mr.Anup Chitkara, Advocate with Ms.Sheetal Vyas, Advocate in Cr. Appeal No. 170 of 2017.

The following judgment of the Court was delivered:

***Vivek Singh Thakur, J.***

These appeals, arising out of the judgment dated 27.8.2016 passed by learned Sessions Judge, Bilaspur in Sessions Trial No. 17/7 of 2014 titled State of H.P. vs. Balak Ram and others in case FIR No. 64 of 2014 dated 8.5.2014 registered at P.S.Barmana under Sections 452, 302, 326A, 201, 506 and 323 read with Section 34 IPC, are being decided together as common questions of law and facts are involved in these appeals.

2. Learned Sessions Judge, vide impugned judgment, has convicted accused Balak Ram and sentenced him to undergo imprisonment for life with fine of Rs.10,000/- under Section 302 IPC, simple imprisonment for ten years with fine of Rs.20,000/- under Section 326A IPC and simple imprisonment for three years with fine Rs.5000/- under Section 452 IPC and to further undergo simple imprisonment of six months, one year and three months for respective default in payment of fine imposed. He has been acquitted of offences punishable under Sections 201, 506 and 323 IPC after extending benefit of doubt in his favour.

3. Accused Ram Pyari and Vijay Kumar have been acquitted of all offences after giving them benefit of doubt.

4. **Criminal appeal No. 81 of 2017** has been preferred by accused Balak Ram against his conviction, whereas **Criminal Appeal No. 170 of 2017** has been preferred by State of H.P. against all accused assailing the acquittal of Balak Ram under Section 201, 506 and 323 IPC and that of accused Ram Pyari and Vijay Kumar under Sections 452, 302, 326A, 201, 506 and 323 read with Section 34 IPC. During course of hearing it transpired that in prayer clause of this appeal on account of typographical mistake which could not be corrected due to oversight, it has been wrongly stated that judgement passed by Special Judge, Kullu, be set-aside whereas prayer should have been for setting-aside the judgement of acquittal passed by learned Special Judge, Bilaspur.

5. Accused Balak Ram and Ram Piari are parents of respondent/accused Vijay Kumar, whereas PW4 Kamal Kumar (brother of Vijay Kumar) is their elder son. Deceased Anjana was wife of PW4 Kamal Kumar.

6. Prosecution in present case, has been launched in pursuance to lodging of an FIR No. 64 of 2016 Ext.PW21/B registered in P.S. Barmana on the basis of statement Ext.PW1/A of deceased Anjana Kumari recorded by Executive Magistrate PW1 Shashi Pal on 8.5.2014 at about 11.20 a.m in Regional Hospital Bilaspur after receiving call from police, wherein deceased Anjana Kumari had stated that she along with her husband was residing in a separate house, whereas her father-in-law, mother-in-law and brother-in-law (all accused) were residing separately and she was a teacher in Oxford School, Barmana and at about 8 to 8.45 a.m when she was getting ready for going to school, her father-in-law, mother-in-law and brother-in-law (accused persons) came from their house and started abusing her and her husband by asking to withdraw the case related to incident occurred at Dehar with threats to kill both of them for not doing so with further allegation that she was the bone of contention of all bad incidents and had her marriage not been solemnized with their son, it would not have happened and thereafter her father-in-law brought a kerosene gallon from outside and poured it on her abdomen and on her body, whereas her husband was overpowered by other two persons and her father-in-law poured entire gallon upon her, whereafter, upon her crying, he put her on fire with match-stick. At the time of pouring kerosene upon her, door was open and she was almost in veramdah. She cried continuously stating that kerosene oil has been poured and when she was put on fire, she ran outside. Whereafter, her husband put off the fire and saved her. Accused fled from the spot. She became unconscious and she did not know how she reached the hospital.

7. It is the case of prosecution that PW4 Kamal Kumar son of accused Balak Ram had solemnised love marriage with deceased Anjana Kumari belonging to a family having lower status in caste in the society than that of family of Kamal Kumar, against the wishes of his other family members and thus relations between the couple and remaining family members were strained and PW4 Kamal Kumar had also been ousted from the family and property, whereafter PW4 Kamal Kumar was living separately in an old kucha ancestral house and 5/6 days prior to the incident, he had shifted to the concrete rooms, the premises where incident happened. This premises had fallen in the share of Balak Ram on partition of the property amongst his brothers.

8 It is further case of prosecution that on 9.4.2011 couple had gone to attend the function in their relation where accused Balak Ram and Vijay Kumar along with one Joginder had started abusing the couple and had assaulted PW4 Kamal Kumar, whereupon the couple had reported the matter to the police in Police Post Dehar and in the meanwhile, assailants had also reached in Police Post and by using his influence, being an Assistant Sub Inspector in the Police Department at that time, accused Balak Ram had managed to get the couple arrested instead of them. Being aggrieved by the acts of Balak Ram and his companions along with Head Constable Incharge of Police Post, couple had preferred a private complaint under Sections 323, 357, 504, 506 and 120-B read with Section 34 IPC in the Court of Judicial Magistrate 1st Class, Sundernagar, District Mandi H.P., the Court having territorial jurisdiction to try the same.

9 According to the prosecution, on the day of incident, all accused came together to pressurize the couple for withdrawal of the case and during that process, Balak Ram poured kerosene on deceased Anjana and incident had taken place, as detailed supra. Immediately, after the incident, Anjana Kumari was taken to ACC Hospital Barmana, where-from, after giving first aid, she was referred to the Regional Hospital Bilaspur. At Bilaspur she was medically examined and on finding her fit to make statement, as certified by the Doctor, her statement was recorded by PW1 and on the same day, she was referred to IGMC, Shimla, where she remained under treatment till her death on 24.6.2014.

10 After completion of investigation, prima facie finding complicity of respondents in commission of offence challan was presented in the Court and case was committed to the Sessions Court. After conclusion of trial, impugned judgment has been passed, which is under challenge in these appeals.

11 Defence of the accused is that marriage of accused Vijay was scheduled on 24 to 26th days of May, 2014 and the complainant-couple earlier residing in the old kacha ancestral house, had broken the lock of rooms, allotted to Balak Ram during partition with his brothers, and had shifted to that premises forcibly, whereupon Balak Ram had approached the police, but being a family mater, he was advised to approach the Panchayat and thereafter, his wife Ram Pyari had called Panchayat members and tried to convince PW4 Kamal Kumar to vacate the room for marriage, whereupon deceased Anjana started abusing from outside and had broken the window pane with helmet. Thereupon PW4 Kamal Kumar came outside, tried to pacify her but when he came inside, Anjana started crying *"Jal-gai, Jal-gai".* Whereupon accused Ram Pyari and PW4 Kamal went out and put off the fire with help of bed sheet and accused had not assaulted the couple but deceased Anjana had herself put her on fire to pressurize them.

12 Prosecution has examined 21 witnesses to prove its case. PW4 Kamal is the only eye witness of the entire incident, whereas PW2 Rajiv Kumar has witnessed the incident partially. PW3 Satya Devi, though was examined as a witness to seizure memo Ext.PW3/A whereby articles like burnt clothes, hair band and pieces of bangles were taken in

possession by police during investigation from the spot, however, in her examination-in-chief as well as in cross examination, has claimed herself to be an eye witness of incident. PW2 and PW3 have been declared hostile for not supporting the prosecution version in its entirety. PW1 Shashi Pal Sharma is Executive Magistrate, who has recorded the statement of deceased in hospital, which has been treated as a dying declaration.

13 It is submitted on behalf of the State that there is ample evidence on record to convict the accused for the charged offences and thus their acquittal in respective offences deserves to be reversed and putting reliance on dying declaration Ext.PW1/A coupled with the other evidence on record including statement of PW4 Kamal Kumar it is canvassed that all of them are liable to be convicted for those offences.

14 On contrary, it is contended on behalf of the respondents that statement of deceased Anjna cannot be treated as dying declaration at all and even if it is to be considered as a dying declaration, the same is under suspicion for the reason that at the time of her medical examination concerned doctor PW5 N.K. Sankhyan has mentioned that her consent could not be signed by her due to burn injuries, whereas statement Ext.PW1/A has been alleged to have been signed by her, which is highly improbable and that PW1 Executive Magistrate Shashi Pal Sharma has put his note with respect to the opinion of doctor in front on the side of statement later on, after the note appended on the back side of the said statement, because note put by him with regard to recording of statement starts on back side of paper and in case both these notes would have been written at the same time in continuity, then the note with respect to the opinion of doctor also would have been started on the back side of paper, containing statement of deceased. It is also contended that signatures of deceased Anjana put on Ext.PW1/A does not tally with her admitted signatures on Ext.DX and Ext.DY and also other documents placed on record as Mark DA-1 and Mark DA-2. It is also canvassed on behalf of the accused that for contradiction in the statement of PW4 Kamal Kumar, story put forth by prosecution with regard to pouring kerosene and putting Anjana Kumari on fire by Balak Ram is highly doubtful.

15 It is a fact that signatures were not taken on MLC Ext.PW5/B. PW5 Dr.N.K.Sankhyan in his examination in chief has clarified the said aspect by stating that he had not taken the signatures of deceased Anjana Kumari on said MLC because she was in severe pain though she was mentally fit and endorsement on MLC in red encircle 'B' has also been recorded by him stating the same thing.

16 PW1 Shashi Pal is Executive Magistrate. There is nothing on record to establish nor it is the case of accused that he had any personal interest in the matter for intimacy with complainant party or any animosity with accused persons or was under any kind of pressure for recording a false statement. There is not even a single utterance to this effect either in suggestions in cross examination on behalf of defence or in statement of accused persons recorded under Section 313 Cr.P.C. Further the incident had taken place between 8 and 8.45 a.m in a village, wherefrom after giving first aid at Barmana, victim was shifted to Regional Hospital, Bilaspur which took 1½ hours and she reached in Regional Hospital at 10.30 a.m. By that time, Executive Magistrate was informed by police, who consulted the matter with the then Additional District Magistrate and rushed to hospital immediately and statement of Anjana was recorded at about 11.30 a.m as evident from endorsement Ext.PW20/A of Investigating Officer on the back side of Ext.PW1/A.

17 PW4 Kamal Kumar is running a small stationery shop at Barmana. There is no evidence on record nor it is found that he or his wife were having any links with highly placed authorities/persons so as to influence the Executive Magistrate or police investigation.

18 On the contrary, it has come in evidence that accused Balak Ram retired from police department in recent past as Assistant Sub Inspector and had also remained posted in security of Hon'ble the Chief Minister of State. Therefore, possibility of connivance of PW1 with complainant party is completely ruled out in the present case. Similar is the case with respect to the opinion of the doctor and for the same reason, there is nothing on record to doubt the opinion of doctor.

19 Contention of learned counsel for the accused, that for endorsement of PW5 Dr.N.K. Sankhayan on MLC Ext.PW5/B that consent could not be signed due to burn injuries, it was impossible for deceased Anjana to put her signatures on Ext.PW1/A, is not having any force for the reason that natural behaviour of a doctor, treating a patient, is always to avoid any inconvenience and painful exertion whereever possible to avoid the same. Thus at the time of recording consent for medical examination, doctor may not have insisted for signatures keeping in view the injuries and being a doctor may have opted to avoid an act increasing pain of the injured, which was not inevitable. Whereas, at the time of recording of evidence by Executive Magistrate the situation was altogether different and at that time injured was complaining an assault upon her which was serious in nature and statement was being recorded by the Executive Magistrate and in such a situation, obtaining signature with special efforts on complaint even with utmost difficulty and undergoing the severe pain is not unnatural and/or impossible. Therefore, the plea, that the deceased could not sign on the consent on MLC Ext.PW5/B due to burn injuries and thus could not have signed her statement, is not sustainable.

20 Now the question raised by learned counsel for accused, as to whether the signatures were put by deceased herself or someone else, also requires consideration. Again, the Executive Magistrate or the doctor was having no personal interest in the matter and Executive Magistrate has categorically stated that deceased had signed herself on her statement Ext.PW1/A with his pen with further observation that some portion of signatures of Anjana Kumari seems to be in Hindi and some portion in English. PW4 Kamal Kumar, her husband, has identified her signatures with further clarification that sometimes she used to sign in that manner also. Certain documents i.e. Ext.DX, Ext.DY, Mark DA-1 and Mark DA-2 have also been relied upon by accused to prove that signatures on Ext.PW1/A are not matching with her signatures on those documents. Two documents Mark DA-1 and DA-2 have only been tendered in evidence by the Advocate only, but not proved as required in accordance with law. Further even if these documents are considered then perusal thereof reflects that signatures of deceased in Ext.DX are different from signatures at Ext.DY and further that normally a person is supposed to sign in a particular fashion, however, there are also persons who put their signatures at different times differently. As there is nothing adverse on record so as to disbelieve PW1, therefore, fact of putting signatures by deceased Anjana on Ext.PW1/A is to be believed.

21 Other plea of accused is that PW1 had inserted a note with respect to opinion of doctor on front side of page at the later point of time to establish that at the time of making statement, deceased Anjana was fit for recording her statement. It is not only the note/endorsement of Executive Magistrate PW1 Shashi Pal Sharma, but there is sufficient evidence on record to prove that at that time, Anjana was fit for making statement. In MLC Ext.PW5/B in circles A and B, PW5 Dr.N.K. Sankhayan, in unequivocal terms, has mentioned that though the patient is crying with pain, but she was conscious, well oriented to time and place, mentally fit and her vitals were normal and was fit for making statement. Besides that, on application Ext.PW5/A, moved by Investigating Officer at 10.30 a.m, PW5 Dr. N.K. Sankhayan has given his separate opinion that she was fit to give statement. Therefore, the fact that it was opined by the doctor that deceased was fit for making

statement is proved on record beyond any suspicion. In such a situation, it become immaterial as to whether the note on back side was endorsed first or the note on front side or as to whether these notes were endorsed in continuation or note in front side was endorsed after endorsement of the note on back side. Moreover, no question on this issue was put to PW1 Shashi Pal Sharma, when he was cross examined in Court.

22 So far as recording of statement Ext.PW1/A according to version of deceased Anjana is concerned, that stands duly proved on record. However, veracity of said statement is a separate issue, which requires to be considered on the basis of other evidence on record. Credence of action and statement of PW1 does not make contents of statement Ext.PW1/A reliable *ipso facto*. Credence of testimony of deceased Anjana is to be assessed on the basis of other evidence on record.

23 PW4 Kamal Kumar, husband of deceased, is an eye witness of incident. During investigation, his statement was recorded under Sections 161 and 164 Cr.P.C. His supplementary statement under Section 161 Cr.P.C. was also recorded. In his deposition in Court, he has stated that his father slapped his wife and started scuffle with them and when he tried to rescue his wife, accused persons pounced upon him and thrown him on double bed and his brother caught him from neck and in the meanwhile, his father picked up a canny of kerosene and poured the same on his wife. They were crying for help and in the meanwhile his wife caught fire. He has further stated that later on, he asked his wife and she had told him that fire was put on her by his father. In his statement Ext.PW4/C recorded on 15.7.2014 under Section 164 Cr.P.C. he had stated that his wife was crying for help and at that time, his father Balak Ram, in front of him put her on fire with matchstick. In his supplementary statement recorded under Section 161 Cr.P.C. Mark D-1, he has stated that his father had taken out a match box from his pocket for putting his wife on fire. But in his cross examination, he has categorically denied to have made such statement to the police. This portion of statement Mark A to A in both i.e. statement under Section 161 and 164 Cr.P.C. including supplementary statement, has been denied to have been stated by him. In cross examination, he has stated that he did not see his father igniting the matchstick with clarification that he was told by his wife that matchbox was taken out by his father from his pocket. He is noneelse but husband of the deceased. He was present at the spot. In earlier statement, he claimed that his father, in his presence and before him, had put his wife on fire. But in Court, he denied to have made such statement to the police, but claimed that this fact was informed by his wife to him. As admitted by him, the room was of 12'x18 feet dimension wherein double bed, fridge, cooler and TV on table were also kept. He was fully conscious and according to him, the kerosene oil was poured in the room and his wife was put on fire on threshold of veramdah. Initially he claimed that he was witness to the action of his father, but in deposition in Court, he disowned his statement on this count. Therefore, it creates doubt with regard to veracity of his statement.

24 Further, in his statement recorded under Section 164 Cr.P.C. he has stated that when his wife started burning thereupon she ran outside the room crying for help. Whereupon, he got himself released from clutches of his mother and brother and put off the fire by covering his wife with bed sheet. In his supplementary statement he has stated that when his wife was put on fire by his father, she was in veramdah near threshold. In Court, he has again stated that on catching fire she ran towards veramdah, possible inference whereof is that she was inside the room when she was put on fire. In cross examination also, he has categorically stated that she was put on fire inside the room and then she came outside. PW21 Inspector Prem Singh has visited the spot and prepared the site plan Ext.PW21/C on the basis of evidence available at the spot, wherein he has mentioned spot 'A' in veramdah, the place where kerosene oil was poured on deceased and place 'B' the spot

inside the room whereto deceased rushed after catching fire and fire was put off by her husband. As per prosecution case as depicted in the site plan, the kerosene oil was poured in veramadah, whereas PW4, has been shifting his stand on this count. Somewhere he is stating that it was poured inside the room and somewhere he is saying that at that time, his wife was at the threshold of veramdah. Whereas spot 'A' and 'B' in site plan Ext.PW21/C none of the spots either' A' or 'B' are on the threshold of veramdah and actual spot where kerosene was found to have been poured is neither inside the room nor at threshold of varamdah but in the 'B' varamdah.

25 In his statement recorded under Section 164 Cr.P.C., in portion 'A' to 'A', PW4 Kamal Kumar has stated that his father Balak Ram put his wife on fire in front of him. Whereas, in cross examination, he has categorically stated that on asking, his wife had told him that fire she put on fire by his father. In cross examination, he has denied to have made the statement mentioned in portion 'A' to 'A'. As recorded in his statement under Section 161 Cr.P.C., Mark 'K' now Ext.PW21/E that at about 8.30 AM when his wife was going to Barmana to attend the school, his father entered the room adjacent to the old house, where they were living. Though, he has stated that portion 'B' to 'B' in the said statement, that his father brought a gallon from outside the room and poured it on his wife, was given by him, but he had not seen his father igniting the matchstick. He has denied to have made statement recorded in portion 'C' to C that when his wife started crying for help after catching fire, then his brother Vijay Kumar and mother Ram Pyari caught and hold him as according to him, he had already been held up by them. In his statement under Section 161 Cr.P.C., in portion 'D' to 'D' it is recorded that at the time of incident, his cousin Sunil Kumar and Rajiv Kumar were also present at the time of incident. But in cross examination, he has denied to have made such statement. In examination-in-chief, he has stated that Rajiv and Sunil Kumar had heard their cries and he and his cousins tried to dial on 100 and 108 services for help.

26 PW4 Kamal Kumar in his cross examination has stated that there are two doors in the room and one door is towards veramdah and another opens towards back side, which were closed but not bolted and after sometime, back door was opened by one of the accused. He has further stated that accused came from front side and went away from the back door and when they entered into the room, the back door was closed and canny of kerosene was brought from back side of the door and said canny was not taken to or from his veramdah at any time during the stay of accused in his room and his wife was put on fire inside the room and then she came outside and he had extinguished the fire in veramadah.

27 Contrary to this statement of PW4, the case presented by prosecution, as noticed supra, as per site plan Ext.PW21/C, the kerosene oil was poured in the veramdah and fire was extinguished inside the room.

28 In statement Ext.PW1/A made by deceased, it is stated that accused Balak Ram brought a gallon from outside the room and poured it on deceased, whereupon she cried and Balak Ram had put her on fire and at that time, door was open and she was at a place like veramdah and she cried. First part of aforesaid statement gives an impression that kerosene was brought inside the room and poured upon the deceased but in later part, it reflects that kerosene was poured upon at a place like veramdah. However, in the last portion it is stated that deceased ran outside after catching fire. Her statement also like statement of PW4, is self contradictory and is inconsistent with regard to the manner in which deceased was put on fire.

29 PW2 Rajiv Kumar and PW3 Satya Devi were declared hostile for not lending support to the prosecution case and were subjected to cross examination by learned Public Prosecutor as well as defence counsel.

30 Law on admissibility and acceptance of and also reliance on evidence of hostile witness is well settled which has been reiterated by the Apex Court in ***Raja and others vs. State of Karnataka (2016)10 SCC 506*** as under:-

> ***"32. That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu v. State (NCT of Delhi) (2011)2 SCC 36 by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991)3 SCC 627 and Koli Lakhmanbhai Chanabhai vs. State of Gujarat (1999)8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."***

31 PW2 Rajiv Kumar, the son of brother of accused Balak Ram, has admitted the animosity with family of accused Balak Ram. However, for resiling from his statement recorded under Section 161 Cr.P.C. he was declared hostile and was subjected to cross examination by learned Public Prosecutor. He has denied portion 'A' to 'A' of statement Mark R, now Ext.PW21/F, wherein it is recorded that accused persons were abusing and quarreling with PW4 Kamal Kumar and deceased Anjana and were asking the reason for shifting from kacha house to pucca house. He has also denied portion 'B' to 'B' wherein it is recorded that deceased was crying for help by saying that "she has been put on fire-she has been put on fire". According to his deposition, on 8.5.2014 after 8.15 a.m when he was going to drop his son in school at Barmana, he saw that accused persons coming to the room, where PW4 Kamal Kumar and his wife Anjana were residing and they were talking with Kamal Kumar and his wife inside the room and in the meanwhile, he went to Barmana to drop his son and came back after 15 minutes and saw Anjana Kumari in flames, she coming out from the room towards veramdah and crying that she was burnt. In his cross examination, PW2 has stated that when Anjana Kumari was coming from back side of house of Het Ram, accused Ram Pyari and PW4 Kamal Kumar came out of the room after opening the door and covered deceased Anjana Kumari with bed sheet and extinguished the fire in his presence and also in presence of Sunil Kumar. He had also gone to ACC hospital Barmana with deceased.

32 PW3 Satya Devi was cited as a witness to recovery of burnt pieces of clothes, hair band, hair and broken bangles vide memo Ext.PW3/A. She has admitted her signature on the said memo Ext.PW3/A, but has also stated that police did not take hair in possession from the spot in her presence. She was also declared hostile. She has admitted that articles were sealed in cloth parcel by police with seal 'A' and parcel was taken in possession vide seizure memo Ext.PW3/A and specimen of seal Ext.PW3/B was also taken on separate piece of cloth. In cross examination, she has admitted that house of accused Ram Pyari is at a distance of 1 K.m. from her house. She has also stated that on the day of incident, she was at her home and at about 7/7.30 AM accused Vijay Kumar and his mother accused Ram Pyari came to her house on scooter and told her that PW4 Kamal and deceased Anjana had broken the locks of her house and asked her )PW3) to come on the spot, whereupon she called Chinti Devi, former Pardhan of Mahila Mandal, and went to the spot and in her cross examination she has also admitted that she saw Anjana Kumari using abusive language and that she was present in old house and witnessed deceased her breaking window pane with

helmet and also noticed PW4 Kama Kumarl coming out of the room and taking her to one side of house for talking with her and then going inside the room and also that she saw deceased, thereafter pouring something on her from canny and putting her on fire and starting cry for help. According to her, deceased had not poured the said liquid on her head and face, but only below the breast and thereafter PW4 Kamal Kumar came outside with blanket and he (PW4) along with Ram Pyari extinguished the fire by putting the blanket on deceased. As per her version all three accused were present on the spot and she also went to the veramadah where deceased had put her on fire and thereafter, Anjana was rushed to the hospital. She has also stated that she had also visited District Hospital, Bilaspur along with Panchayat Pardhan to see deceased Anjana and had requested the police to record herPW34) statement being an eye witness of the spot, whereupon she was asked to come to the spot and on next day, she along with Chinti Devi again went to Police Station and told that accused were wrongly arrested and were not involved in the crime and submitted a written statement to SHO Barmana whereupon SHO told them to approach Superintendent of Police Bilaspur and whereupon she went to S.P. office on 13.5.2014 and submitted her written statement Ext.DA to the Superintendent of Police which was got written through a Journalist and thereafter an officer, in the rank of Additional Superintendent of Police went to the spot and recorded her statement Ext.DB on 21.5.2014. Perusal of statements Ext.DA and Ext.DB refelcts that both these statements, by and large, are similar to the deposition of this witness in the Court. She (PW3) has categorically stated that deceased Anjana herself put her on fire in her presence.

33 PWs Chinti Devi and Sunil Kumar have not been examined to avoid repetition. There is no other spot witness examined by the prosecution.

34 As per prosecution case, filing of private complaint, by PW4 Kamal Kumar and his wife, against accused Balak Ram and Vijay Kumar along with two others is a cause for killing Anajana Kumari. For proving the filing of the said complaint, PW6 Hem Chand, a practicing Advocate at Sub Divisional Court Sundernagar, has been examined who has proved the complaint Ext.PW6/A which was taken in possession by police during investigation vide memo Ext.PW6/B. Though in cross examination, filing of Ext.PW6/A has been questioned for not bearing signatures of complainant and Advocate thereupon, however, certified copy of complaint with signatures has also been placed on record by accused themselves as Ext.DA-1 along with power of attorney Ext.DX, filed by PW4 Kamal and Anjana in the said complaint. Copy of criminal complaint Ext.PW6/A has also been proved by PW12 Naveen Kumar copyist-cum-Criminal Ahalmd of the Court of ACJM, Sundernagar. Therefore, filing and pendency of complaint preferred by PW4 Kamal and Anjana against accused Balak Ram and Vijay along with two others is duly established on record. It has also come in evidence that PW4 Kamal Kumar had married with deceased Anjana against the wishes of family and for that reason, he was ousted from the house and was residing in kacha house and had shifted to the place of occurrence 5/6 days prior to the incident. Animosity, filing of complaints and counter complaints against each other is well established on record. The animosity is double edged weapon. It can be attributed as a motive to commit alleged offence by accused and at the same time, it can also be a reason for deceased Anjana to make statement against them by implicating accused for alleged commission of offence, as claimed.

35 PW8 Dr. Pawan Rai is medical officer of Health Centre, ACC Barmana who had given first aid to Anjana Kumari. PW5 Dr. N.K. Sankhayan, as referred supra, had given medical treatment to Anjana Kumari in Regional Hospital, Bilaspur and had issued MLC Ext.PW5/B along with opinion of fitness of Anjana Kumari thereon with regard to her mental fitness to make statement and also a separate certificate Ext.PW5/A regarding fitness of

Anjana Kumari to make statement on application Ext.PW5/C submitted by Investigating Officer to him. He had also examined PW4 Kamal Kumar and had issued Ext.PW5/F with opinion that injuries No. 1 to 3 on the neck of PW4 might be possible with nails and injury No. 4 during an effort to extinguish fire.

36 PW16 Dr. D.K. Sharma, Professor, Department of Surgery IGMC who is the Head of the Unit in IGMC Shimla, in which injured Anjana Kumari remained under treatment since 8.5.2014 till her death on 24.6.2014, has proved the death summary Ext.PW16/A pertaining to deceased Anjana Kumari. According to him, patient was making speedy recovery, however, on 24.6.2014 she started to develop breathing difficulties and reduced urinary output and at about 10.30 a.m the patient had become pulse less and thereafter cardio pulmonary resuscitation (CPR) was initiated, however, despite the best efforts patient could not be resuscitated and was declared dead and cause of death was SIRS and MODS (Systemic Inflammatory Response Syndrome and Multiple Organ Disfunction Syndrome).

37 PW7 Dr.Piyush Kapila Assistant Professor, Forensic Medicine, IGMC Shimla had conducted the postmortem of deceased and according to him, the deceased survived the immediate effects of the burn injuries and died due to subsequent complications of the burn injuries.

38 PW13 Satish Kumar is brother of deceased Anjana Kumari, who had witnessed the seizure of bed sheet Ext.P4 used for extinguish the fire by PW4 Kamal Kumar vide memo Ext.PW13/A.

39 PW10 LC Maya Devi had recorded rapat No. 36A Ext.PW10/A on 8.5.2014 at 9 AM in computer at the instance of SHO on the basis of telephonic information received in the Police Station that some unknown person had put a lady on fire, who was burning at village Salnoo.

40 PW9 HC Dev Dutt who was MHC at the relevant time has proved on record deposit of sealed parcels on 8.5.2014 by PW21 SHO Prem Singh in malkhana and sending of case property to RFSL Mandi through C. Kamal Dev on 12.5.2014 vide RC No. 63/14 and deposit of bed sheet Ext.P4 by PW14 ASI Lavkesh Kumar on 18.5.2014 in malkhana. He has proved the copy of malkhana register Ext.PW9/A, RC register Ext.PW9/B and RC Ext.PW9/C.

41 PW11 ASI Partap Singh had visited IGMC Shimla to get the postmortem of dead body of deceased conducted by filing application Ext.PW7/A and for receiving case summary and treatment summary of deceased.

42 PW14 Lavkesh Kumar has taken in possession bed sheet Ext.P4 vide memo Ext.PW13/A. PW15 LC Kamla Devi was MHC during leave of PW9 HC Dev Dutt and she has proved sending of parcel to RFSL Mandi through PW18 HHC Raj Kumar vide RC No. 71 of 2014 and has proved copy of RC register Ext.PW15/A.

43 PW17 C. Kamal Dev besides depositing the parcels at RFSL Mandi had also witnessed the seizure of bed sheet Ext.P4 vide memo Ext.PW13/A. PW18 has corroborated the statement of PW15 LHC Kamla Devi with regard to deposit of parcel in RFSL Mandi.

44 PW20 HC Hem Raj has collected the treatment record of deceased from ACC hospital, Barmana, Regional Hospital Bilaspur and IGMC Shimla by moving applications Ext.PW8/A, Ext.PW20/A and Ext.PW20/B.

45 PW18 Sub Inspector Ashok Chauhan has also conducted a part of investigation. As per his deposition in Court, he went to spot with Mr.Bhupinder Kanwar Additional Superintendent of Police Bilaspur where 3-4 persons were interrogated in village itself and he had also visited Sundernagar and collected copy of complaint Ext.PW6/A from PW6 Hem Chand Advocate vide memo Ext.PW6/B. He has further stated that on 24.6.2014 on receiving information of death of Anjana Kumari, PW11 HC Partap Singh was deputed to IGMC Shimla and provisions of Sections 302 and 326-A IPC were added by him in the case FIR on 15.7.2014. He got the statement Ext.PW14/C of Kamal Kumar recorded under Section 164 Cr.P.C. before the Magistrate and after receiving the FSL report Ext.PW19/A to Ext.PW19/D he has completed the investigation and prepared the challan and forwarded it to the Court.

46 In the beginning PW21 Inspector Prem Singh was Investigating Officer. He had moved an application Ext.PW5/A for medical examination of Anajan Kumar and after obtaining opinion from Medical Officer regarding her fitness to make statement, his telephonic information to Additional S.P. Bilaspur with regard to incident for recording of statement Ext.PW1/A of Anajana Kumari, the Executive Magistrate PW1 Shashi Pal. After receiving the said statement from PW1, he made endorsement Ext.PW21/A thereupon and sent it to the Police Station for registration of FIR, whereupon FIR Ext.PW21/B was registered. He prepared spot map of spot Ext.PW21/C and took broken bangles, burnt clothes etc. in possession vide memo Ext.PW3/A. He has deposed that statements of PW3 Satya Devi Ext.PW21/D, PW4 Kamal Kumar Ext.PW21/E and PW2 Rajiv Kumar Ext.PW21/F were recorded by him as per their version without adding or deleting anything therein. He has stated that plastic canny, having kerosene oil, was not recovered from spot and therefore, Section 201 IPC was added on 16.5.2014 and thereafter, he had proceeded on leave after handing over the investigation to PW19 ASI Lavkesh Kumar.

47 Presence of accused and PW4 Kamal Kumar along with his wife Anjana Kumari in the pucca room occupied by PW4 Kamal Kumar and Anjana at the time of alleged incident is undisputed. According to the complainant party, accused had entered their room and asked to withdraw the case filed by them in Sundernagar Court with threatening that on failure to do so, the couple would be killed. Whereas, the story put forward by accused persons is that marriage of accused Vijay Kumar was fixed on 24-26th May, 2014 and complainant couple who was residing in kacha house earlier had occupied pucca room 5/6 days prior to the incident after breaking the locks of said premises, whereupon accused Balak Ram had complained to police, but police considering it a family dispute, had advised him to settle the dispute in Panchayat as he and PW4 Kamal Kumar were father and son. Thereafter, accused Ram Pyari called the Panchayat members on the spot whereupon Anjana Devi started abusing from outside and had broken the window pane by hitting it with helmet, thereafter Kamal Kumar came out and advised her and went back to room and thereafter Anjana put herself on fire and after hearing her cries, PW4 Kamal Kumar and accused Ram Pyari came out of the roomand extinguished the fire.

48 Burning of deceased Anajna Devi after pouring kerosene oil on her body and thereafter her death on 24.6.2014 is not disputed. MLCs Ext.PW5/B and Ext.PW5/F pertaining to deceased and PW4 Kamal Kumar have not been disputed. The postmortem report Ext.PW7/B and cause of death are also not in dispute. The only disputed fact is that as per prosecution case, Balak Ram put her on fire, whereas defence of accused is that when accused persons were requesting PW4 Kamal Kumar to vacate the premises at least till the marriage of accused Vijay Kumar, Anjana Kumari herself put her on fire. For determining the cause of death, the relevant evidence on record is statement of deceased Anjana Ext.PW1/A, deposition of PW4 Kamal Kumar in Court as well as statement and

supplementary statement recorded under Section 161 Cr.P.C. and statement under Section 164 Cr.P.C. recorded before the Magistrate and statement of PW2 Rajiv Kumar. Though, PW3 also claimed her presence but prosecution had not relied upon her statement on that count, but cited her as a witness to the recovery/seizure of burnt clothes, hair band, hairs and broken pieces of bangles. Sunil Kumar another witness cited as a spot witness was given up being repetitive, whereas one Chinti Devi cited as a witness along with PW3 Satya Devi to memo of seizure Ext.PW3/A was also given up being repetitive, however, it has come on record that she (Chinti Devi) like PW3 Satya Devi was also pressing for recording her statement, in contrast to the prosecution case, by visiting the Police Station as well as office of Superintendent of Police, whereupon Additional SP Shri Bhupinder Kanwar had also visited the village and had interrogated certain persons on the spot.

49 As per defence, Additional S.P. had recorded statement of PW3 Satya Devi, PW Chinti Devi on 21.5.2014. However, no such statement is on record as a part of challan but accused have placed on record application Ext.DA submitted by Satya Devi to the Superintendent of Police and statement Ext.DB recorded by Additional SP on 21.5.2014.

50 There is no reference in challan with regard to investigation/interrogation carried out by Additional SP and statements recorded by him during that investigation/interrogation. PW19 Ashok Chauhan has admitted recording of statement Mark-1 of Chinti Devi and Ext.DB of Satya Devi by Additional SP on 21.5.2014. According to him, Chinti Devi and Satya Devi, at the time of recording their statements under Section 161 Cr.P.C., had not disclosed the facts as stated by them in statement Mark-1 and Ext.DB and they had told that they were related to accused Ram Pyari. It is also the case of prosecution that Additional SP had found that Chinti Devi and Satya Devi were trying to help the accused out of way. Plea of PW19 Ashok Chuhan that Satya Devi and Chinti Devi had informed him about relations with accused persons is incorrect as in her statement PW3 Satya Devi had clearly stated that she is Rajput and accused are Scheduled Caste. Further, Additional SP Bhupinder Kanwar has neither been cited nor examined as a witness despite the fact that during his investigation he had recorded statements of villagers and statements recorded by him were also not made part of challan. It was incumbent upon the prosecution to place the complete facts on record with its opinion along with reasons, but the prosecution has chosen to place on record that selective evidence only, which was suitable to their story. It creates doubt about the fair investigation.

51 Satya Devi in her statement stated that accused persons and PW4 Kamal Kumar were present in room occupied by the couple and Anjana Kumari was outside the room in veramadah where she poured the kerosene upon herself when PW4 Kamal Kumar went back after advising her. Even her statement is ignored. There is another witness PW2 Rajiv Kumar whose presence has been relied upon by PW4 Kamal Kumar. In his statement recorded under Section 161 Cr.P.C., it was stated that deceased Anjana was crying that she had been burnt, whereas in Court he has categorically stated that she was crying that she had burnt. According to him, he had not witnessed the slot of incident when Anjana Devi either was put on fire or put herself on fire as at that time, he had gone to Barmana to drop his son in school. But he has categorically stated that she was crying that she had burnt (Jal gai-jal gai). In his cross examination, he has stated that she had come from back side of house of Het Ram and PW4 Kamal Kumar and Ram Pyari had come out of the room and covered her with bed sheet and extinguished the fire in his presence and in presence of Sunil Kumar. It again run to the contrary to the claim of PW4 Kamal Kumar that Anjana Kumari was put on fire inside the room and thereafter she ran outside and was followed by him after getting himself free from clutches of his mother and brother. Even according to prosecution story as also depicted in spot map Ext.PW21/C and at one place in deposition of

PW4 Kamal Kumar, it has come on record that deceased Anjana Kumar was put on fire either in veramdah or on the threshold of veramadah, which is in contradiction to the claim of deceased Anjana Kumari made in her statement Ext.PW1/A. Statement of PW4 Kamal Kumar is self contradictory on this count. Therefore, it emerges from the aforesaid evidence on record is that it cannot be said with certainty that it was accused Balak Ram, who poured kerosene on Anajna Kumari and put her on fire. Even PW4 Kamal Kumar, as per his deposition in Court, is not sure about it was contrary to his earlier version claiming himself an eye witness, he has stated that this fact was told to him by his wife.

52 Conviction can be based on the solitary dying declaration also, if it is such that in the circumstances of the case it can be regarded as truthful. On the other hand, in case on account of an infirmity, it cannot be considered to be entirely reliable, corroboration would be required. ***(See Kushal Rao vs. State of Bombay*** reported in ***AIR 1958 SC 22*** and ***Gopal Singh and another vs. The State of Madhya Pradesh and another*** reported in ***AIR 1972 SC 1557)***

53 Putting reliance on judgment in ***Kushal Rao's case*** supra, learned counsel for the accused has submitted that a statement made by a dying person as to the cause of death, has been accorded by the Legislature, a special sanctity which should, on the principle that it was made at a time when the person making statement was in danger of losing his life, be respected, however, if there are clear circumstances on record in evidence to show that person making statement was not in expectation of death, it will have an impact not only upon the admissibility of the statement but to its weight also.

54 Reliance has also been put on behalf of the accused on a judgment of the Apex Court in ***Dadu Lakshmi Reddy vs. State of A.P.*** reported in ***AIR 1999 SC 3255*** wherein referring the judgments viz. ***Tapinder Singh vs. State of Punjab*** reported in ***1971(1) SCR 599/(1970)2 SCC 113*** and ***Khushal Rao's case*** supra it has been observed that a dying declaration is neither a deposition in Court nor made on oath or in presence of accused and thus its credence cannot be tested by cross examination and in view of inherent weaknesses attached to the dying declaration it would not be justifiable to draw an initial presumption that dying declaration contains and contains only the truth and it has been reminded that a dying declaration should be subjected to very close scrutiny while testing its reliability keeping in view all relevant attending circumstances.

55 Referring the verdict of Apex Court in ***Uka Ram vs. State of Rajasthan*** reported in ***AIR 2001 SC 1814*** it is canvassed on behalf of the accused that dying declaration is admitted on the basis of maxim, *"Nemomoriturus Praesumitur Mentire"* which means that the man will not meet his maker with a lie in his mouth, but before relying upon the statement the Court is obliged to rule out the possibility of statement being either the result of tutoring, prompting or conducive or product of imagination.

56 Reliance has put on ***C.Magesh vs. State of Karnataka (2010)5 SCC 645*** wherein the Apex Court after considering its previous pronouncement in case ***Suraj Singh vs. State of Uttar Pradesh*** reported in ***(2008) 16 SCC 686*** has held that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency and consistency is the keyword for upholding the conviction of an accused and therefore the evidence must be tested for its inherent consistency and the inherent probability of the story and consistency with the account of other witness has been held to be creditworthy with further observation that probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

57 Recently the Apex Court in ***Shama vs. State of Haryana*** reported in ***(2017)11 SCC 535*** has stated the principles to be kept in mind always at the time of examining the dying declaration, which read as under:-

> ***"30. Dying declaration made by the deceased is admissible in evidence under Section 32(1) of the Evidence Act, 1872. In the absence of any kind of infirmity or/and suspicious circumstances surrounding its execution, once it is proved in evidence in accordance with law, it can be relied on for convicting an accused even in the absence of corroborative evidence but with a rule of prudence that it should be so done with extreme case and caution. (See Panchdeo Singh vs. State of Bihar reported in (2002)1 SCC 577).***
>
> ***31. One of the principles which is always kept in kind while examining the dying declaration is that "a man will not meet his Makr with a lie in his mouth". As aptly said by Mathew Arnold in a very old English case (see Lyre LCR in R.v. Woodcock reported in (1789)1 Leach 500 "Truch sits on the lips of a dying man". This principle is deduced from a well-known Latin legal maxim "nemo moriturus praesumitur mentire."***
>
> ***32. We are not impressed by the submission of the leanred counsel for the appellant when he urged that the dying declaration is bad because it was recorded by the Inspector and not by any Magistrate.***
>
> ***33. In our considered opinion, firstly, the law does not prescribe any format for recording dying declaration; and secondly, it also does not prescribe any specific authority to record it unless any special law or rule is enacted to that effect. No such rule was brought to the notice of the courts below and here also. On the other hand, we find that perfect working and neatly structured dying declaration at times brings about an adverse impression and creates suspicion in themind of the court since the dying declaration need not be drawn with mathematical precision.***
>
> ***34. All that the law requires is that the declarant should be in fit state of mind and be able to recollect the situation resulting in the available state of affairs in relation to the incident and the Court should be satisfied that the reliance ought to be placed thereon rather than distrust."***

58 Applying aforesaid exposition of law related to dying declaration in the present case, we find, as discussed here-in-above, that it has not come in evidence on record that at the time of making statement Ext.PW1/A deceased Anjana was expecting her death imminent, rather opinion of the doctor reflects that though she was crying with pain but she was conscious, well oriented to time and place, mentally fit and her vitals were normal. None of the witnesses including PW1 Shashi Pal Sharma, PW4 Kamal Kumar and PW5 Dr.N.K.Sankhyan, has deposed to the effect that there was situation giving impression of imminent death of Anjana Kumari at the time of recording her statement Ext.PW1/A. It is also the fact that deceased expired after 47 days after incident that too as stated by PW7 Dr. Piyush Kapila, not due to immediate effect of burn injuries but due to subsequent complications of burn injuries. In these circumstances, it cannot be said to have been established by prosecution that at the time making statement Ext.PW1/A, deceased Anjana was in a state of mind that she was going to die on account of burn injuries. Therefore, Ext.PW1/A is required to be scrutinized with extreme care and caution.

59 The best evidence to corroborate her statement is deposition of PW4 Kamal Kumar. As noticed supra, testimony of PW4 Kamal Kumar is inconsistent not only with statement Ext.PW1/A with respect to the spot of pouring kerosene oil and person putting her on fire but also inconsistent with his earlier statements Ext.PW4/A, mark K-1 and Ext.PW21/E. In this regard, the site map Ext.PW21/C and testimony of Investigating Officer PW21 Prem Singh are also contrary to statement Ext.PW21/A as well as statement of PW4 Kamal Kumar. Therefore, despite finding no fault in recording the statement Ext.PW1/A, for being an inconsistent with other evidence on record, the conviction cannot be based solely on this statement as the surrounding circumstances are rendering its suspicious.

60 In view of the previous animosity and criminal litigation going on between the parties possibility of implicating the accused in a serious case cannot be ruled out.

61 It is an admitted case of parties that accused persons entered the room in possession of PW4 Kamal Kumar and his family. Statement of PW4 Kamal Kumar that accused persons had entered in his room is duly corroborated by statement of PW2 Rajiv and PW3 Satya Devi and also by defence taken by accused that they had gone to PW4 Kamal Kumar for asking to vacate the room at least till the marriage of accused Vijay Kumar. It is the case of defence that PW4 Kamal Kumar had entered the room after breaking the locks and whereupon accused Balak Ram had contacted SHO Barmana telephonically and on whose advise Ram Pyari accused had called Panchayat members on the spot and accused entered the room occupied by family of PW4 Kamal Kumar. Stand of PW4 Kamal Kumar is that accused persons had come to pressurize them to withdraw the case pending in Sundernagar Court.

62 The presence of accused on spot and entry in the room occupied by family of PW4 Kamal Kumar and also altercation taking place is also corroborated by statements of PW2 Rajiv Kumar and PW3 Satya Devi. Strained relations between the parties are undisputed and therefore, the entry of accused persons in premises in the occupation of family of PW4 Kamal Kumar cannot be said to be friendly entry.

63 Be that as it may, the fact remains that accused persons had entered the room occupied by family of PW4 Kamal Kumar either to pressurize him to withdraw the case or to vacate the room which he had occupied five days prior to the incident. In either of the eventuality, they entered the room with intention to intimidate, insult or annoy the family of PW4 Kamal Kumar and thus have committed an offence of house trespass as defined under Section 442 IPC punishable under Section 448 IPC.

64 The accused have been charged for an offence under Section 452 IPC which is an offence of higher degree than the offence under Section 442/448 IPC and therefore, they can be convicted for commission of offence under Section 442 IPC punishable under Section 448 IPC without being specifically charge sheeted for that offence.

65 In the light of aforesaid evidence, it is also proved on record that accused has also criminally intimidated PW4 Kamal Kumar and his wife and thus committed an offence punishable under Section 506 IPC.

66 So far as the charge framed under Section 201 IPC for causing disappearance of evidence of offence on the ground that kerosene canny could not be recovered by Investigating Officer from the spot is concerned, no evidence to establish the same is on record and hence the accused are rightly acquitted for an offence under Section 201 IPC.

67 For discussions here-in-above, it has not been proved beyond reasonable doubt that it was accused Balak Ram who had poured kerosene oil on deceased Anjana and put her on fire, therefore, he cannot be convicted under section 326-A IPC for causing burn or grievous hurt by using any means with intention of causing or with knowledge that he would likely to cause such injury or hurt.

68 Though, it has come in evidence of PW4 Kamal Kumar that accused Balak Ram had slapped his wife deceased Anjana and his mother and brother had over-powered him and brother had caught him from neck and in MLC Ext.PW5/F it is opined by the doctor that injuries No. 1 to 3 found on his neck may be possible with nails. However, as the veracity of PW4 Kamal Kumar with regard to manner in which incident took place, is under cloud, it cannot be said beyond doubt that these injuries were also caused by accused persons. Therefore accused are also liable to be acquitted under Section 323 IPC.

69 In view of above discussion, on the basis of evidence on record, we are of the considered view that prosecution has failed to prove charges against the accused under Sections 302, 323, 326-A and 201 IPC. However, there is evidence on record proving beyond the shadow of doubt that accused persons have committed offences punishable under Sections 448 and 506 IPC.

70 Accused persons were arrested on 8.5.2014. Accused Ram Pyari was released on bail on 20.10.2014, whereas accused Vijay Kumar remained in custody till 27.8.2016 and accused Balak Ram is in jail till date. Keeping in view the entirety of facts and circumstances and also that accused Ram Pyari is 55 years old, it would be appropriate to sentence them for imprisonment for a period they already undergone. The amount of fine imposed upon accused Balak Ram while sentencing him under Sections 302 and 326-A of Indian Penal Code, if already deposited, shall be refunded to him against proper receipt. The accused persons, however, are sentenced to pay fine of Rs 1000/- each for the commission of offence punishable under Section 448 of Indian Penal Code and Rs.3000/- each under Section 506 of Indian Penal Code.

71 Both the appeals are partly allowed in aforesaid terms. Bail bonds furnished by accused Vijay Kumar and Ram Pyari are discharged. Accused Balak Ram, if his custody is not required in any other case, shall be released from custody forthwith. Release warrant be prepared accordingly. Record of the trial Court be sent back forthwith.

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

Gorkha Ram .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 545 of 2017.
Reserved on: November 30, 2018.
Decided on: December 5, 2018.

**Protection of Children from Sexual Offences Act, 2012-** Sections 5(m) and 5(n)- Penetrative sexual assault by father on daughter – Proof- Prosecution alleging that after

death of his wife accused had been sexually abusing his daughters- Trial Court convicting accused of said offences- Appeal against- Accused contending wrong appreciation of evidence on part of Trial Court- Facts revealing (i) FIR registered on complaint of Health Worker of NGO, but NGO was not registered. (ii) Health worker not mentioning names of members of Mahila Mandal who revealed her sexual exploitation of victims by accused (iii) 'R' aunt of victims inimical towards accused (iv) Medical evidence not disclosing injuries on the person of victim. (v) Statement of victim self contradictory (vi) Possibility of victim having been tutored by NGO on day her statement was recorded- Held- Having regard to totality of circumstances, appeal allowed - Conviction set aside. (Paras 20 to 30).

***Cases referred:***

Baldev Singh vs. State of H.P., decided on 26.11.2018

Vivek Singh vs. State of Himachal Pradesh, ILR 2017 (V) HP 395 (D.B.)

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| For the appellant | Mr. Lakshay Thakur, Advocate. |
| For the respondent | Mr. Vikas Rathore and Mr. Narinder Guleria, Addl. AGs with Mr. Kunal Thakur, Dy. AG. |

The following judgment of the Court was delivered:

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**Dharam Chand Chaudhary, J.**

Gorkha Ram, a convict (hereinafter referred to as the accused) is in appeal before this Court. He is aggrieved by the judgment dated 17.8.2017 passed by learned Special Judge, Kangra at Dharamshala in Sessions Case No. 41-D/VII of 2016, whereby he has been convicted for the commission of offence punishable under Section 5(m) and 5(n) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act" in short) and sentenced to undergo rigorous imprisonment for a period of 10 years and also to pay a fine of Rs. 20,000/-.

2. A case, vide FIR No. 9 of 2016 dated 9.7.2016 came to be registered against the accused on the basis of an application Ext. PW-14/A made by PW-6 Komal Parihar, allegedly Health Worker in "Jagori" a NGO, PW-4 Asha, Para Legal Volunteer and one Raveena, amicus curaie to President, Child Welfare Committee Kangra at Dharamshala, H.P. A copy thereof was also forwarded to Ms. Shalini Agnihotri, Addl. Superintendent of Police, Kangra at Dharamshala. The Addl. Superintendent of Police forwarded the same to Women Police Station, Dharamshala for registration of the case against the accused. The allegations, in a nut shell, against the accused are that PW-6 Komal Parihar was apprized in the meeting of Mahila Mandal at Bhali on 25.6.2016 by some women of the village present there that the accused had been torturing mentally and physically his minor daughters after the death of his wife. The accused allegedly tried to develop physical relations with his elder daughter. In order to verify such allegations when she went on 8.7.2016 to the house of the accused, his elder daughter, the victim herein told that on that day also, she was beaten up by her father and during night time, he used to do wrong acts with her. She also came to know that cries of the minor girls could be heard every day from the house of the accused. PW-7 Rekha Devi, Aunt (Tai) of the minor girls allegedly disclosed to PW-6 Komal Parihar that the accused under the influence of liquor had been exploiting his minor daughters, mentally and physically.

3. On registration of the FIR Ext. PW-14/B, SI Kiran Bala, I.O., Women Cell, Dharamshala has conducted the investigation. On the application Ext. PW-1/A she moved,

the medical examination of the victim(s) was conducted by PW-1 Dr. Manju. She issued the MLCs Ext. PW-1/B, PW-1/C and PW-1/D. The statement of the victim was recorded and photographed also vide CD Ext. PY. The statements of PW-4 Asha Ext. PW-14/C and PW-6 Komal Parihar under Section 161 Cr.P.C. were also recorded. The accused was arrested on that very day and got subjected to medical examination qua which application Ext. PW-10/A was made to the Medical Officer, Zonal Hospital, Dharamshala. The MLC is Ext. PW-10/B. The articles preserved by PW-1 Dr. Manju and PW-10 Dr. Kulbhushan Sharma, for scientific investigation were deposited with MHC Police Station Dharamshala. The site plan Ext. PW-14/D was also prepared in the presence of PW-4 Asha, LC Sonia and PW-7 Rekha Devi. In their presence, a local mattress (Khind) was also taken into possession vide seizure memo Ext. PW-4/A. The supplementary statement of PW-4 Asha Ext. PW-14/E was also recorded. Photograph Ext. PW-4/C-1 was also clicked by the I.O with her cell phone. On the demarcation given by the accused, memo Ext. PW-9/E was prepared. The photograph Ext. PW-4/C-2 was also clicked by the I.O. Site plan Ext. PW-14/E was prepared. On the same day i.e. 11.7.2016, PW-14 SI Kiran Bala has made an application with a prayer to record the statement of the victim under Section 164 Cr.P.C. and on the basis thereof, learned JMIC (I), Dharamshala has recorded her statement Ext. PW-5/A. The case property was forwarded to Forensic Science Laboratory for analysis. On the receipt of report of Chemical Examiner ( Ext. PX) and on completion of the investigation, report under Section 173 Cr.P.C. was filed against the accused.

4. Learned trial Judge, on appreciating the police report and documents annexed thereto and finding a case under Section 5(m) and 5(n) of the POCSO Act made out against the accused, framed charge against him accordingly. The accused, however, pleaded not guilty and claimed trial. The prosecution, as such, has produced the evidence in support of the charge so framed against the accused.

5. The material prosecution witnesses are victim of the occurrence PW-5 (name withheld), PW-4 Asha, Para Legal Volunteer, PW-6 Komal Parihar, Health Worker in “Jagori”, Raveena (not examined) and PW-7 Rekha Devi. The remaining prosecution witnesses are PW-1 Dr. Manju who has conducted the medical examination of all the three minors, including the victim, PW-10 Dr. Kulbhushan Sharma who has medically examined the accused, PW-11 Dr. Surender Kumar, Asstt. Director, RFSL, Dharamshala who has proved the report Ext. PX. PW-2 Harshvardhan Vaidya is the Chairman, Child Welfare Committee and PW-3 Ramesh Mastana is the Coordinator. The remaining witnesses are police officials, hence formal.

6. Learned trial Judge, on appreciation of the oral as well as the documentary evidence produced by the prosecution and hearing learned Public Prosecutor as well as learned defence counsel has concluded that the prosecution case against the accused stands established beyond all reasonable doubt. He, as such, has been convicted and sentenced as pointed out at the outset.

7. The legality and validity of the impugned judgment has been questioned on the grounds *inter alia* that there is no iota of evidence to suggest the involvement of the accused in the commission of the offence. The impugned judgment, on the other hand, is based on conjectures, surmises and hypothesis. The evidence as has come on record by way of testimony of PW-4 to PW-7 is stated to be wrongly appreciated which has resulted in miscarriage of justice to the accused. When PW-1 Dr. Manju on the basis of clinical examination of the victim she conducted had not noticed any injury on her face, chest and abdomen, in pubic region, labia majora and there being no finding of penetrative sexual assault, the findings to the contrary are stated to be not legally sustainable. PW-7 Rekha Devi allegedly is not trustworthy, being inimical to the accused as per her own admission.

In case, the victims' were being tortured physically and mentally by the accused (their father), why this witness has not reported the matter either to police or complained to the local residents. The statement of PW-5 victim, could have not been relied upon because after the registration of FIR on 9.7.2016, the accused was arrested and she remained in the custody of PW-4 Asha and PW-6 Komal Parihar. Therefore, the possibility of the victim being tutored by them cannot be ruled out. It has also been pointed out that in a case of this nature, it is not safe to place reliance on the testimony of a child witness. The prosecution, as such, is stated to have failed to prove its case against the accused beyond all reasonable doubt, hence, the accused deserves to be acquitted of the charge framed against him.

8. Against this backdrop, while Mr. Lakshay Thakur, Advocate, learned defence counsel has sought the impugned judgment to be quashed and set aside, learned Addl. Advocate General has come forward with the version that the impugned judgment, being well reasoned and based upon cogent and reliable evidence produced by the prosecution calls for no interference.

9. The machinery has been set into motion by PW-6 Komal Parihar, who claims herself to be a volunteer of **'Jagori'**, a NGO. Whether any NGO, namely 'Jagori' exists and is a registered body, there is no evidence on record. As a matter of fact, in normal course, a NGO is required to be registered and acts to the knowledge and notice of the Government department, such like Women and Social Welfare and Social Justice and Empowerment which generally remains in touch with welfare of the people. Therefore, any NGO, namely 'Jagori' in existence is not at all proved.

10. The very first version qua the alleged sexual assault committed by the accused on his own daughter finds mention in the application Ext. PW-14/A submitted by PW-6 Komal Parihar, the so called Health Worker of "Jagori", PW-4 Asha, Para Legal Volunteer and one Raveena allegedly (Nyay Sakhi) an amicus curiae to Chairman, Child Welfare Committee, Kangra District. As per this document, it is PW-6 Komal Parihar, who for the first time came to know about the physical and mental harassment of the victim and her sisters by their father, the accused in the meeting of Mahila Mandal Bhali on 25.6.2016 from its members (women of village Bhali). Since the meeting of Mahila Mandal must be a regular feature during each and every month, therefore, it can reasonably be believed that PW-6 Komal Parihar was knowing the names etc. of those members of Mahila Mandal. She, however, did not disclose their names in the application Ext. PW-14/A. Therefore, it remains mystery as to who were those women of Village Bhali and members of Mahila Mandal, who disclosed the alleged mal-treatment and sexual exploitation of the victim and her sisters by the accused to PW-6 Komal Parihar. In case said PW-6 Komal Parihar was present in the meeting of Mahila Mandal on that day at Bhali, and the victims were residing in the same village, she would have met them and taken the stock of the situation at their house and verified the allegations of their mal-treatment by the accused. As per this document, PW-6 Komal Parihar went to Bhali to the house of accused on 8.7.2016. Though on the reverse of this document she allegedly informed PW-4 Asha and Raveena over cell phone and they also came to Village Bhali to the house of the accused, however, this part of the application seems to be introduced later on because the first part of the application gives a clear indication that Asha and Raveena were not there and it is rather PW-6 Komal Parihar who alone had gone to the house of the accused at Village Bhali on that day. Nothing has come in this document that the accused had been opening the trouser of the victim and used to kiss as well as lick private part of the victim. Therefore, if the contents of the application Ext. PW-14/A are believed to be true, the has victim only revealed to PW-6 Komal Parihar that her father had been beating her and doing wrong act with her during

every night. This document also introduces another prosecution witness PW-7 Rekha Devi. She as per the record is none else but the wife of the step brother of the accused. She allegedly disclosed before PW-6 Komal Parihar that the accused under the influence of liquor had been exploiting his daughters physically and also mentally on each and every day. Therefore, Rekha revealed something new which the victim had not disclosed to PW-6 Komal Parihar. The application Ext. PW-14/A perhaps was closed with a request to the Chairman, Child Welfare Committee, Kangra to save all the three minor girls from their mal-treatment by initiating proceedings in accordance with law in the matter at once on its first page and as noticed supra, the second part of this application on its reverse that PW-6 Komal Parihar informed PW-4 Asha and Raveena also and that they reached at Village Bhali is an afterthought, may be with malafide intention to create false evidence.

11. PW-6 allegedly came to know about the torture and maltreatment as well as sexual abuse of the victim (PW-5) by none else but her father in a meeting of Mahila Mandal in Village Bhali from some women present there. She, however, has not disclosed the names of those women. It has also not been proved that on what date, month and time the Mahila Mandal meeting was convened. PW-6 Komal Parihar has also not disclosed the names of those women. As per the normal human conduct, had she been present in the meeting, she would have been in the knowledge of the names of those women or if not, should have tried to ascertain their names so that being a social activist, she would have been in a position to give authentic information qua the so called torturing to the authorities, including the police. She having not disclosed the names of so called women from whom she came to know about the torturing of the victim, including her sexual harassment by the accused, this part of the prosecution story seems to be false.

12. Otherwise also, on 8.7.2016 when PW-6 Komal Parihar went to the house of the victim at village Bhali and enquired from the victim about the plaster/band aid in her leg, she revealed that her father had beaten her with burning firewood when she could not manage to cook the food on account of wet firewood. Also that, on an occasion, he had assaulted her with the lid of cooker and he had been pressurizing her to cook food. Had she been beaten up and tortured, she should have stated that also in her statement recorded under Section 164 Cr.P.C. Therefore, the statement of PW-6 Komal Parihar, the so called volunteer of NGO, that the accused on one occasion had administered beatings to her with burning firewood and on another with lid of cooker and was also pressurizing and terrorizing her as and when found to have not cooked food by her, hardly inspire any confidence. Even nothing of the sort the victim has stated in her statement recorded under Section 164 Cr.P.C. Above all, when on 9.7.2016, the victim was taken to hospital after registration of the FIR and arrest of her father for medical examination, no injury could be detected on her person as is apparent from the perusal of the MLC Ext. PW-1/B. There is nothing in the statement of PW-6 Komal Parihar that the victim had also revealed that her father, the accused rubs his penis with her vagina and also kisses her vagina. As per the statement of PW-6 Komal Parihar, rather it is Rekha PW-7 who revealed that on the previous night the victim and her sisters when tortured by their father, the accused, were crying loudly. Also that, the accused had been committing the alleged immoral act with his daughter, the victim. Although, as per PW-6 Komal Parihar, she got verified the facts so disclosed by PW-7 Rekha from the victim and she admitted the same as correct. Yet, had it been so, the victim should have revealed to PW-6 Komal Parihar at that very moment when she apprized her about the alleged mal treatment and torturing at the hands of her father, the accused.

13. Now, if coming to the statement of the victim Ext. PW-5/A recorded under Section 164 Cr.P.C., the accused had been opening the zip of his pants and touching his Penis and tongue with her vagina. Such, however, was not her version before PW-6 Komal

Parihar on 8.7.2016 when she visited the house of the accused to meet the victims at Village Bhali. Such version of the victim in Ext. PW-5/A in the considered opinion of this Court is tutored one. Now, if coming to the statement of the victim while in the witness-box, she tells us that the accused had been rubbing his private part with her private part during night. Therefore, there are three different versions of her alleged exploitation given by the victim i.e. first as in the application Ext. PW-14/A; second in her statement Ext. PW-5/A recorded under Section 164 Cr.P.C. and third in her statement recorded while in the witness-box as PW-5. Above all, PW-5 a minor aged approximately 9 years at the relevant time, is not expected to speak the language deployed in the statement recorded under Section 164 Cr.P.C. (Ext. PW-5/A). A girl of her age can only speak so if tutored by someone and the degree of the tutoring is also very high. According to her, two volunteers of the so called NGO were accompanying her on that day to the Court. Therefore, it is doubtful that she had made such statement voluntarily and without any undue influence. There is another aspect that the statement of the victim under Section 164 Cr.P.C. was got recorded on 11.7.2016 i.e. after the arrest of the accused in this case on 9.7.2016. Had she been residing in the company of her father, the possibility of tutoring her could have been ruled out. The statement, therefore, when recorded at a stage when her father was already taken into custody, the possibility of she being minor girl, could have been motivated in one way or the other being ignorant of the consequences of such statement, including that in case any such statement is made by her against the accused none else but her father, what would be the implications thereof cannot be ruled out. Any such girl cannot also be expected to understand the values of relations i.e. between father and a daughter and on being allured for petty things like sweets, toys, shoes or dress may fall prey to it and depose in a particular manner and fashion as required by the person motivating the minor to make a particular statement of his/her choice.

14. Though, as per the version of the victim in her cross-examination, she was not tutored either by PW-4 Asha or PW-6 Komal Parihar at any point of time, however, her admission that they were present in the Court the day when her statement Ext. PW-5/A under Section 164 Cr.P.C. recorded and on the day of her examination in the Court also, it can reasonably be believed that some sort of tutoring was there because otherwise a girl of tender age i.e. 10 years old on the day when appeared as a witness in the Court and approximately 9 years when allegedly assaulted mentally and physically by the accused, cannot be accepted to have an understanding to recognize the private parts like Penis or vagina or making such statement as one can expect either from an adult or at least a girl having attained the age of discretion.

15. Interestingly enough, the entire family comprising the accused, the victim and her two sisters as well as grandmother used to reside in a single room. The victim has admitted in the cross-examination that her grandmother lived with them in that very room till the arrest of her father, the accused. How, it was possible for the accused to have assaulted his own daughter that too in the presence of his mother in the manner as claimed by the prosecution is not understandable. Above all, the mother of the accused who may have thrown some light qua this aspect of the matter has not been examined as a witness by the prosecution for the reasons best known to it nor even associated also in the investigation of the case.

16. Not only this, but PW-4 Asha had also given different version qua the manner in which the accused had allegedly been assaulting the victim, as it has come in her statement Ext. PW-14/C recorded under Section 161 Cr.P.C. that when she met the victim at Village Bhali, the latter told her that her father, the accused had been touching her private parts and simultaneously enjoying sex by way of masturbation (हस्तमैथुन) (to enjoy sex

otherwise than in natural way). It was not even the case of the prosecution also nor anyone, including the victim has stated so during the course of investigation. Even PW-4 Asha has also not stated so while in the witness-box.

17. It is worthwhile to mention here that the evidence as has come on record by way of the testimony of PW-7 Rekha Devi, the aunt (Tai) of the victim is altogether contrary to the prosecution case because nothing has come during the course of the investigation of the case that the victim used to weep on the "Samadhi" of her deceased mother and that PW-7 Rekha Devi noticed injury on her private part at one occasion when she had been urinating and that on asking from the victim about the injury she revealed that her father had been kissing her private part and also inserting his finger therein. PW-7 Rekha Devi, therefore, has introduced a new story. If her statement under Section 161 Cr.P.C. available in the police record is seen, it has come therein that the accused in the courtyard of the house had been touching his daughters in a highly objectionable manner which looked very bad to her. She, however, said nothing of the sort when examined in the witness box as PW-7. Nothing is also there in the prosecution case that the accused had been insisting the victim to sleep with him and making his two other minor daughters to sleep separately as has come in the statement of PW-7 Rekha Devi. This witness in her cross-examination tells us that her husband was born to her father-in-law from the second marriage. Also that they have only one house in which one room is with the accused and the other with her and that the courtyard is common. They both used to quarrel with each other and the Panchayat also visited their house when the accused quarreled with her. The version of PW-7 Rekha Devi, therefore, amply demonstrates that her relations with the accused were not cordial and rather inimical. Not only this, but she tells us that her mother-in-law started residing with her only since last one month, meaning thereby that earlier she had been residing with the accused and his daughters in the same room which is in his share. Although, she denied the suggestion that she deposed falsely against the accused, yet the possibility of her doing so cannot be ruled out because after the implication of the accused in this case and removal of his daughters to shelter home, it is she who had to enjoy the house. The possibility of there being no Mahila Mandal at Village Bhali cannot be ruled out because had it been so, it is Pradhan or any other office bearer who would have been associated in the investigation of this case. The registration number of such Mahila Mandal with the Department of Women and Child Welfare would also have been obtained and produced in evidence. The close scrutiny of the statement of PW-7 Rekha Devi, therefore, renders the entire prosecution story highly doubtful.

18. Now, if coming to the statement of PW-4 Asha to the effect that she had visited Village Bhali along with PW-6 Komal Parihar on 27.6.2016, is highly doubtful as it is not recorded so in the application Ext. PW-14/A. As discussed hereinabove, she did not at all visit Village Bhali along with PW-6 Komal Parihar and the story to this effect was introduced later on as is apparent from the trend of the contents of application Ext. PW-14/A. Her version that PW-6 Komal Parihar came to know from the ladies in the meeting of Mahila Mandal at Village Bhali qua sexual exploitation of the victim being hearsay is of no help to the prosecution case. PW-4 Asha having visited Village Bhali on 8.7.2016 on being informed by the so called shop keeper that the victim and her sisters had returned to their house is also doubtful for the reasons recorded hereinabove. Who was that shopkeeper requested by them to inform that as and when the girls return to their house is not proved on record, being not examined. Above all, a different story to the effect that when they met with the victim at the house of the accused, she was found to have applied bandage on her right leg and on enquiry she revealed that her father had beaten her with burning wood, is also introduced by this witness while in the witness-box. The story of the alleged torturing of the victim on account of not cooking food is also false and concocted one. PW-4 Asha

when confronted in her cross-examination admitted that nothing to the sort that they had given their cell number to the shop keeper finds mention in their statements Ext. D-1 and D-2 recorded under Section 161 Cr.P.C.

19. PW-7 Rekha Devi referred to by PW-4 Asha in her statement has already been termed as an inimical witness for the reasons recorded hereinabove. It appears that in order to implicate the accused in this case falsely is the part and parcel of illegal designs of PW-4 Asha, PW-7 Rekha Devi and PW-6 Komal Parihar. The version of PW-4 Asha in her cross-examination that in the house comprising two rooms, in one room the accused was residing whereas in another his mother is again contrary to the factual position because as per the prosecution evidence itself, in one room the accused was residing with his mother and children whereas in another PW-7 Rekha Devi and her family. It was suggested to her by the defence that on 8.7.2016, the accused had lodged missing report of his daughters in Police Post Kotla and that he even visited Women Police Station, Dharamshala also on that day, she expressed her ignorance. Since, she has not denied the suggestion so given, therefore, such a plea raised by the accused in his defence appears to be nearer to the factual position. According to PW-6 Komal Parihar, the record of this case has not been maintained. When it has come in the statement of PW-4 Asha that the record qua the cases discovered by the volunteers of "Jagori" is being maintained, it is not understandable as to why the same was not maintained nor produced in the Court. Though, the suggestion that the record was not maintained because the victim did not disclose anything qua her sexual exploitation is denied being wrong, however, this alone seems to be the apparent reason of not maintaining the record of this case by the so called NGO "Jagori". It is quite possible that PW-4 Asha and for that matter PW-6 Komal Parihar were afraid of taking a legal action by the accused for leveling false allegations of sexual exploitation against him and as such the possibility that in order to save their skin, he has been implicated falsely in this case cannot be ruled out.

20. PW-6 Komal Parihar, the so called Health Worker, is also not dependable because on leveling of such serious allegations by the women in the meeting of Mahila Mandal at Bhali, she even did not care to ascertain the names of those women so that they could have been associated by the police during the course of investigation. Above all, such women as per her version had levelled such allegations indirectly against the accused. The story that those women disclosed about swelling of private part of one of the girl child of the accused, has come for the first time in her statement as nothing to the sort is there in the prosecution case. Since PW-7 Rekha Devi had allegedly seen injury in the private part of the victim as discussed supra, therefore, PW-6 Komal Parihar and PW-7 Rekha Devi seem to be the mastermind to frame the accused in this case falsely. Her statement that they went to the house of the accused where his daughters were not available and given their cell phone to the shopkeeper is again false as already discussed hereinabove in this judgment. As per PW-4 Asha, it is she who received the call from the so called shop keeper whereas as per PW-6 Komal Parihar, it is she who had received the telephonic call. According to her, it is she alone who had gone to Bhali as has come in Ext. PW-14/A. Meaning thereby that the prosecution story qua PW-4 Asha and Reena had also come there on the call she made is false as already discussed. The story that the victim was found to have applied bandage in her leg due to the injury she received allegedly by way of her beatings with burning wood is also discarded while discussing the evidence to this effect having come on record by way of testimony of PW-4 Asha. It is already said that the implication of the accused in this case appears to be the handy work of the trio i.e. PW-4 Asha, PW-6 Komal Parihar and PW-7 Rekha Devi, therefore, it is not desirable to refer to the evidence that Rekha informed this witness about the torturing of the victim and her sisters by the accused any further. In her cross-examination, it is admitted by PW-6 Komal Parihar that she had gone to District Jail,

Dharamshala to meet the accused to know as to how his daughters have to be kept in the house, however, denied that she had arguments with the accused there. It is also denied that she told the accused to give his younger daughter to someone known to her and that in lieu thereof, she may help him in this case and also that on this heated exchanges had taken place between them is also though denied being wrong, however, when she admits her visit to the jail to meet the accused, the possibility of all this having taken place cannot be ruled out. They were informed by the shopkeeper, however, according to PW-6 Komal Parihar, his name was not known to her is surprising to note. Why she had not maintained the record of the proceedings of this case, she failed to explain. When as per her admission, all the three daughters of accused were brought to Dharamshala, their medical examination was got conducted, nothing including injury on their person was detected during such examination. She admitted that no enquiry was made from the local residents about the maltreatment of the minor girls by their father. When she tells us that all the ladies present in the meeting of Mahila Mandal were saying so, it is not understandable as to why she did not disclose so to the police during the course of investigation. When PW-7 Rekha Devi herself admits enmity with the accused and they both had been quarrelling with each other, to deny the suggestion that PW-7 Rekha Devi had given a false statement to her is contrary to the factual position.

21. Now, if coming to the medical evidence as has come on record by way of testimony of PW-1 Dr. Manju, when as per the findings she recorded in the MLC that there were no injuries on the face, chest, abdomen, pubic region and labia majora nor any active bleeding as well as hymn was intact, coupled with the factum of there being no allegation of penetrative sexual assault made, how this witness has ruled that there is possibility of unnatural sexual assault having been committed upon the victim, remained unexplained. According to her, the opinion so given was based upon physical examination of the victim, she conducted. In her cross-examination, it is admitted that there was no evidence of penetrative sexual assault having been committed upon the girls, including the victim. Even if it is believed that there was redness in labia minora, there is admission on the part of PW-1 Dr. Manju that such injury is possible in case of itching having been done by the victim herself. Therefore, such evidence is suggestive of that the redness in labia minora of the victim was not due to the sole reason of the accused rubbed or kissed her vagina and there may be other reason therefor. The possibility of the opinion is not based on subjective satisfaction of PW-1 Dr. Manju in the given facts and circumstances of this case, therefore, cannot be ruled out. The medical evidence, as such, is not suggestive of that the accused committed penetrative sexual assault upon the victim and is guilty for the commission of the offence punishable under Section 5(m) and 5(n) of the POCSO Act. It is worthwhile to mention here that the report under Section 173 Cr.P.C. was filed against the accused with a prayer to convict and sentence him for the commission of the offence punishable under Section 8 of the POCSO Act. The sentence prescribed against an offender under Section 8 of the Act is imprisonment which shall not be less than 3 years but may extend to 5 years. Learned Special Judge has, however, framed the charge under Section 5(m) and 5(n) of the POCSO Act i.e commission of penetrative sexual assault by him being father of the victim. Section 5 of the POCSO Act deals with aggravated penetrative sexual assault. It is nobody's case that the accused had committed penetrative sexual assault upon the victim because even she herself has nowhere stated either in her statement recorded under Section 164 Cr.P.C. (Ext. PW-5/A) or in the another while in the witness box that the accused ever penetrated his penis in her vagina. In the statement under Section 161 Cr.P.C. of the victim recorded by the Investigating Officer, she, however, has completely ruled out the penetrative sexual assault. The allegations, as has come on record by way of her testimony that he had been opening the zip of his pants and taking out his penis and after kissing her private part (vagina) and rubbing his penis also has already been discarded being wrong because,

no such statement was made by her either to the police or to PW-6 Komal Parihar till she was not in the custody of the said witness and also PW-4 Asha and also Raveena on 8.7.2016 when they allegedly visited the house of the accused and met the girls, including the victim there. FIR was registered on the next date i.e. 9.7.2016 and the accused was also arrested on that day itself. It is after that the kissing and rubbing his penis with vagina was introduced in her statement recorded under Section 161 Cr.P.C. i.e on 9.7.2016 and the statement recorded under Section 164 Cr.P.C. Ext. PW-5/A, though un-dated, however, the application Ext. PW-14/F filed in the Court for recording the same on 19.7.2016. In the considered opinion of this Court, the victim was tutored after being removed from the custody of father on 8.7.2016 and the statement Ext. PW-5/A is the result thereof. Why, PW-4 Asha and PW-6 Komal Parihar conducted themselves in such a manner, though no apparent reason thereof is on record, however, plea raised by the accused in his defence as emerges from the trend of cross-examination of the prosecution witnesses that they did so because he refused to give his younger daughter to someone else at their behest and on being threatened by him to be sued on account of managed to register a case with false allegations against them seems to be nearer to the factual position. Even, PW-4 Asha has introduced a new story of masturbation while kissing and touching vagina of the victim because such allegations were not there in the application (Ext. PW-14/A) nor anyone else stated so while in the witness-box.

22. The close scrutiny of the evidence in the manner as aforesaid, amply demonstrate that the prosecution has falsely implicated the accused in this case and thereby not only tarnished the reputation of the accused, who happens to be the father of the victim, but also put a question mark on the pious relations between father and a daughter. On the other hand, the prosecution story in the opinion of this Court has been engineered and fabricated to implicate the accused in this case falsely.

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

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

> "35. Before parting, we would be failing in our duty if not point out that overall conduct of the Investigating Agency which has implicated the accused in a false case on the basis of highly interested evidence i.e. the only statement of complainant who was not only inimical to the accused but also to other members of his family. Her mother PW-2 Chino Devi, though helped her daughter, the complainant in getting the accused booked falsely, however, unsuccessfully. Anyhow, we leave it open to high ups in police department to take steps as warranted to sensitize the officers/I.Os so that any such instance does not reoccur.

> 36. Learned trial Judge has also failed to appreciate the evidence in its right perspective and swayed only by the severity of the allegations and the alleged incident of rape with a minor below to years of age by none else but allegedly her father. Since the allegations levelled against the accused were highly sensitive having repercussions in the society as a whole, an onerous duty was cast upon learned trial Judge to have examined the given facts and circumstances of the case and also evidence available on record with all circumspection and more care and caution. Due to such an approach in the matter, pious relations between a father and daughter got tarnished. We hope and trust that in a case of this nature, the Investigators, Prosecutors and Adjudicators shall discharge their respective duties in the light of the principles we settled in this judgment and also in accordance with law. With the above observations, the appeal is finally disposed of."

25. In a case where the daughter-in-law had levelled allegations of her ravishment sexually by none else but her father-in-law, **Cr. Appeal No. 96 of 2016**, titled **Baldev Singh vs. State of H.P.,** decided recently on **26.11.2018** by one of us (Justice Dharam Chand Chaudhary, J.) while in Single Bench has observed as under:

> "27. .....If not shocking, it is painful to point out that in order to implicate father-in-law falsely without caring that what will be the repercussions thereof in the public at large, the FIR was registered after due deliberation to the reasons best known to the prosecutrix and her father.
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> 31. Therefore, the close scrutiny of the evidence, in the manner as aforesaid amply demonstrates that the prosecutrix and for that matter her father to the reasons best known to them have implicated falsely the accused in this case and thereby if not totally destroyed the social fibre has certainly weakened it and also put a big question mark on the pious relations between a father-in-law and daughter-in-law. Additionally, the prosecution story which in the opinion o this Court has been engineered and fabricated has culminated in a discussion that a father-in-law can also assault sexually his own daughter-in-law."

26. Similar are the facts of the case in hand because PW-7 Rekha Devi is '*Bhabhi'*, that too not the wife of real brother but that of step brother of accused, hence may be interested in getting rid of the accused by implicating him in a false case so that she could have enjoyed his property and house also. She seems to have been assisted by PW-4 Asha and PW-6 Komal Parihar in fulfilling her illegal design.

27. We find the present also a case where the Investigating Agency has not made any effort to conduct investigation from different angle to rule out the possibility of false implication of accused before filing the report under Section 173 Cr.P.C. in the Court. The investigation rather has been conducted in a casual and routine manner to implicate the accused in this case by hook and crook. This Court, on noticing such type of faulty investigation and glaring discrepancies in some matters in the recent past though proceeded to close the same by leaving it open to the respondent-State/high ups in the Police Department to take remedial steps, including imparting training to the Investigating Officers so that only the truth and nothing beyond the truth is brought to the Court keeping in mind that if true facts alone are brought to the Court without there being any padding,

improvements and discrepancies, the conviction rate may considerably increase. However, it appears that such observations either have been ignored or not given much importance and as a result thereof there is no improvement in the standard of investigation. We, therefore, now direct the respondent-State/Police Department as well as Prosecution Department through learned Advocate General, State of Himachal Pradesh to take remedial steps such as imparting training to the Investigators/Prosecutors and all other duty holders. In case the mechanism to provide the training is not available, the machinery and infrastructure available with the Himachal Pradesh Judicial Academy can be pressed into service. We feel that the training in right direction to all dutyholders can improve the standard of investigation and would facilitate to achieve the goal of fair trial, a Constitutional right of an accused.

28. The learned trial Court also seems to have swayed merely by passion in view of the involvement of the accused in a case not only heinous but also grievous in nature, however, without caring to ascertain the genuineness and authenticity of the allegations levelled against him on appreciation of the evidence with all care, caution and circumspection, otherwise may have persuaded itself to take a view contrary to the one taken in the impugned judgment. As a matter of fact, the evidence produced by the prosecution in this case has not been appreciated in its right perspective. The present rather is a case where the prosecution has failed to prove its case against the accused beyond all reasonable doubt.

29. Being so, the findings recorded against the accused are neither legally nor factually sustainable. The impugned judgment, as such, does not stand the test of judicial scrutiny, hence, deserves to be quashed and set aside.

30. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the impugned judgment is quashed and set aside and the accused is acquitted of the charge framed under Section 5(m) and 5(n) of the POCSO Act. He presently is undergoing sentence, therefore, if not required in any other case, be set free forthwith. The release warrant be prepared accordingly. The fine amount as imposed upon the accused, if deposited, shall be refunded to him against proper receipt.

Before parting, we shall be failing in our duty if not discus and pass appropriate orders qua the fate of three minor daughters of the accused, who on account of this case and as per the record have been lodged in a shelter home. The accused, after his release from the jail, consequent upon this judgment may stake his claim qua their custody, being their father and only natural guardian. Our apprehension, however, is that he may be inimical if not against two younger daughters, at least against the elder one, the victim in this case. Therefore, in the event of the custody of his minor daughters is required by the accused, he shall file an application in this regard in the trial Court. The application, if so filed, shall be considered and decided by learned trial Judge in accordance with law after affording an opportunity of being heard to his minor daughters through Court Guardian, which is left open to be appointed by learned trial Judge. We hope and trust that in the event of the custody of the minor daughters of the accused being entrusted to him, the paramount consideration with learned trial Judge would be their welfare alone and nothing beyond it.

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

Managing Director, HRTC, Shimla & another .....Appellants.
Versus
Shweta Thakur & Others .....Respondents.

FAO No. 445 of 2018
Decided on: 13.11.2018

**Motor Vehicles Act, 1988** - Section 166- Motor accident - Claim application- Compensation- Assessment- Claims Tribunal allowing application of claimants and awarding compensation including compensation of Rs.1,00,000/- towards loss of consortium to widow and Rs.1,00000/- towards loss of love and affection to children - Appeal- Held- Tribunal wrongly awarded aforesaid sums under conventional heads- Compensation towards loss of consortium and loss of love and affection brought down in consonance with National Insurance Company Ltd. vs. Pranay Sethi and others, reported in 2017 ACJ, 2700. Appeal partly allowed- Award modified (Paras 3, 8 & 9).

For the Appellants: Mr. G.S Rathour, Advocate.
For the Respondents: Ms. Devyani Sharma, Advocate, for respondents No. 1 to 4.
None for respondent No.5.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge**

The instant appeal, is, directed against the award of 14.6.2017, pronounced by the learned Motor Accident Claims Tribunal (III), Circuit Court at Amb, District Una, H.P. in M.A.C Petition No. 11 of 2016, whereunder, an apt indemnificatory liability stands fastened, upon, the appellants, to, pay compensation amount constituted in a sum of Rs.66,12,461/- alongwith interest @ 9% per annum, from the date of filing the petition till its deposit, vis-a-vis, the claimants'/ respondents No. 1,3 and 4 herein.

2. The learned counsel for the appellants, has contested the validity, of, the findings returned, upon, the issue appertaining, to, the relevant mishap being caused, by the rash, and, negligent manner, of, driving, of, the offending vehicle, by its driver/respondent No.5 herein. In making the aforesaid submission, he relies upon the testimony rendered by the driver of the offending vehicle. However, the aforesaid submission cannot be accepted, as, an ocular witness to the occurrence, one Naresh Kumar (PW-4), rather stepped into the witness box, and, has rendered an apt version, wherewithin echoings occur, qua the relevant mishap standing sparked by the rash, and, negligent manner, of, driving, of, the offending vehicle, by its driver/respondent No.5 herein. Further more, with the apt FIR proven by PW-2 Shri Saveen Kumar, rather unraveling therein, ascription, of, an apt incriminatory role vis-a-vis driver/ respondent No.3, of, the offending vehicle, thereupon the non-lodging of FIR, by, the driver of the offending vehicle also rather disables him to render a testification contradictory therewith.

3. However, the learned counsel for the appellants, submits that the assessment, of, compensation made by the learned tribunal, under the heads; loss of consortium, vis-a-vis, the widow of the deceased, and, under the head of loss of love and affection, besides, under the head funeral expenses, respectively, quantified in a sum of Rs.

1,00,000/-; Rs.1,00,000/ and Rs. 25,000/- rather falling in dis-concurrence with the mandate recorded by the Hon'ble Apex Court in case titled as National Insurance Company Ltd. vs. Pranay Sethi and others, reported in 2017 ACJ, 2700.

4. The aforesaid submission has force, and, in consonance with the verdict supra, hence sum(s) of Rs. 1 lac , 1 lac and 25,000/- assessed, as, compensation under the heads "loss of love and affection", "loss of consortium" and "funeral expanses" is set aside. However, now at, the claimants are entitled to, under, conventional heads, namely, "funeral expense", and, "loss of estate" compensation amount borne in a sum of Rs. 15,000/- each and, the widow of the deceased is entitled to, under, conventional head, namely "consortium to wife", compensation amount(s) borne in a sum of Rs.40,000/-.

5. The learned counsel for respondents No.1 to 4, has also contended that the learned Tribunal has not meted, any, appropriate multiplier, upon, the figure of annual dependency, worked, vis-a-vis, the claimants. She submits that, despite, the matriculation certificate of the deceased, as, comprised in PW-6/C rather making a clear revelation qua the deceased hence being at the relevant time, aged 25 years, yet the learned Tribunal assessed his age at 26 years, and, accordingly has proceeded, to, mete an erroneous multiplier, to, the apt figure of annual dependency.

6. The aforesaid submission has vigor, and, with the age of the deceased in the extant case, and, at the relevant time, being evidently 25 years, thereupon, the compensation amount stands reworked as (a) after meteing of 50% apt increase vis-a-vis the figure of annual dependency i.e Rs.39159/- (last drawn salary of the deceased) + 19,579.5/- (50% of the last drawn salary)= Rs. 58738.8/- per month or say Rs.58700/-, thereupon the apt Annual income stands computed, as, Rs. 58700/- x 12= 7,04,400/-, (b) deducting 20 % towards income tax i.e Rs. 1,40,800/-, (c) the apposite remaining amount comes to Rs. 5,63,600/- and after deducting 1/3rd therefrom, towards personal expenses of the deceased, the, amount comes to Rs. 3,75,733/-. At the time of her death the deceased was aged 25 years, hence thereon, in consonance with the verdict of Hon'ble Apex Court in Sarla Verma and others versus Delhi Transport Corporation and another 2009(6) SCC 121, the proper multiplier, to be adopted, is 18. Adopting, hence, a, multiplier of 18, thereupon, the total loss of dependency, is calculated at Rs. 3,75,733 x 18 =67,63,194/-.

7. The afore re-assessing of multiplier, to, the figure of annual dependency, dehors, no appeal or cross objection being preferred by the claimants, vis-a-vis, the instant appeal preferred herebefore by the appellants stands anvilled, upon, a verdict rendered by the Hon'ble Apex Court, in a judgment titled, as, United India Insurance Company Ltd. Versus Smt. Kulwant Kaur, reported in latest HLJ 2014 (HP) 174, (i) wherein a mandate is borne qua the appellate authority rather acting within ambit of apt jurisdiction, in, enhancing compensation, despite the claimants not questioning the adequacy of compensation.

8. Accordingly, the appeal is partly allowed and the award is modified to the extent above. Accordingly the claimants, are held entitled to a total compensation of Rs.67,63,194+Rs.40,000+Rs.15,000+ Rs.15,000 =Rs.68,33,194/- alongwith interest @ 7.5% per annum, from the date of filing of petition till realization of awarded amount. Compensation amount be apportioned amongst the claimants in the manner, as, made by the learned Tribunal.

9. The amount of interim compensation, if awarded, be adjusted against the aforesaid compensation amount, at the time of final payment. Since the claimant/respondent No.4 herein is minor, hence the amount of compensation qua his

share is ordered to be kept in the FDR drawn upon some nationalized bank till he attains majority All pending applications also stand disposed of. Records be sent back forthwith.

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

Shri Rajbir Yadav .....Petitioner.
Versus
Smt. Poonam Kumari .....Respondent.

CMPMO No. 91 of 2018
Decided on : 19.11.2018

**Guardian & Wards Act, 1890 (Act)-** Section 9**- Code of Civil Procedure, 1908 -** Order VII Rule 11- Custody of Minor- Grant of- Territorial jurisdiction- Relevancy- Held- Only that Court has jurisdiction to pass order regarding custody of minor within whose local jurisdiction child is ordinarily residing- Trial Court ordering transfer of custody in favor of mother without first deciding objection of father whether child was ordinarily residing within its jurisdiction- Petition against- Petition allowed- Order set aside- Matter remanded with direction to Trial Court to first decide application of father filed under Order VII Rule 11 and then proceed further. (Paras 2 & 3)

For the Petitioner: Mr. Rajesh Kumar Parmar, Advocate.
For the Respondent: Ms. Anjana Khan, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, J (oral)**

The instant petition stands directed, against, the impugned order pronounced by the learned Additional Chief Judicial Magistrate, Nalagarh (Exercising the Power of District Judge, under Guardian and Wards Act), District Solan, H.P., whereunder, the interim custody of the minor child namely Shivansh Yadav, was, till disposal of the main petition, ordered to be handed over to his natural guardian/respondent herein.

2. Without adverting to the merits of the case, the paramount fact, rather rests, upon, the anvil qua the petitioner herein, through casting an application before the learned Court below, hence therethrough seeking rejection of the plaint or return of the petition, to the Court holding the jurisdiction. The afore application was instituted or filed subsequent to the learned trial Court making the impugned decision upon the afore apposite application. Consequently, the learned trial Court was not enjoined to make any order thereon, before, its proceeding to make an affirmative decision, upon, Cr.M.A No. 304/6 of 2017. Conspicuously, dehors, the afore application standing filed subsequent to the impugned verdict, being recorded, the factum qua existence of a specific mandate, in Section 9 of the Guardian & Wards Act, 1890, provisions whereof stand extracted hereinafter, whereunder, upon ingredients thereof' being satiated, thereupon even the assumption, of, jurisdiction, upon, the apposite application, whereon the impugned order stood rendered, hence stood jurisdictionally stained.

> 9. Court having jurisdiction to entertain application -(1) If the application is with respect to the guardianship of the person of the minor it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.
>
> (2). If the application is with respect to he guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.
>
> (3). If application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."

3. The learned trial Judge was hence enjoined to make discernments from the memo of parties qua, whether, the minor Shivansh Yadav, was, thereat residing or was ordinarily residing, within, the territorial jurisdiction, of, the Court located at Jhajjar. Nowat, the memo of parties, further, discloses that the minor Child, was, residing alongwith the petitioner at the matrimonial home, of, the respondent herein, and only on 11.11.2017, it stands averred in the application, qua the respondent herein, being exiled, from her matrimonial home, and, thereat the custody, of, the minor child rather being forcibly snatched from her by the petitioner herein. The afore averment, as, occurs in paragraph 3, of the petition, does prima-facie, discloses qua the minor child at the stage of meteing, of, an order upon the apposite application, rather ordinarily residing, within, the territorial jurisdiction, of, the Courts located at Jhajjar. Consequently, prima facie for jurisdictional disempowerment, the impugned order is hence quashed and set aside. The matter is remanded to th learned trial Court concerned, to, after making a decision, upon, an application, cast under the provisions of Order 7 Rule 11 CPC, to, thereafter, in case, it holds that the Court located at Nalagarh, holds jurisdiction, to, try the main petition, and, make a fresh decision, upon, the apposite application in accordance with law. The parties are directed to appear before the learned trial Court on 18.12.2018. Till a decision is rendered upon the afore petition, the petitioner shall continue to hold custody of the minor child. The learned trial Judge is censured for his making prima-facie, a, jurisdictionally void verdict.

All pending applications stand disposed of accordingly.

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

M/S Himachal Co-operative Non Agriculture Thrift and Credits Society Limited
.....Plaintiff/non-applicant.

Versus

Shri Raj Kumar Mittal and another ....Defendants/applicants.

OMP No. 177 of 2018 in CS No. 9 of 2018
Reserved on: 2.11.2018
Decided on : 20.11.2018

**Code of Civil Procedure, 1908-** Order XXXVII Rule 3(5) – Summary suit- Leave to defend- Grant- Plaintiff society filing recovery suit on basis of cheque issued by defendant- Criminal proceedings qua dishonour of aforesaid cheque also pending before Judicial Magistrate- Defendant seeking leave to defend on ground that cheque was given towards security and writings on it are forged- Held- Court may grant unconditional leave to defend suit when defendant is able to establish that he has good triable defence – In appropriate cases, Court may grant leave to defend subject to defendant making payment in Court or otherwise securing plaintiff's claim- However where defence put forth by defendant is illusory or moonshine then by granting leave to defendant statutory holistic purpose of Order XXXVII Rule 3(5) would rather be defeated- Defendant not found having taken plea of 'security cheque' or of 'forgery' before criminal court- Leave to defend refused. (Paras 20 to 23).

***Cases referred:***

State Bank of Hyderabad vs. Rabo Bank, (2015) 10 SCC 521

Sunil Enterprises and another vs. SBI Commercial & International Bank Ltd., (1998)5 SCC 354

For the plaintiff/non-applicant: Mr. B.C Negi, Sr. Advocate with Mr. N.K Bhalla and Mr. Dalip K Sharma, Advocates.

For the defendants/applicants: Mr. P.S Goverdhan, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, J**

This order will dispose of an application, cast under the provisions of Order 37 Rule 3 (5) of the Code of Civil Procedure, as, moved before this Court, by the defendants/applicants(hereinafter referred to as the "defendants"), wherethrough, they seek hence leave to defend the summary suit, instituted by the plaintiff/non-applicant (hereinafter referred to as the "plaintiff").

2. The plaintiff has instituted the instant suit, cast under the provisions of Order XXXVII, of the Code of Civil Procedure, seeking there-through, the, recovery of suit amount. An averment is embodied in the plaint, qua the plaintiff being a duly registered co-operative Society, registration whereof, is, entered at Sr. No. 687, in the apt records, maintained by the Registering Authority concerned. The plaint has been instituted by the duly authorized representative of the society. The suit has been drawn, on, anvil of cheque bearing No. 644323 of 6.6.2016, drawn on State Bank of India, Solan, embodying therein a sum of Rs. 45,50,000/-, cheque whereof, upon, its presentation before the Bank concerned, was refused to be honoured. Photocopy of the Cheque is appended with the plaint as Annexure P-3. In sequel thereto, the apt statutory notice was served, upon, the defendants. Notice whereof, is, borne in Annexure P-5, and, upon the defendants not meteing compliance thereto, a complaint embodied, in Annexure P-6, was, instituted before the Court of Judicial Magistrate, Ist Class, (II), Solan. Clause (a) of Paragraph 5 of the plaint, details the amount(s) taken as loan, by the defendants, from the plaintiff.

3. Succinctly, the dishonored cheque borne in Annexure P-3, is, espoused to be carrying hence sum(s) of money arising, towards a legally enforceable debt. The plaintiff, through the instant plaint, cast under the afore provisions, has, upon Annexure P-7, Annexure whereof comprises a notice issued by the defendants, hence, reared a vehement contention, before this Court, (i) that the recitals borne therein, being, readable as

admission(s) of the defendants, vis-a-vis, issuance, of, the afore dishonored negotiable instrument, borne in Annexure P-3, being towards a legally enforceable debt, hence, a verdict rather summarily decreeing the plaintiff's suit being pronounced, upon, the plaintiff.

4. When notice was served, upon the, defendants, the instant application, cast under the provisions, of, Order 37 Rule 3(5) of the Code of Civil Procedure, stood instituted before this Court, by the defendants, wherethrough, they seek leave of the Court, to, defend the suit, and, obviously espousals' contrary to the ones embodied in the plaint, stand reared therein. In paragraph 2 of the afore OMP, a contention is reared qua some borrowings, being made by the defendants, from the plaintiff society, and, the entire borrowings being liquidated, by the defendants, and, also disclosures rather holding concurrence, with, the afore averment, hence, also occur in the apt statement, of, account prepared up to 31.3.2016. A further averment is borne therein qua liquidation of the loan amount being made, either, through RTGs or through cheques, hence, per se, **the defendants contest, that, the apt liquidation not occurring through cash payments. A denial is borne in afore OMP qua the amount embodied in the cheque aforesaid, being, not realizable, from, the defendants, hence, the suit being not maintainable, for, its being hence summarily decreed.**

5. A contention, vis-a-vis, the suit being not maintainable, within, the ambit, of, Section 72 of the Himachal Pradesh Co-operative Societies Act, 1968, is, also reared, conspicuously qua the condition set-forth therein, remaining un-complied with, by, the plaintiff. Further more, the afore dishonored cheque, is, contended by the defendants to be a part of a series of blank security cheques, issued, by the defendants, to, the plaintiff before March, 2016. Moreover, it is also contended, that, the issuance thereof being under pressure standing exerted, upon, one Raj Kumar Mittal, by one Chander Pal, Secretary of the Society. Also the details occurring on the back side of the cheque, are, averred to be made by the plaintiff, as such, the cheque is alleged to be forged. A cheque in addition, from one amongst, the series of blank cheques, and, carrying a sum of Rs. 9 lacs, stands contended to be presented for encashment by M/S A.R Associates, of which one Raj Kumar, is, stated to be a partner. Moreover, the defendants also aver, in, the afore OMP, qua forbidance being made upon one Chander Pal , from, making misuse of certain blank cheques, A notice is stated to be issued on 10.6.2016, whereunder, a request for returning, the, security cheques, was made. However, it is further averred that the plaintiff failed to do so, rather, he has instituted the instant summary suit.

6. The plaintiff meted reply to the application, and, contended that given the averments, made, in the summary suit, and, with the afore rendered admission, of, the defendants, rather renders the suit amount, to be an undisputed claim, and, with the extant summary suit being backed, by an apparent statutorily holistic purpose, and, also with the instant suit, hence satiating, all thereof apt statutory ingredients,(i) thereupon the espoused leave being granted to the defendants, would rather render the afore holistic statutory purpose hence being defeated.

7. In opposition to the statement of account, appended with the application, the, plaintiff has appended with its apt reply, hence Annexure R-1, annexure whereof, comprises the statement of account appertaining, to, the period from 1.4.2015 to 31.3.2017, wherethrough, rather ,the, disclosures borne in the prior thereto statement of account, ending up to 31.3.2016, hence stand negativated.

8. The defendants while meteing rejoinder to the reply furnished by the plaintiff, contended, that Annexure R-1 appended with the reply to the afore OMP, is, bereft of any vigor, and, is a false document.

9. Before proceeding to determine, the, validity of the aforesaid submissions addressed before this Court, by the learned counsel for the parties, it is deemed incumbent, to bear in mind the expostulations of law, as are enjoined to be applied thereon, for hence making a conclusion, qua, the espoused leave being accordable or refusable. The trite expostulations of law, are, embodied in a judgment rendered by the Hon'ble Apex Court in Case titled as *Sunil Enterprises and another* versus *SBI Commercial & International Bank Ltd., reported in (1998)5 SCC 354,* whereunder the Hon'ble Apex Court, has set forth the hereinafter extracted expostulations of law:-

> "4(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured."

10. The afore expostulation of law are further elaborated and reiterated, in a judgment rendered, by the Hon'ble Apex Court in case titled as *State Bank of Hyderabad* versus *Rabo Bank, reported in (2015) 10 SCC 521*, relevant paragraphs 15 to 17 whereof are extracted hereinafter:-

> "15. As regards the entitlement of a defendant to the grant of leave to defend, the law is well settled long back in the year 1949 in Sm. Kiranmoyee Dassi Vs. Dr. J. Chatterjee, AIR 1949 Cal 479, in the form of the following propositions:
>
> If the defendant satisfies the Court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign the judgment and the defendant is entitled to unconditional leave to defend.
>
> If the defendant raised a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
>
> If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately made it clear that he has a defence, yet, shows such a stage of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff s claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.
>
> If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.
>
> If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.
>
> 16. It is also noticed that the law as enunciated above, has been followed by the Courts in several cases [See also : Santosh Kumar Vs. Bhai Mool Singh, AIR 1958 SC 321, Milkhiram (India) (P) Ltd. Vs. Chamanlal Bros, AIR 1965 SC 1698, Mechelec Engineers & Manufacturers Vs. Basic Equipment Corpn., (1976) 4 SCC

687 and Sunil Enterprises & Anr. Vs. SBI Commercial & International Bank Ltd. (1998) 5 SCC 354].

17. An analysis of the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, the plaintiff is entitled to leave to sign judgment."

11. For apt application(s), of, the inherent apt nuance, of, the afore expostulations of law, upon, the competing espousals hence reared by the plaintiff, and, for hence validating or invaliding them, rather also enjoins eruption, of, apt material personifying qua (a) an evident bonafide defence being reared by the defendants, whereupon, the defendants being enjoined to be granted, the espoused leave to defend; (b) qua the afore rearings of defence, within, the afore expostulations being not a positive good defence; (c) rather the espoused defence being both a bonafide or a reasonable defence, to the plaintiff's claim, (d), and, with imminent inference(s) being ensuable therefrom qua, upon, the defence being put to trial, there being every likelihood of emergence, of evidence, thereupon an apt inference being erectable qua the defendants hence rearing a bonafide or a reasonable defence; (e) upon the defence being illusory or sham or practically moonshine, thereupon, the plaintiff being enjoined, to seek leave to sign the judgment, and, the defendants being dis-entitled to seek leave to defend.

12. Further more, even if the afore expostulations of law, stand satisfied by the plaintiff, and, when hence the plaintiff is enjoined to be granted, leave to sign the judgment yet, the Court may proceed to protect the plaintiff, by allowing the defence, to proceed, yet subject, to, as a measure, of, mere clemency being bestowed, upon, the defence, comprised in the directions being made, upon, the defendants, to, give an adequate security, vis-a-vis, the suit amount. Within the ambit of the afore expostulated parameters of law, this Court proceeds to determine the factum, qua, the admission, if any, of the defendants, as embodied in the notice issued by the defendants, rather hence, boosting a firm conclusion, that, the amount borne in the dishonored cheque, being an undisputed amount, (i) hence for obviating the suit being put to a procrastinated trial, upon, the apt leave being meted to the defendants, (ii) thereupon this Court rather would proceeding to grant leave, to the plaintiff to sign the judgment, (iii) also, it is enjoined to make discernments, from, the afore rendered material qua whether the defendants rather satiating the afore parameters, whereafter, this Court may proceed to grant the espoused leave to it/him/them.

13. The most pertinent documentary evidence, existing on record, whereon reliance is placed by the plaintiff-non applicant, to, contend that it carries apt admission(s), of, the defendants/applicants, is, embodied in Annexure P-7, admission whereof occurs, in, the hereinafter extracted apt paragraph, borne in paragraph 1 thereof.

"That Shri Raj Kumar Mittal my aforesaid client being partner of first two concerns and being Director of two Private Limited Companies took loan on different dates from your society and company in order to advance business of the aforesaid concerns and companies. The said loans were taken in individual capacity and also as partner of the said concerns and companies. In order to secure repayment of loans taken on different dates Shir Chander Pal Aggarwal being officials of the Society and company used to take blank cheques signed by my said client and without filling the name of the society,

company or any individual. However, whatever amount is used to be taken as loan was shown in the said cheques. My client also issued blank cheques duly signed by him in his individual capacity from his saving account which were handed over to Shri Chander Pal aforesaid. Further blank stamp papers duly signed by my client as partner of the aforesaid concerns and also in his individual capacity were obtained by your society and company and handed over to Shri Chander Pal official of the society and company."

14. However, subsequent thereto a recital occurs, in Annexure P-7, that, certain blank cheques being handed over to one Chander Pal Aggarwal, and, from one amongst the afore blank cheques, a cheque carrying a sum of Rs. 9 lacs, standing presented on 9.6.2016 by one Amit Aggarwal son of Chander Pal Aggarwal, and, hence an echoing also occurs therein that the afore misdemeanor(s) of the son of Mr. Chander Pal Aggarwal, rather rendering open an inference, that the cheque at hand, being one amongst the blank chques, and, it not carrying any undisputed realisable or decreeable amounts' of money.

15. Further more, reliance is placed, upon, notice borne in Annexure P-5, issued by the counsel for the plaintiff, and, served upon the defendants, conspicuously, prior to the institution of a complaint under Section 138 of Negotiable Instruments Act, espousals borne wherein, are, in concurrence with the recitals, borne in the complaint, and, with the defendants not meteing any reply thereto, hence subsequent thereto exculpating echoings, as, are borne in Annexure P-7, being an afterthought, and, a sheer concoction, and, also not rendering hence effaced, the, effect of the afore sentence, occurring in paragraph 1 of Annexure P-7.

16. Nowat is to be gauged, the respective efficacy(s) of the afore submission imperatively, on, anvil of the afore apt expostulated parameters,.

17. The dishonored negotiable instrument is issued, on, 6.6.2016, and, the statement of account, appended with the the application, rather appertains to the period much prior thereto, in as much, as, qua 31.3.2016. Consequently prima-facie, the statement of account appended with the application, at hand, with disclosure occurring therein qua no loan amounts yet pending against the defendants rather is rendered insignificant. Also, any contest qua Annexure R-1, appended with the plaintiff/non-applicant's reply, conspicuously vis-a-vis, its authenticity may not be relevant. Contrarily when it constitutes an authenticated copy of the statement, of, account, and, when, it, hence holds proximity, vis-a-vis, issuance of the dishonored negotiable instrument, (i) and, when it assumes an enhanced aura of validity given, upon, a combined reading of the apt disclosures' made therein vis-a-vis cheque borne in Annexure P-3, and, with notice borne in Annexure P-5, and, also, (ii) when its' issuance occurs in contemporaneity, vis-a-vis, issuances of cheque borne in Annexures P-3 and of notice borne in P-5 (iii) thereupon unveilings rather emerging qua inter-se congruity occurring inter-se all the aforesaid Annexures.

18. Reiteratedly, in making the aforesaid conclusion, the factum of notice, comprised in Annexure P-5, remaining un-replied, by the respondent/plaintiff, thereupon the contents thereof, do acquire an aura of validity, (i) and, further more when it is issued in contemporaneity, vis-a-vis, statement of account, (ii) also, thereupon all the afore annexures acquire an alike aura of sanctity. Even though, Annexure P-7 carries therewithin, the, afore extracted apt sentence, and, with the afore Annexure standing issued, on 10.6.2016, yet the effect of the afore sentence, does rather avail an inference, that, certain borrowings, being made by the defendants, from the plaintiff, and, for liquidation thereof,

the defendants issuing cheques, and, the amount borne in the cheques rather remaining un-liquidated.

19. Since the defendants hence rear a plea, that, all the liquidations hence occurring through, cheques or through RTGs mode, and, not through cash, (i) thereupon when Annexure R-1 appended with the reply, does bear proximity vis-a-vis, issuance of the dishonored negotiable instrument, (ii) thereupon, the afore sentence occurring in Annexure P-7, tantamounts to an admission qua the sums borne therein, being towards liquidation of outstanding borrowing, as, made by the defendants from the plaintiff.

20. Even otherwise the defendants prima-facie appear to raise various submissions, that, certain security cheques being issued by them to the plaintiff, and, that the figures, and, the scribings occurring therein being, not, in his/their hands. However, the defendants did not adduce any evidence qua therewith, before, the learned trial Magistrate concerned nor any disclosures stand made, in the apt testification rendered therebefore, qua the afore trite fact, hence coming under contest. The further effect thereof, is, that the espousal occurring in paragraph 2 of Annexure P-7, qua son of one Chander Pal Aggarwal, misusing a cheque for a sum of Rs. 9 lacs, comprised in his presenting it, before the Bank concerned, stands falsified, (i) besides for the reasons, that, it appertains to a period much prior to the period of issuance, of, the dishonored instruments, (ii) and, it carrying an amount lesser than the amount borne, in, the dishonored instrument, hence, also diminishes the vigor of the espousal, of, the defendants, (iii) predominantly also given despite the witnesses' concerned, of the plaintiff, while rendering testifications, before, the learned trial Magistrate concerned, hence making echoings' qua the apt statement of account being available (iv) yet the the defendants not making adduction(s) thereof before the Court, whereas the afore adduction of statements of accounts, would facilitate the Court, in, drawing an inference qua the defendants' admission being negatived or effaced, whereupon, non-adduction thereof, gives, rather strength to the afore admission.

21. Be that as it may, for all the assigned reasons, the defendants have abysmally failed, to, establish qua theirs holding a reasonable, fair and bonafide defence, and, also grossly failed, to, at this stage ,rear a ground that if the afore defence(s) are put to trial, theirs bringing forth hence evidence, (i) whereupon, an inference may be drawable of their defence, being workable or being genuine or holding sanctity, (ii) contrarily, thereupon it is to be concluded that the apt leave being refusable or unaccordable to the defendants.

22. The defendants contest qua with the apt statutory notice contemplated in Section 72 of the Cooperative Society Act, hence remaining evidently un-issued,thereupon the suit being not maintainable. However, the aforesaid contention would gather weight, upon, the the defendants rather committing misconduct of criminal breach of trust, vis-a-vis, plaintiff's funds, and, hence his/theirs misconduct touching, upon, the management and business of the plaintiff society. However the aforesaid evidence is amiss, contrarily when the defendant is a loanee, of, undisputed sums of money, thereupon, even when the statutory notice remained un-served, prior to the institution of the instant summary suit, yet, apt leave being grantable rather to the plaintiff.

23. Further more, the aforesaid defence is illusory or moonshine, and, further if given the afore expostulated condition precedents for, hence the apt leave being granted, when remain hence unsatisfied, thereupon, the, statutory holistic purpose, would rather be defeated, upon, the suit being put to the rigors, of, a procrastinated trial.

In view of the above, the application stands disposed of.

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

Mayur Verma ...Petitioner.
Versus
State of Himachal Pradesh ....Respondent.

Cr.M.P(M) No. 1457 of 2018
Decided on : 21.11.2018.

**Code of Criminal Procedure, 1973-** Section 439**- Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 21 & 37- Regular bail- Grant of- Applicant accused of possessing 9 grams of Heroin, seeking regular bail- Prosecution contesting bail on ground of his being an habitual offender since another case under Act already pending against him- Held- Case does not fall in category of Commercial quantity- No likelyhood of accused fleeing away from justice or his tampering with prosecution evidence- Apprehension of prosecution can be met by imposing stringent conditions- Application allowed- Accused ordered to be released on bail subject to conditions- Prosecution given liberty to approach Court for cancellation of bail if accused found involved in another case. (Paras 5 to 7).

***Cases referred:***
Maulana Mohammed Amir Rashadi vs. State of Uttar Pradesh and another (2012) 2 SCC 382

For the Petitioner: Mr. N.S Chandel, Advocate.
For the Respondent: Mr. Hemant Vaid, Mr. Desh Raj Thakur, Additional Advocate Generals with Mr. Vikrant Chandel and Mr. Yudhveer Singh Thakur, Deputy Advocate Generals.
HC Ramesh Chand No. 1671, P.P City Rampur in person.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, J (oral)**

The instant petition has been instituted by the bail applicant under Section 439 Cr.P.C, for his being ordered to be released from judicial custody, wherein he is extantly lodged, for his allegedly committing offences punishable, under, Section 21 of NDPS Act, registered in case FIR No. 146 of 2018 of 1.10.2018 with Police Station, Rampur Bushehar, District Shimla. H.P.

2. The investigating Officer, is, present in Court, and, has disclosed, that, Heroin carrying a weight of 9 grams, standing allegedly recovered from the conscious and exclusive possession, of, the bail applicant. The afore quantity of Heroin recovered, from, the purported conscious and exclusive possession of the bail applicant, renders it to fall within the category, of less than commercial quantity thereof, and, thereupon the rigor(s) of statutory provisions of Section 37 of the NDPS Act, are not applicable, whereupon, this Court proceeds to accord the indulgence of bail in favour of the bail applicant.

3. The learned Additional Advocate General, submits before this Court, that, the bail applicant is a habitual criminal, and, he immediately subsequent to his being an accused in case FIR No. 109 of 2018, is re-indulging in offences constituted in the instant FIR. He submits that hence given the repeated indulgence of the applicant in criminal activities, thereupon, the according of facility of bail in his favour, being not appropriate, as there, is every likelihood of his influencing the prosecution witnesses, in other cases pending against him, and, also his re-indulging in the commission of offences.

4. Even though the factum of repeated, and, successive indulgence of the bail applicant, in, criminal activities and besides the factum of criminal cases pending against him, though, is a necessary factor to be borne in mind, when according or refusing the facility of bail, to him. However, in view of the mandate enshrined in *Maulana Mohammed Amir Rashadi* vs. *State of Uttar Pradesh and another (2012) 2 SCC 382,* wherein it stands enshrined, that upon strict/stringent conditions, being hence imposed, by this Court, would, rather obviate the factum of the bail applicant, hence fleeing from justice or influencing witnesses. Thereupon, in consonance therewith, imposition of stringent conditions, would also hence mitigate as well as allay, the, apprehension of the State, that, given his previous repeated indulgences in criminal activities, upon, his being granted bail,it would facilitate his abusing his bail, and, his re-indulging in criminal activities. Consequently, this Court proceeds to afford qua him the facility of bail, however, subject to the condition qua upon his re-indulging in criminal activities, it shall facilitate the respondent, to move this Court for cancellation of bail.

5. Moreover, when at this stage, no material, has been placed on record, by the prosecution, demonstrating that in the event of bail being granted to the bail applicant, there being every likelihood of his fleeing from justice or tampering with prosecution evidence, thereupon this Court is constrained to afford, the facility of bail in favour of the bail applicant.

6. Accordingly, the bail applicant is ordered to be released from judicial custody, subject to compliance by him with the following conditions:-:

1. That he shall furnish personal bond in the sum of Rs.1,00,000/- with two sureties in the like amount, to the satisfaction of the learned JMIC, Rampur Bushehar.
2. That he shall join the investigation, as and when required by the Investigating agency.
3. That he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the Police.
4. That he shall not leave India without the prior permission of the Court.
5. That he shall deposit his passport, if any, with the Police Station, concerned.
6. That in case of violation of any of the conditions, the bail granted to the petitioner shall be forfeited and he shall be liable to be taken into custody.

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

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**BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.**

Pr. Commissioner of Income Tax, Shimla. .....Appellant.

Versus

M/s H.P. Excise & Taxation Technical Service Agency .....Respondent.

ITA No. 85 of 2018 alongwith connected mattes.
Judgment reserved on 28.11.2018
Date of decision: December 07, 2018

**Income Tax Act, 1961** Section 2(24) – "Income"- Meaning- Held- Income includes all those benefits, whether in terms of money or otherwise which are to be taken into consideration for purpose of payment of income tax or professional tax. (Para 26)

**Income Tax Act, 1961** Section 2(24)(i)- "Profits"- Meaning- Held- "Profits" means gross proceeds of business transaction minus cost of transaction- "Profits" connotes idea of pecuniary gain- If there is an actual gain, its quantum or amount would not be material (Paras 27 & 28)

**Income Tax Act, 1961** Section 2(24)(i)- "Gains"- Meaning- Held- Expression "Gains" is not synonymous with word "Profits" for it is not restricted to pecuniary or commercial profits only as it includes other consideration of value gained also. (Para 29)

**Income Tax Act, 1961-** Sections 4 & 12 AA- **Societies Registration Act, 1860 (Act)**- Liability of Juristic person- Held- Requirement to seek exemption from payment of Tax by Trust or Institution registered under Act serving cause of general public utility would arise only when some actual income is derived by it. (Para 32)

**Income Tax Act, 1961** Sections 4, 147,148 - **Himachal Pradesh Value Added Tax Act, 2005-** Section 34(2) **- Himachal Pradesh Value Added Tax Rules, 2005-** Rules 61 and 62 – Himachal Pradesh Excise and Taxation Technical Service Agency (Society) setting up check post barriers in different parts of State and collecting Tax amount for and on behalf of State- Collected amount also being deposited in Treasury after defraying expenses incurred on collection of Tax- Income Tax Appellate Tribunal upsetting order of Commissioner, Income Tax (Appeals) and holding that amount deposited by Society in Government treasury not taxable- Appeal by Revenue- Held- Amount collected by Society straightway used to be deposited in Government treasury after deducting actual expenditure made by it on collection process- Society neither gained anything nor earned any profit- Vat amount recovered by Society was an entrustment of statutory function- It performed statutory function and collected tax amount for and on behalf of State and transferred such collection to Government- Temporary parking of Tax collection with Society for some time cannot be treated as income generated by it- Amount so collected by Society not taxable as its income (Para 30)

***Cases referred:***

CIT vs. Sunil J. Kinariwala, 259 ITR 10 (SCC)
CIT Bombay City versus Surji Ballabh Dass, 46 ITR 144
CIT vs. Gold Coin Health Food (P) Ltd., (2008) 9 SCC 622

Commissioner of Income Tax Bombay City-II vs. Sitadas Tirathdas, 41 ITR, 367 SC
Commissioner of Income Tax vs. Pepsu Road Transport Corporation, 253 ITR, 303 P&H
Gujarat Municipal Finance Board versus Deputy Commissioner of Income Tax (Assessment) 221 ITR, 317 Gujarat
Rajkot District Gopalak Co-operative Milk Producers Union ltd. vs. CIT 204 ITR, 590 Gujarat
Somiaya Orgeno Chemicals Ltd. vs. CIT, 216 ITR, 291 Bombay
Topman Exports versus CIT (2012) 3 SCC 593

For the appellant(s): Mr. Vinay Kuthiala, Sr. Advocate with
Mr. Diwan Singh Negi, Advocate.
For the respondent(s): M/s Vishal Mohan, Aditya Sood and Praveen Sharma, Advocates.

The following judgment of the Court was delivered:

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**Surya Kant, Chief Justice.**

This order shall dispose of the above captioned Appeals preferred by the Revenue, challenging a common order dated 30.11.2017, passed by the Income Tax Appellate Tribunal, Division Bench 'A' Chandigarh (hereinafter referred to as 'the Tribunal'), whereby the Tribunal has allowed the Assessee's appeals in part whereas Cross-Appeals filed by the Revenue have been dismissed in respect of the Assessment Years 2007-2008 to 2011-2012 and 2013-2014.

2. The substantial question of law sought to be raised in these Appeals is as follows:

> *"Whether on the facts and in the circumstances of the case, the ITAT is right in law in holding that the income of the assessee, which was paid to the Govt. as per the bye laws of the assessee society, is not taxable, inspite of the fact that the assessee had debited such payment to its P&L Account and had claimed it as a revenue expenditure though the assessee is not registered u/s 12AA of the Act and nor its income is exempt under any of the provisions of the Act"*

3. Before adverting to the question formulated above, it would be useful to give a brief synopsis of the facts. The Assessee-Society, hereinafter referred to as 'the respondent-Assessee', was registered under the Societies Registration Act, 1860 (hereinafter referred to as 'the 1860 Act') on 27.8.2002. The object of the Society as incorporated in its Memorandum of Association, *inter alia,* includes:

> *"To facilitate the general public dealers carrying goods and crossing the barriers established by the State Govt. and also to diffuse awareness amongst the general public/dealers about the sales tax laws.*
>
> *To utilize the information technology for deeper systematic reforms in tax administration by creation of a separate entity properly geared to provide supportive role to the Department in creation of data bank (dealer wise/commodity wise, Circle wise and Barrier wise), in transmission of information and establishment of client server environment.*
>
> *To back up the computerization requirement of the Department of Excise & Taxation Department and for this purpose develop infrastructure therefore both in terms of software as well as hardware.*

*To facilitate adoption of ST-XXVI-A form in a computer friendly format and generate funds by rendering this services to the dealers so as to make it a self sustaining activity.*

*To carry out all such activities as are envisaged in section 20 of the Society Registration Act 1860, which are in the interest of society.*

*To derive optimum benefits from fully networked computerization in terms of providing computerized functioning of Multi-purpose Barriers, issuance of computerized receipts, on line networking to facilitate sharing of data between all Offices/Assessing Authorities in the Department and develop other related infrastructures incidental thereto.*

*The Society shall for this purpose, generate receipts in lieu of providing these services at the Multi-purposes Barriers, and utilized the same to fulfill the objectives of the Society.*

*And in furtherance of the above objectives:*

*(i) Develop, create, manage and maintain infrastructure for providing such services."*

4. The primary funds of the respondent-Assessee were to be augmented by collecting the statutory levy under Section 34 of the Himachal Pradesh VAT Act, 2005 (hereinafter referred to as 'the VAT Act, 2005'), whereunder the State Government was empowered to establish check-post(s) or erect barriers with a view to preventing or checking evasion of tax under the VAT Act, 2005. Sub-Section (2) of Section 34 of the Act requires the owner or person in-charge of a goods carriage or vessel to carry with him the goods carriage record, a trip sheet or a log-book and tax invoice diary as well as a delivery note containing such particulars as may be prescribed and to produce the same before the officer in-charge of a check-post or barrier and to submit in triplicate a 'Declaration' containing particulars of the goods in the prescribed form. Initially, the cost of 'Declaration', as per Rules set-up by the Government of Himachal Pradesh was Rs.5/-. The respondent-Assessee, as may be noticed from the object of its formulation, was entrusted with the responsibility of collection of VAT at the above-stated prescribed rate and upon collection of the same, Re.1/- was to be deposited immediately in the Government Treasury and thereafter, in terms of Bye-Law 10.2 of the Society, the remaining amount had to be transferred to the State Government in 'Sales Tax' Head, after meeting out the expenditure incurred by the Society.

5. It would also be relevant to reproduce at this stage the extracts of ST-XXVI-A as prescribed in Clause 8 of the Bye-Laws of the Society read with Clause 10.2 thereof, which are to the following effect:

*"8. ACCOUNT OF ST XXVI-A FORM*

*1. The computer generated STXXVI-A form bearing serial number shall be issued at the Barrier(s) and the E.T.O/In charge Barrier shall maintain proper account of the said forms under the supervision of concerned Assistant Excise and Taxation Commissioner of the District.*

*2. E.T.O./In charge barrier will deposit Rs. 1/- per form (out of the amount of Rs. 5/- per form as at present or as per rates prescribed from time to time in respect of computerized ST-XXVI-A form/services rendered)/ in the relevant receipt head of the Department as per practice hitherto fore.*

*3. The balance amount after depositing Rs. 1/- per form will be credited to the Funds of the Society and deposited on day to day basis in a Saving Bank*

*Account to be opened in respect of each barrier(s) with the nearest Scheduled Bank/Cooperative Bank.*

*4. Keeping in view the requirement of the funds, the Executive Committee can authorize the Assistant Excise and Taxation Officer/In charge Barrier concerned to invest the amount in excess of their requirement in Short Term deposit lest there be any loss of interest.*

*5. Notwithstanding any thing contained above, the amount collected shall be available for being utilized in the entire State for the purposes set out and as per approval of the Governing Body.*

*xxxxx xxxxxxx xxxxx xxxxx*

*10.2 After meeting the expenses towards the objectives for the approved purposes listed above and accounting for the liabilities accrued and projected, the surplus amount, if any, shall be deposited in the receipt head 0040 Sales Tax on yearly basis on approval of the Governing Body."*

6. The **respondent-Assessee, thus, has been maintaining all such multipurpose barriers in the State of Himachal Pradesh from where all goods get in or get out of the State and which are required to be declared at the multipurpose barrier as per Section 34 of the VAT Act, 2005 read with Rules 61 and 62 of Himachal Pradesh VAT Rules, 2005 (hereinafter referred to as 'the VAT Rules, 2005'). A form bearing No. ST-XXVI-A was to be issued to the person declaring the goods at a cost of Rs.5/- per form till the levy was further enhanced to Rs.10/- w.e.f. 18.5.2009.**

7. **As noticed above, in terms of Clause 8.2 of the Bye-Laws, the respondent-Assessee used to deposit Re.1/- per 'Declaration' with the Government Treasury out of the Rs.5/- till the year 2009 which was later enhanced to Rs.2/- after the tax amount was increased from Rs.5/- to Rs.10/- per 'Declaration'. It is also a matter of record that the respondent-Assessee applied for registration under Section 12AA of the Income Tax Act 1961 (hereinafter referred to as 'the IT Act 1961') to the Commissioner of Income Tax, Shimla, who rejected the application on 29.11.2013 holding that the activities carried out by the respondent-Assessee did not benefit the general public rather those were meant to provide the infrastructural facilities to the Excise and Taxation Department of Government of Himachal Pradesh.**

8. The respondent-Assessee has, in its Income Expenditure Statements, been showing the surplus of income over expenditure. The Assessing Officer, therefore, issued notice under Section 148 read with Section 147 of the IT Act,1961 on 8.1.2014 for taxing the excess of the income over expenditure, the amount ranging from Rs.64,20,238/- (Assessment Years 2007-2008) to Rs.1,29,37,365/- (Assessment Years 2010-2011) and supplied the copy of reasons recorded for the re-opening of the cases.

9. **The respondent-Assessee contested the notice(s) and its precise case was that no surplus income accrued to it as all the surplus income was payable to the State Government and therefore, it had earned no taxable income. The Assessing Officer turned down the plea and 'excess income over expenditure' was computed for the purpose of respondent-Assessee's tax liability.**

10. **The respondent-Assessee filed Appeal before the Commissioner, Income Tax (Appeals), who after going through its activities held that 20% of the tax amount collected and paid to the State Government could not be treated as 'income' of the respondent-Assessee, as it was paid directly to the Government Treasury. As regard to the remaining 80% of the tax collection, it was held to be a part of character of**

**income, as according to the Commissioner, Income Tax (Appeals), the respondent-Assessee had the freedom to utilize the said amount for the objective(s) of the Society.**

11. The aggrieved Assessee filed appeals before the Appellate Tribunal against confirmation of 80% of its collection as taxable income whereas the Revenue also filed Cross-Appeals against the deletion of 20% of the fee amount. The Tribunal has, vide order under appeals, dismissed the Revenues' Appeals whereas that of the respondent-Assessee's have been allowed in part.

12. The Tribunal has gone in *extenso* into the Memorandum of Association of the respondent-Assessee as well as the details of its background, functional requirements, operation and model, accounting structure and ultimate payment to the exchequer of the Government. It also went into the composition of the Governing Body, organizational structure, funds and operation of the accounts of the respondent-Assessee, as enumerated in its Bye-Laws and reproduced in the order(s) under appeal.

13. The Tribunal, with an intent to analyze the functioning of the respondent-Assessee viz-a-viz provisions of the VAT Act 2005, has also dwelled upon Section 34 of the said Act read with Rules 61 and 62 of the VAT Rules, 2005 framed there under.

14. The Tribunal has thus concluded that:

> *"28. On a comprehensive examination of the purpose of registering the society in the name of H.P. Excise and Taxation Technical Service Agency, the organizational structure and conducting of its functions, Rules & Regulations of the society, Receipts & Payment Account of the society, details of the collections on account of tax and amounts paid to Government, relevant provisions of H.P. VAT Act 2005, Establishment of Check Posts of Barrier and inspection of goods in transit, the following points emerged as under:*
>
> *1. The checkpost or barriers and inspection of goods in transit were established as per the HP VAT Act 2005.*
>
> *2. The Assessee Society was floated to look after the affairs and tax collection at the check post and barriers.*
>
> *3. The governing body of the Assessee Society consists of Chairman and six members along with a member secretary who are all from the excise and taxation department except a Technical Director from NIC and MD of Electronic Development Corporation who mainly aid in providing required information technology inputs.*
>
> *4. The executive committee of the Assessee Society comprise of 8 members along with one Member Secretary who are all officials of Excise and Taxation Department.*
>
> *5. The Assessee Society is involved in collection and deposit of receipts from STXXVI-A Forms.*
>
> *6. Out of the collected amount 20% is paid immediately to the Government.*
>
> *7. The remaining amount is kept in the short term deposits.*
>
> *8. The surplus amount shall be deposited in the receipt head 0040-Sales Tax Account on yearly basis.*
>
> *9. The accounts are audited by the IFU of the Sales Tax Department which will compile the final account the Additional Excise and Taxation Commissioner (Head Quarter) is the Authorized Signatory."*

15. The Tribunal, on examination of the financial affairs of the respondent-Assessee and after going through its income and expenditure statements for the relevant Assessment Years, has further concluded that:

> *"32. Thus, after going through the entire affairs of the assessee we hold that the surplus of income over expenditure also belongs to the Government which has been duly deposited in the state exchequer cannot be the income of the assessee.*
>
> *33. Before us the assessee has submitted statement reflecting the payment of balance amount of the 80% of the fee collected has also been paid to the Treasury of the State Government.*
>
> *34. The Assessing Officer is hereby directed to examine the Challans paid by the assessee into the Government account under the receipt head 0040 Sales Tax Account as submitted by the assessee and give due benefit for the amounts paid into the Government exchequer."*

16. It is in this backdrop, coupled with a firm finding of fact to the effect that the surplus of income over expenditure of the respondent-Assessee belongs to the State Government and has been duly deposited in the public Exchequer that the question which falls for determination is-whether 80% of the balance amount duly deposited by the respondent-Assessee in the Government Treasury, after deducting the expenses incurred by it, amounts to 'taxable income' under the IT Act, 1961, more so when the respondent-Assessee is not registered under Section 12AA of the said Act?

17. We have heard Mr. Vinay Kuthiala, learned Senior Advocate, on behalf of the appellant-Revenue and Mr. Vishal Mohan, Advocate, on behalf of the respondent-Assessee at a considerable length and gone through the record.

18. It was urged on behalf of the appellant-Revenue that the respondent-Assessee is a 'juristic person' falling within the ambit of Section 2 (31) of the IT Act, 1961. The respondent-Assessee has been formed for manning all the multipurpose barriers to charge the goods which cross the barriers whether coming into or going out of the State of Himachal Pradesh. All such goods have to be declared at the multipurpose barriers in accordance with Section 34 of the VAT Act, 2005 read with VAT Rules, 2005 for which the assessee sells the 'Declaration Form' and derives 'income' therefrom.

19. The respondent-Assessee applied for exemption under Section 12AA of the IT Act, 1961 but its application was rejected as the activities that it carried out were not of general public utility but were for providing infrastructural facilities to the Excise and Taxation Department of the State of Himachal Pradesh. On this premise, it was urged that the respondent-Assessee was 'earning income' at the multipurpose barriers by sale of Forms etc., and was preparing the income and expenditure statements in which it has been showing surplus of income over expenditure in its Returns. The respondent-Assessee was depositing excess of income over expenditure in the Government Treasury for payment to the State Government and was debiting these amounts in the income and expenditure statements and claiming it as revenue expenditure. This payment, according to the learned Senior Counsel for the Revenue, is only a diversion of income and is not related to any business activity of the respondent-Assessee. He argued that under Section 14 of the Himachal Pradesh Societies Registration Act, 2006, a Society is a body corporate and a separate legal entity and in view of Section 8 of the said Act, the Society can have neither profit motive nor its profit can be distributed amongst the Members. Thus, it was apparent that the mandate of law prohibits distribution of income of the Society and the excess

revenue over expenditure therefore, constitutes as 'income of the Society' and is liable to be taxed as envisaged by Section 4 read with Section 2 (24) of the IT Act, 1961.

20. Learned Senior Counsel for the Revenue relied upon ***CIT versus Sunil J. Kinariwala, 259 ITR 10 (SCC)*** wherein the Hon'ble Supreme Court has ruled as follows:

> "*When a third person becomes entitled to receive the amount under an obligation of an assessee even before he could lay a claim to receive it as his income there would be a diversion by overriding title, but when after receipt of the income by the assesse it is passed to on a third person in discharge of the obligation of the assessee, it will be case of application of income by the assesse and not of diversion of income by overriding title."*

21. Learned counsel for the respondent-Assessee, on the other hand, countered the appellant's claim urging that the concept of taxation under the IT Act, 1961 is relatable to the 'real income' which actually belongs to the Assessee.

22. In the instant case, 'statutory levy' under the VAT Act, 2005 is being collected by virtue of the powers entrusted by the State Government to the respondent-Assessee. Since the entire collection is deposited in the Government Treasury of the State after deducting the actual expenditure incurred by the respondent-Assessee, no 'real income' accrues to the Society.

23. Learned counsel has relied upon the decision in ***Commissioner of Income Tax Bombay City-II*** versus ***Sitadas Tirathdas, 41 ITR, 367 SC,*** in which Hon'ble Supreme Court has ruled that what is to be subjected for taxation is only and only real income over which the assessee possesses a right and not any other thing. He cited ***Somiaya Orgeno Chemicals Ltd. versus CIT, 216 ITR, 291 Bombay,*** where the issue considered was-whether the cess collected and kept in a separate bank-account as per the statutory order and to be utilized for a particular purpose, was 'income' in the hands of assessee? It was held that the 'statutory levy' could not be equated as the 'real income' of the assessee. ***Rajkot District Gopalak Co-operative Milk Producers Union ltd.*** *v*ersus ***CIT 204 ITR, 590 Gujarat,*** *w*as cited where the question which fell for consideration was-whether income of the project assigned to a Co-operative Society on lease and license basis and profits of which were to be paid to the State Government, could be treated as 'income' of the assessee? It was held that the entire income belonged to the Government and it could not be treated as the income of the assessee and was thus not taxable. Similarly, in ***Commissioner of Income Tax*** versus ***Pepsu Road Transport Corporation, 253 ITR, 303 P&H,*** the Court considered the question as to whether the amount forfeited by the employer out of the provident fund where it was categorically mentioned that the said amount belonged to the Trust, was income of the assessee. Invoking the concept of 'real income', the High Court held the same not to be the income of the assessee. A somewhat similar view was taken in ***Gujarat Municipal Finance Board*** versus ***Deputy Commissioner of Income Tax (Assessment) 221 ITR, 317 Gujarat.***

24. As regard to the facts highlighted on behalf of the appellant-Revenue that the respondent-Assessee had, in its Returns of income shown surplus as payable to the Government, it was argued that the entries in the books of account cannot, by any stretch of imagination, amount to earning of the income, as held by the Hon'ble Supreme Court in ***CIT Bombay City*** versus ***Surji Ballabh Dass, 46 ITR 144.***

25. On an objective analysis of the rival submissions, the question which eventually arises for determination is whether the retention of a part of the VAT collected by the respondent-Assessee till the process of determination of its actual expenditure incurred

on the collection, followed by deposit of balance surplus amount in the Government Treasury for onward transmission to the State Government, can be treated as the 'real income' in the hands of the respondent-Assessee for the purpose of IT Act, 1961?

26. It is true that 'income' has not been defined in Section 2 (24) of the IT Act, 1961 but with the addition of expression 'includes', the scope and ambit of 'income' stands enlarged. Various components illustrated in the definition Clause including 'profits and gains' are part of the 'income'. In view of the comprehensive definition chosen by the Legislature, something which is not expressly included in Section 2 (24), can also form part of the 'income'. If the dictionary meaning of the word 'income' is to be logically and liberally construed, the 'income' shall include all those benefits, whether in terms of money or otherwise, which are to be taken into consideration for the purpose of payment of income tax or professional tax. None of the receipts illustrated in Section 2 (24) except 'profits and gains' have been cited or applied by the Revenue to adjudge the 'income' of the respondent-Assessee. The 'profits and gains', as ruled by the Hon'ble Supreme Court in ***CIT versus Gold Coin Health Food (P) Ltd., (2008) 9 SCC 622*** refers to positive income only.

27. The word 'profit' means the gross proceeds of a business transaction minus the costs of transaction. 'Profits' imply a comparison of the value of an asset when the asset is acquired with the value of the asset when such asset is transferred and the difference between the two values is the amount of 'profit' or 'gain' made by a person [See: ***Topman Exports versus CIT (2012) 3 SCC 593***].

28. To say it differently, the word 'profit' connotes the idea of pecuniary gain. If there is an actual gain, its quantum or amount would not be material; but such amount would be component of 'income' in terms of Section 2 (24) (i) of the IT Act, 1961.

29. The expression 'gain', on the other hand, is not synonymous with the word 'profit', for it is not restricted to pecuniary or commercial profits only as it includes other considerations of value gained also. For example, any advantage or benefit acquired or value addition made by some activities would amount to gain, even though the activities are not profit motivated.

30. Applying these principles to the facts of the cases in hand, it may be seen that the respondent-Assessee continued to receive Rs.5/- per Form till May, 2009 out of which Re.1/- was straightaway deposited in the Government Treasury and out of the balance of Rs.5/-, only the actual expenditure incurred by it on collection process was deducted and the balance amount (80% as assessed by the authorities) was duly deposited in the Government Treasury to be paid to the Excise and Taxation Department of the State Government. In this entire process, the respondent-Assessee neither gained anything nor earned any profit. The VAT amount recovered by the respondent-Assessee was/is an entrustment of the statutory function of the State which alone is competent to levy VAT under Section 34 of the VAT Act, 2005. The respondent-Assessee thus neither created any source of income nor generated any profit or gain out of such source. The Assessee merely performs the statutory functions under the VAT Act, 2005 and collects the tax amount for and on behalf of the State and transfers such collection to the Government Treasury. Even if the tax collection remains temporarily parked with the Assessee for some time, it cannot be treated as 'income' generated by the Assessee as the said amount does not belong to it.

31. The Tribunal has thus rightly concluded that the surplus of income over expenditure, as reflected in the entries or the Returns filed by the respondent-Assessee, also belonged to the State Government which was duly deposited in the Government Treasury.

Hence, it does not partake the character of 'profit or gain' earned by the respondent-Assessee.

32. The non-registration of the respondent-Assessee, under Section 12AA of the IT Act, 1961 is inconsequential, for an occasion to seek exemption from payment of tax on the income by a Trust or Institution serving the cause of general public utility would arise only when some actual income is derived. The respondent-Assessee though is a 'juristic person' but in the absence of any income having been earned by it through 'profits or gains' within the meaning of Section 2 (24) of the IT Act, 1961, the respondent-Assessee is indeed not obliged to seek exemption under Section 12AA of the IT Act, 1961, for it does not have any taxable income.

33. For the reasons afore-stated, the substantial question of law is answered in negative against the appellant-Revenue and in favour of the respondent-Assessee.

34. As a necessary corollary, all the appeals must fail and are accordingly dismissed alongwith pending applications, if any.

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**BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.**

Sh. Dharam Singh Chaudhary and others .....Petitioners.
Vs.
State of Himachal Pradesh and another .....Respondents.

CWP No.: 912 of 2018
Reserved on: 03.12.2018
Date of Decision: 07.12.2018

**Constitution of India, 1950-** Articles 226 & 310 **- Administrative Law-Doctrine of Pleasure**- Applicability- Government appointing petitioner as Non-official member of Himachal Pradesh State Commission for Backward Classes for three years- By subsequent notification Government removing him from membership before expiry of three years – Challenge thereto- Petitioner contending that once appointed, he could not have been removed before expiry of three years- Held- Person appointed without following any selection process, cannot claim right to be heard before removal – Person who is appointed at pleasure of Government and who came to removed by same pleasure cannot claim that order of removal has been passed in breach of principles of natural justice- Such person can be removed at any time by exercising power of Doctrine of Pleasure. (Para 5)

For the petitioners: Mr. Tenzen Negi, Advocate.
For the respondents: Mr. Ashok Sharma, Advocate General, with M/s J.K. Verma, Ranjan Sharma, Ritta Goswami, Adarsh Sharma, Nand Lal Thakur and Ashwani K. Sharma, Additional Advocate Generals.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, Judge***:

By way of this writ petition, the petitioner has prayed for quashing of impugned Notification dated 10.04.2018 (Annexure P-3), vide which the Department of Social Justice & Empowerment, Government of Himachal Pradesh has withdrawn the nomination of Non-Official Members of Himachal Pradesh State Commission for Backward Classes including the petitioner, in supersession of earlier Notification of the Department of even number dated 28.11.2016 with immediate effect.

2. Vide Notification dated 28.11.2016, which stands withdrawn vide impugned Notification dated 10th April, 2018, the petitioner was re-nominated as a Non-Official Member of the Himachal Pradesh State Commission for Backward Classes for a term of three years. The grievance of the petitioner is that once the respondent-Department had nominated him for another term of three years, then said re-nomination could not have been withdrawn, as has been done vide impugned Notification.

3. On the other hand, the stand of the State is that as the Non-Official Members, including the petitioner of the Commission in issue were re-nominated to the Commission by way of an administrative decision on 18.11.2016, they have no right to continue and the re-nomination was rightly withdrawn on 10.04.2018 and in fact the petitioner has gone the way he had come.

4. We have heard learned counsel for the parties.

5. It is not in dispute that nomination or re-nomination of the petitioner as a Member of the Commission was not in response to any advertisement issued by the Commission to fill up the office. Thus, both nomination as also re-nomination of the petitioner to the office in issue was at the pleasure of the Government. Besides this, as has been rightly pointed out by the learned Additional Advocate General, the issue involved in this writ petition is squarely covered by a recent judgment of this Bench in CWP No. 1135 of 2018, titled as ***Amit Nanda*** Vs. ***State of Himachal Pradesh and another***, decided on 22.11.2018. In the said judgment, this Court has categorically held that a person/appointee, who came to be appointed with out following any selection process, neither can claim that he/she be heard before he/she is removed, nor a person who is appointed at the pleasure of the Government and who came to be removed by the same pleasure, can claim that the Order of removal has been passed in breach of principles of natural justice. It has also been held that it is not necessary that such an appointee should continue for the entire period and he can be removed at any time by exercising the power of 'doctrine of pleasure'.

6. In the light of the aforesaid, the petitioner has no right to question the Notification dated 10th April, 2018, which has been issued by the State while exercising the 'doctrine of pleasure', vide which the re-nomination of the petitioner has been withdrawn. The petition is accordingly dismissed being devoid of any merit. Miscellaneous application, if any, also stand disposed of.

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

M/s A.D. Hydro Power Ltd. .....Petitioner
Versus
Sh. Juglu Ram ....Respondent

CMPMO No. 302 of 2018
Decided on 3.12.2018

**Constitution of India, 1950-** Article 227- **Indian Telegraph Act, 1885 (Act)**- Sections 16(1) & 16(3)- Grant of Damages- Jurisdiction- Claimant filing application for damages before District Magistrate for loss caused to his property while laying transmission lines over his land- District Magistrate granting damages- Claimant filing petition for enhancement before District judge- District judge dismissing petition of claimant- Petition against by Licenser- Held- Under Section 16 (3) of Act jurisdiction to award compensation lies only with District Judge – District Magistrate has no jurisdiction whatsoever to grant compensation- Order of District Magistrate granting compensation being without jurisdiction is null and void- Order of District Judge upholding order of District Magistrate also set aside- Petition allowed. (Paras 10 to 13).

***Case referred:***
Nar Singh Dass vs. Union of India through Secretary (Power and Energy), GOI, New Delhi and Ors, 2013 (2) Shim.LC 879

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| For the petitioner | : | Ms. Jyotsna Rewal Dua, Senior Advocate, with Mr. Jitender Singh, Advocate. |
| For the respondent | : | Mr. G.R. Palsra, Advocate. |

The following judgment of the Court was delivered:

**Sandeep Sharma, Judge** (oral):

Instant petition filed under Article 227 of the Constitution of India is directed against the order dated 22.8.2017, passed by the learned District Judge, Kullu, District Kullu, H.P, whereby two separate applications filed by the parties to the lis came to be disposed of by a common judgment, petitioner-applicant (hereinafter referred to as "the applicant"), being aggrieved and dissatisfied with passing of order dated 30.5.2014, passed by the learned Deputy Commissioner, Kullu, on the application having been made by the respondent herein, seeking therein compensation to the tune of Rs. 8 lac, on account of damage to his house and property by the applicant while laying transmission line, preferred a petition under Section 16 (3) of the Indian Telegraph Act, 199 (in short "the Act"), in the court of learned District Judge. Similarly, respondent who had earlier filed petition before the Deputy Commissioner, Kullu, and was awarded sum of Rs. 4 lac on account of damages caused to his house and property by the applicant while laying transmission line also approached the District Judge Kullu, District Kullu, under Section 16 (3) of the Act, praying therein for enhancement of compensation. Learned District Judge vide common judgment dated 22.8.2017, dismissed both the applications having been filed by the applicant as well as respondent and as a consequence thereof, order dated 30.5.2014, passed by the learned Deputy Commissioner, Kullu, H.P., came to be upheld. In the aforesaid background, applicant has approached this Court in the instant proceedings, praying therein to set-aside impugned order passed by the learned District Judge as well as Deputy Commissioner, being passed without jurisdiction.

2. Having heard parties and perused material available on record vis-à-vis reasoning recorded in the impugned orders referred herein above, this Court is persuaded to agree with the contention of Ms. Jyotsna Rewal Dua, learned Senior counsel representing

the applicant that Deputy Commissioner, Kullu, had no authority whatsoever to award compensation, if any, to the respondent on account of damage to the house and property by the applicant while erecting towers and laying transmission line, while exercising power under Section 16 (3) of the Act.

3. It would be apt to reproduce Section 10 of the Act, which reads as under:

> *"10 Power for telegraph authority to place and maintain telegraph lines and posts .—The telegraph authority may, from time to time, place and maintain a telegraph line under, over, along, or across, and posts in or upon, any immovable property: Provided that—*
>
> *(a) the telegraph authority shall not exercise the powers conferred by this section except for the purposes of a telegraph established or maintained by the 1 [Central Government], or to be so established or maintained;*
>
> *(b) the 1 [Central Government] shall not acquire any right other than that of user only in the property under, over, along, across, in or upon which the telegraph authority places any telegraph line or post; and*
>
> *(c) except as hereinafter provided, the telegraph authority shall not exercise those powers in respect of any property vested in or under the control or management of any local authority, without the permission of that authority; and*
>
> *(d) in the exercise of the powers conferred by this section, the telegraph authority shall do as little damage as possible, and, when it has exercised those powers in respect of any property other than that referred to in clause (c), shall pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers."*

Section 10 of the Act, provides that telegraph authority may from time to time, place and maintain telegraph line under, over, along, or across, and posts in or upon, any immovable property.

4. Section 16 of the Indian Telegraph Act, 1885, reads as under:

> *"16. Exercise of powers conferred by section 10, and disputes as to compensation, in case of property other than that of a local authority.—*
>
> *(1) If the exercise of the powers mentioned in section 10 in respect of property referred to in clause (d) of that section is resisted or obstructed, the District Magistrate may, in his discretion, order that the telegraph authority shall be permitted to exercise them.*
>
> *(2) If, after the making of an order under sub-section (1), any person resists the exercise of those powers, or, having control over the property, does not give all facilities for their being exercised, he shall be deemed to have committed an offence under section 188 of the Indian Penal Code, 1860 (45 of 1860).*
>
> *(3) If any dispute arises concerning the sufficiency of the compensation to be paid under section 10, clause (d), it shall, on application for that purpose by either of the disputing parties to the District Judge within whose jurisdiction the property is situate, be determined by him.*
>
> *(4) If any dispute arises as to the persons entitled to receive compensation, or as to the proportions in which the persons interested are entitled to share in it, the telegraph authority may pay into the court of the District Judge such amount as he deems sufficient or, where all the disputing parties have in*

*writing admitted the amount tendered to be sufficient or the amount has been determined under sub-section (3), that amount; and the District Judge, after giving notice to the parties and hearing such of them as desire to be heard, shall determine the persons entitled to receive the compensation or, as the case may be, the proportions in which the persons interested are entitled to share in it.*

*(5) Every determination of a dispute by a District Judge under sub-section (3), or sub-section (4) shall be final: Provided that nothing in this sub-section shall affect the right of any person to recover by suit the whole or any part of any compensation paid by the telegraph authority, from the person who has received the same."*

Section 16 of the Act provides that if the exercise of the powers mentioned in section 10 in respect of property referred to in clause (d) of that section is resisted or obstructed, the District Magistrate may, in his discretion, order that the telegraph authority shall be permitted to exercise them, meaning thereby, in the event of dispute, if any, on account of laying of transmission line or erection of towers, authority responsible for laying transmission line would approach the District Magistrate, who in turn shall ensure that no obstruction is caused on the spot for laying the transmission line. Similarly, Section 16 (3) provides that if there is any dispute with regard to sufficiency of compensation to be paid under Section 10 clause (d), an application in this regard shall be made by either of the disputing party to the District Judge, within whose jurisdiction the property situates. Careful reading of clause 16 (3) clearly suggests that dispute with regard to sufficiency of compensation, which otherwise at the first instance is to be paid by the agency laying transmission itself, is to be determined by the District Judge only, not by the District Magistrate. Similarly, perusal of Section 16 (4) and (5) further suggests that in the event of dispute with regard to the apportionment inter-se parties qua the share of compensation, determination of the dispute by the District Judge, under sub-section (3) or sub-section (4), shall be final.

5. In the case at hand, facts as emerge are that respondent, whose property came to be used for erection of towers and laying of transmission lines by the applicant, applied to Deputy Commissioner, Kullu, HP, under Section 16 (3) of the Act, seeking therein compensation to the tune of Rs. 8 lac, who vide order dated 11.11.2013, while taking cognigence of the aforesaid application, having been filed by the respondent, directed, SDM, Kullu, to furnish report. Careful perusal of this order suggests that Deputy Commissioner referred to notification of Government of India dated 18.4.2006 issued in exercise of power conferred under Clause-(3) of Sub Section (2) of Section 176 read with sub-section (2) of Section 67 of the Electricity Act, 2006, authorizing the District Magistrate to fix compensation payable to owner by the licensee. In the aforesaid order, Deputy Commissioner also took cognigence of the judgment dated 17.3.2010, passed by the Division Bench of this Court in CWP No. 513 /2007 titled A.D. Hydro Project v. State of H.P.

6. Ms. Jyotsna, learned Senior Counsel, during arguments invited attention of this Court to the aforesaid notification, perusal whereof clearly suggests that reliance placed by the Deputy Commissioner, on the notification, is totally mis-placed. Aforesaid notification dated 18.4.2006, is issued by the Central Government. Clause 4 of the notification clearly provides that *"nothing contained in this rule shall affect the powers conferred upon any licensee under section 164 of the Act."* At this stage, it would be profitable to take note of Section 164 of the Electricity Act, 2003, herein below:-

*"Section 164 Exercise of powers of Telegraph Authority in certain cases:*

*The Appropriate Government may, by order in writing, for the placing of electric lines or electrical plant for the transmission of electricity or for the purpose of telephonic or telegraphic communications necessary for the proper co-ordination of works, confer upon any public officer, licensee or any other person engaged in the business of supplying electricity under this Act, subject to such conditions and restrictions, if any, as the Appropriate Government may think fit to impose and to the provisions of the Indian Telegraph Act, 1885 (13 of 1885), any of the powers which the telegraph authority possesses under that Act with respect to the placing of telegraph lines and posts for the purposes of a telegraph established or maintained, by the Government or to be so established or maintained."*

7. Careful perusal of aforesaid provision of law contained under Section 164 of Indian Electricity Act, clearly suggests that an appropriate government by order in writing for placing of electric lines or electrical plants for the transmission of electricity, confer upon any public officer, licensee or any other person engaged in the business of supplying electricity under the Act, any of the powers, which the telegraph authority possesses under that Act with respect to the placing of telegraph lines and posts, subject to conditions and restrictions, if any, as the appropriate Government, may think fit to impose and to the provisions of the Indian Telegraph Act, 1885. Bare reading of aforesaid provision of law suggests that an appropriate Government with a view to ensure smooth laying of transmission of electricity or telephone lines, may impose conditions as it may think fit and also resort to the provisions of Indian Telegraph Act, 1885.

8. Otherwise also, notification dated 23.5.2016, issued by the HP State Electricity Board suggests that it also framed similar rules under Sections 67 and 68 of the Electricity Act, 2003, which are *para-materia* to the Electricity Central Rules and it also contains similar conditions that nothing contained in this rule shall effect the powers conferred upon any licensee under Section 164 of the Act. Under Section 16 (3) of the Act, which has been reproduced supra, specific authority i.e. District Judge, has been prescribed for determining compensation qua the damage to the house and property by the licensee while erecting towers and laying transmission lines and as such, determination of compensation by the Deputy Commissioner, drawing strength from the notification referred herein above, is totally without jurisdiction and against the Statute, which otherwise specifically provides for the remedy.

9. In view of the discussion made herein above, this Court is persuaded to agree with Ms. Jyotsna Rewal Dua, learned Senior counsel that Deputy Commissioner Kullu, had no jurisdiction at all to determine the compensation while exercising power under Section 16 (3) of the Act, drawing strength, if any, from the aforesaid notification, Rule 3 (4) whereof clearly provides that under Section 164 of the Act, authority responsible for laying transmission lines can prescribe/formulate certain guidelines, but subject to such conditions and restrictions, if any, as the appropriate Government may think fit to impose and to the provision of the Indian Telegraph Act, 1885 (13 of 1885).

10. As far as judgment rendered by the Division Bench of this Court in CWP No. 513 of 2007 is concerned, this Court is not persuaded to agree with Mr. G.R. Palsra, learned counsel that in view of the mandate given in that judgment, Deputy Commissioner was duty bound to determine the compensation under Section 16 (3) of the Act, because bare perusal of judgment clearly suggests that petitioner therein had approached the Court in altogether different circumstances and by way of that petition, petitioner had prayed that a direction may be issued to the respondent to ensure that petitioner company is able to carry out transmission work of the time bound 192 MW Hydro Electric Power Project peacefully in

spite of the objections of the owners/occupiers/any person claiming any interest on the land over which the towers are to be constructed. Petitioner therein also prayed that respondent be directed to make available to the petitioner, lands where the towers as per its approved scheme scheme/surveys are to be erected and the transmission lines are to be laid out. In the aforesaid petition, petitioner also prayed that respondent may also be directed to specify any agency/officer with which the petitioner company is required to deposit the compensation for the damage qua the land over which transmission towers of the Project is proposed to be erected. Division Bench of this Court having taken note of the pleadings adduced on record by the respective parties, held that Section 118 of the HP Tenancy and Land Reforms Act, 1972, is not applicable in the present case and directed the State Government and authorities concerned to render helping hand to the petitioner so that developmental project is able to commence the commercial production at least by 1.6.2010. But since land owners were not allowing the company to erect towers despite readiness of the company to pay compensation, Division Bench directed the Deputy Commissioner to ensure that compensation is paid to the land owners and no unnecessary delay is caused for the enhancement of the project. Leaving everything aside, this court is in full agreement with Ms. Dua that there cannot be any direction against the statute. When Section 16 (3) specifically provides that in the event of dispute inter-se parties with regard to the compensation, it is only District Judge, who is competent to decide the dispute inter-se parties, within whose jurisdiction the property is situate. In the case at hand, as has been discussed herein above, Deputy Commissioner has wrongly determined the compensation taking cognigence of the application having been filed by the respondent under Section 16 (3), which is/was otherwise not maintainable before it and as such, order, if any, passed by it on that application cannot be allowed to sustain being passed without any jurisdiction.

11. Interestingly, in the case at hand, learned District Judge while deciding the application filed by the applicant under Section 16 (3), which otherwise is the only prescribed mode under the Act to dispute the compensation, failed to decide the specific objections raised by the applicant, rather he without deciding the question of maintainability/competence of Deputy Commissioner, to decide proceedings under Section 16 (3), proceeded to decide the application filed under Section 16 (3) by the respondent that too in the proceedings filed by the applicant under Section 16 (3), which was definitely filed against the order passed by the Deputy Commissioner. Careful perusal of impugned order passed by the learned District Judge, clearly suggests that it while deciding the application having been filed by the respondent under Section 16(3) placed sole reliance upon report which was called for by the Deputy Commissioner pursuant to application filed by the respondent, seeking therein compensation under Section 16 (3) from the SDM. It is not in dispute that respondent while prosecuting his case under Section 16 (3) before the District Judge, did not adduce on record any evidence, in support of his claim, rather reliance, if any, is/was placed upon report of the SDM, which was admittedly called for by the District Judge in the proceedings initiated by it under Section 16 (3) of the Act, which was beyond its jurisdiction. Since proceedings initiated by the Deputy Commissioner under Section 16 (3) were also beyond his jurisdiction, report, if any, called in those proceedings could not be relied upon by the District Judge while determining the compensation, if any, in the application having been filed by the respondent under Section 16(3) of the Act, that too, in the petition having been filed by the petitioner herein, laying therein challenge to order passed by the District Judge, whereby he without jurisdiction awarded sum of Rs. 4 lac as compensation.

12. Reliance is placed on judgment passed by co-ordinate Bench of this Court in case titled ***"Nar Singh Dass v. Union of India through Secretary (Power and Energy),***

***GOI, New Delhi and Ors,"*** **2013 (2) Shim.LC 879,** relevant para whereof is reproduced herein below:-

> 4. In Power Grid Corporation of India Limited versus Basant Singh and others, LPA 204 of 2007, decided on 21st May, 2010, Division Bench of this Court presided over by Hon'ble the Chief Justice has considered the provisions of Indian Telegraph Act, 1885. Adverting to the provisions of Section 10 and 16, this Court holds:
>
> > "2. Under Section 10(d) it is clear that the Telegraph Authority while exercising power conferred under the Section for drawing the line or placing a post etc. it shall do as little damage as possible and in case there is any damage it shall pay full compensation to all persons interested for any damage sustained by them by reason of the drawing line or placing tower. By a separate Notification this Act has been made applicable to exercise of the powers by the appellant under the provisions of erstwhile Indian Electricity Act, 1910 read with Electricity (Supply) Act, 1948. Under Section 16 of the Indian Telegraph Act, if there is any dispute on sufficiency of the compensation, it is open to the disputing party to approach the District Judge of competent jurisdiction for adjudication regarding sufficiency of compensation. The provision reads as follows:-
> >
> > "16(3). If any dispute arises concerning the sufficiency of the compensation to be paid under Section 10, clause (d), it shall, on application for that purpose by either of the disputing parties to the District Judge within whose jurisdiction the property is situate, be determined by him."
> >
> > 3. **Under Section 10(d) of the Indian Telegraph Act, 1885 what is contemplated is the compensation for the damage caused to a property by drawing an electric/ telegraph line or placing a tower. It is not the compensation as understood under the Land Acquisition Act where the land itself is acquired. Once the land is acquired, the party from whom land is acquired ceases to be owner of the property and ownership, title and possession, after acquisition vests in the acquisitioning/ requisitioning authority.** As far as the exercise of power for drawing of telegraph line or placing a tower etc. is concerned, the party is never divested of its ownership or title or possession. It is only a permissive use which is given a statutorily status. In the process, no doubt, the owner might suffer some injury. That injury is to be compensated in terms of the extent of injury like the adverse impact on the prospects of income or use of the property. It can never be land value as such since, as we have already stated above, the owner is never divested of his title, ownership or possession. But at the same time injury certainly could be there. Under Section 10(d) or in exercise of power under Section 16(3) the question only shall be as to what is the extent of injury to the property over which line is drawn or tower is placed, to be compensated in terms of money and nothing more.
> >
> > 4. **Having analysed the legal position as above, and on going through the factual position in the present case, we find that the learned District Judge has misdirected himself in granting the**

**land value itself by way of compensation by comparing the value of the property in the vicinity. That method is to be adopted, only when the Court exercises its power under Section 18 of the Land Acquisition Act, 1894 for the purpose of deciding land value in a case duly referred to the Court after acquisition of the property.** The power that is exercised under Section 16(3) of the Indian Telegraph Act is not akin to the power exercised by the Reference Court under the Land Acquisition Act, 1894."

13. **Consequently, in view of the discussion made herein above as well as judgment relied upon, it is quite apparent that power under Section 16 (3) of the Act for determining the compensation could only be exercised by the District Judge, not by the Deputy Commissioner and as such**, impugned order dated 11.11.2013 passed by the learned Deputy Commissioner Kullu, is held to be void and illegal having passed without jurisdiction. Similarly, impugned order dated 22.8.2017, passed by the learned District Judge, Kullu, also cannot be allowed to sustain in view of the detailed discussion made herein above and as such, both the orders are quashed and set-aside. However, liberty is reserved to the respondent to file appropriate proceedings, if required and desired before appropriate court of law in accordance with law for compensation. Since matter remained pending adjudication before this Court as well as courts below, plea of limitation would not be raised in case respondent approaches the appropriate court of law for redressal of his grievances, within a period of two months from the date of passing of judgment.

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

Ramesh Chand ...Non-applicant/Petitioner.

Versus

Mahender Singh and others ...Applicants/Respondents.

EMP No.7 of 2018 in Election Petition No.1/2018
Reserved on: 04.12.2018
Decided on: 11.12.2018

**Representation Of The People Act, 1951(Act)-** Sections 82 & 86 (4)**- Code of Civil Procedure, 1908-** Order 1 Rule 10- Election Dispute- Nature of proceedings- Held- Election disputes being matter of special nature are not lis at common law or an action in equity- The Act is complete code in itself- Election disputes are strictly statutory proceedings under sections 82 and 86(4) of Act- Contest of election petition is confined to candidates at election and all others are excluded- Application filed by Election Commission of India and Returning Officer of Legislative Constituency seeking their deletion from array of parties allowed. (Paras 14 to 20).

***Cases referred:***

B. Sundara Rami Reddy vs. Election Commission of India and others 1991 Supp (2) SCC 624

B.S. Yadiyurappa vs. Mahalingappa and others AIR 2001 SC 4041

Jyoti Basu vs. Debi Chosal, AIR 1982 SC 983

Michael B. Fernandes vs. C.K. Jaffer Sharief and others (2002) 3 SCC 521
N.P.Ponnuswami vs. Returning Officer, Namakkal Constituency 1952 AIR (SC) 64)

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| For the Non-applicant/Petitioner: | Mr. Shrawan Dogra, Senior Advocate, with Ms. Nishi Goel and Mr. Bharat Thakur, Advocates. |
| For the Applicants/Respondents: | Mr. Satya Pal Jain and Mr. R.K.Sharma, Senior Advocates, with Mr. V.B. Verma and Ms. Neha Sharma, Advocates, for respondent No.1.<br>Mr. Ankush Dass Sood, Senior Advocate, with Mr. Arjun Lall, Advocate, for the applicants/ respondents No.2 & 3. |

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, J.***

Respondents No. 2 and 3 i.e. Returning Officer, 32-Dharampur Constituency and Election Commission of India have filed this application for deletion of their names on the ground that they are not necessary parties to the petition.

2. It is averred that as per the statutory requirements of the election laws, an election contest is not an action at law or a suit in equity but is purely a statutory proceeding unknown to the common law and even though the applicants may be proper parties under the Code of Civil Procedure but under the provisions of the Act, they cannot be made as parties to the election petition.

3. The petitioner/non-applicant has opposed the application by filing reply wherein it is averred that respondents No. 2 and 3 being necessary parties to the litigation, their names cannot be deleted.

4. When the case came up for consideration on 20.11.2018, the petitioner sought time to file supplementary affidavit and in the supplementary affidavit so filed, it is averred that since specific averments have been made in the election petition referring to the role of respondents No.2 and 3 in paragraphs 9, 10, 11 to 14, 17 to 20, 22, 25, 26, 29, 30 to 34, therefore, they are the necessary parties.

5. Respondent No.1 has not filed reply to the application, but has supported the contents of the application and would further claim that since the petitioner despite having been afforded opportunity to delete the names of respondents No.2 and 3, has failed to do so, thereafter the election petition itself is liable to be rejected under Section 86(1) of the Act.

6. I have heard learned counsel for the parties and have thoroughly gone through the contents of the application, reply and supplementary affidavit.

7. At the out-set, it needs to be observed that elections and election disputes are a matter of special nature and that though the right to franchise and right to office are involved in an election dispute, it is not a lis at common law nor an action in equity. (See: Constitution Bench decision of the Hon'ble Supreme Court in ***N.P.Ponnuswami vs. Returning Officer, Namakkal Constituency 1952 AIR (SC) 64).***

8. The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in

equity but is a purely statutory proceeding unknown to the common law and the Court possesses no common law power.

9. The right conferred being a statutory right, the terms of that statute have to be complied with. There is no question of any common law right to challenge an election.

10. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight-jacket. Thus, the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. (See: ***Jyoti Basu v. Debi Chosal, AIR 1982 SC 983).***

11. The legal position is, therefore, well settled that election disputes are strictly statutory proceedings. The Representation of the People Act, 1951 is a complete Code and election disputes are strictly statutory proceedings which are to be regulated by the Act. The persons who may be joined as respondents in an election petition are governed exclusively by Sections 82 and 86(4) of the Act, which are reproduced here-in-below for ready reference:

> ***"82.Parties to the petition****.-A petitioner shall join as respondents to his petition -*
>
> *(a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and*
>
> *(b) any other candidate against whom allegations of any corrupt practice are made in the petition."*
>
> *"**86 (4).** Any candidate not already a respondent shall upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.*
>
> *Explanation.- For the purposes of this sub-section and of Section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition."*

12. The aforesaid provisions came up for consideration before the Hon'ble Supreme Court in ***Jyoti Basu*** case (supra), wherein it was held that no one may be joined

as a party to an election petition otherwise than as provided under Sections 82 and 86(4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition.

13. In ***B. Sundara Rami Reddy vs. Election Commission of India and others 1991 Supp (2) SCC 624***, the Hon'ble Supreme Court categorically held that Election Commission is not to be impleaded as a respondent in an election petition as it is neither a necessary nor a proper party. It is further held that it is Section 82 of the Act which governs such situation, whereas the CPC applies only to a limited extent i.e. subject to the provisions of the Representation of the People Act. It is yet further held that the concept of 'proper party' is and must remain alien to an election dispute under the Act and only those may be joined as respondents to an election petition, who were mentioned in Sections 82 and 86(4) and no others. However, desirable and expedient it may appear to be, none else shall be joined as parties.

14. Complete answer to both the questions i.e. who are necessary parties to an election petition and what is the effect of joining of a person(s) who are not necessary parties is to found in ***B.S. Yadiyurappa vs. Mahalingappa and others AIR 2001 SC 4041***, wherein after placing reliance on the judgments, as referred to above, it was observed by the Hon'ble Supreme Court as under:

> "2. *Respondent Nos. 4 and 5 moved an interim application in the election petition praying that their names be deleted from the array of parties thereto. An application to the same effect was made by the first respondent; he also moved an application praying that the election petition be dismissed because of the impleadment of respondent nos. 4 and 5. By the judgment and order under challenge, a learned single Judge of the High Court allowed the latter application. He dismissed the election petition under the provisions of Section 86(1) of the Representation of the People Act, 1951 ("the said Act") because parties other than those mentioned in Section 82 of the said Act had been impleaded thereto.*
>
> *3. The election petitioner is in appeal.*
>
> *4. Our attention has been drawn to the judgment of this Court in Maraka Radhey Shyam Ram Kumar v. Roop Singh Rathore & Ors., [1964] 3 SCR 573. A Constitution Bench considered the very situation with which we arc now concerned. It noted that the foundation of the argument before it was that there had been non-compliance with the provisions of Section 82. What had happened there, as here, was this : All the parties whom it was necessary to join under the provisions of Section 82 were joined as respondents to the petition, but other respondents, in excess of the requirements of Section 82, were also Joined. The question, therefore, was did this amount to non-compliance with, or contravention of, the provisions of Section 82. Learned counsel for the appellant in that case wanted the Court to read Section 82 as though it said that the persons named therein and no others should be joined as respondents to the petition. He wanted the Court to add "and no others" to the Section. The Court found no warrant for such a reading of Section 82. It held that if all the necessary parties had been joined to the election petition, the circumstance that a person who was not a necessary party had also been impleaded did not amount to a breach of provisions of Section 82 and no question of dismissing the election petition arose. It was open to the Tribunal (or, here, the Court) to strike out the name of the party who was not a necessary party within the meaning of Section 82. The position, it was noted,*

*would be different if a person who was required to be joined as a necessary party under Section 82 was not impleaded as a party to the petition.*

*5. This judgment in Maraka Radhey Shyam Ram Kumar was not noticed by the learned Single Judge in the judgment under challenge but was distinguished on the ground that it was confined to its own facts. We find it difficult to agree. This is not a judgment that is confined to its own facts but is an elucidation of the law set out in Section 82 of the said Act.*

*6. In Mohan Raj v. Surendra Kumar Taparia & Ors., [1969] 1 SCR 630 the same position was reiterated. It was held that in an election petition the court can strike out a party who is not necessary but, by reason of the provisions of the said Act, the power of impleadment, cannot be used if a necessary party has not been joined.*

*7. In Jyoti Basu & Ors. v. Debi Ghosal & Ors., [1982] 1 SCC 691, this Court dealt with Section 82 of the said Act, and it is this judgment which the High Court principally relied upon. The ratio of this judgment, is that a person who is not a candidate cannot be joined as a respondent to an election petition. The High Court, however, failed to notice that, having so held, this Court ordered the deletion of the superfluous party from the array of parties.*

*8. It is, therefore, clear, on the authorities of this Court, that those who are mentioned in Section 82 of the said Act must be made parties to an election petition and, if they are not, the election petition is one which does not comply with the provisions of Section 82 and must, therefore, be dismissed by reason of the terms of Section 86( 1). It does not, however, follow that if to an election patition parties other than those who are necessary parties under Section 82 have been impleaded, the election petition is one that does not comply with the provisions of Section 82 and must be dismissed. Such a petition can be amended by striking out from the array of parties those additionally impleaded."*

15. Similar reiteration of law can be found in another Hon'ble three Judges Bench decision of the Hon'ble Supreme Court in ***Michael B. Fernandes vs. C.K. Jaffer Sharief and others (2002) 3 SCC 521***, wherein it was observed as under:

***"4.*** *....Mr. Venkataramani then relied upon the decision of Calcutta High Court in Dwijendra Lal Sen Gupta vs. Hare Krishna Konar, A.I.R. 1963 Calcutta 218, where the question came up for consideration directly and the Calcutta High Court did observe that the Returning Officer may nevertheless in an appropriate case be a "proper party" who may be added as party to the election petition and undoubtedly, the aforesaid observation supports the contention of Mr. Venkararamani. Following the aforesaid decision, a learned Single Judge of the Bombay High Court in the case of H.R. Gokhale vs. Bharucha Noshir C. and Ors., A.I.R. 1969 Bombay 177, had also observed that the observations of Shah, J in Ram Sewak Yadav's case, AIR 1964 SC 1249 in paragraph (6) is not intended to lay down that the Returning Officer can in no event be a proper party to an election petition. But both these aforesaid decisions of the Calcutta High Court and Bombay High Court had been considered by this Court in Jyoti Basu case and the Court took the view that the public policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons other than those mentioned in Sections 82 and 86(4). The Court also in paragraph (12) considered the*

*consequences if persons other than those mentioned in Section 82 are permitted to be added as parties and held that the necessary consequences would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Section 86(6) of the Act. In the aforesaid premises, we reiterate the views taken by this Court in Jyoti Basu's case and reaffirmed in the latter case in B. Sundara Rami Reddy and we see no infirmity with the impugned judgment, requiring our interference under Article 136 of the Constitution. This appeal accordingly fails and is dismissed."*

16. Thus, what can be taken to be settled in view of the aforesaid exposition of law when read with Sections 82 and 86(4) of the Act is that the contest of the election petition is designed to be confined to the candidates at the election and all others are excluded and, therefore, only those may be joined as respondents to an election petition, who are mentioned in Sections 82 and 86(4) and no others. The provisions of the Civil Procedure Code apply to election disputes only as far as may be and subject to the provisions of the Act and any rules made thereunder and the provisions of the Code cannot be invoked to permit which is not permissible under the Act. It is in this context that the concept of 'proper parties' is and remains alien to an election dispute under the Act.

17. Since Section 82 designates the persons who are to be joined as respondents to the petition, provisions of the Civil Procedure Code, 1908 relating to the joinder of parties stands excluded. Under the Code even if a party is not necessary party, he is required to be joined as a party to a suit or proceedings if such person is a proper party, but the Act does not provide for joinder of a proper party to an election petition. The concept of joining a proper party to an election petition is ruled out by the provisions of the Act. Therefore, the concept of joinder of a proper party to a suit or proceeding underlying Order 1 of the Civil Procedure Code cannot be imported to the trial of election petition, in view of the express provisions of Sections 82 and 87 of the Act. The Act is a self-contained Code which does not contemplate joinder of a person or authority to an election petition on the ground of proper party.

18. Now, adverting to the submissions made by Mr. Satya Pal Jain, learned senior Counsel for respondent No.1 that the election petition should be dismissed as the petitioner despite opportunity has failed to delete the names of respondents No.2 and 3, I am afraid that such contention is too far fetched and, therefore, not sustainable in the eyes of law.

19. In all the judgments cited above, it has been categorically held that the person who was not "contesting candidate" and/or "other than contesting candidate" though impleaded to the election petition, does not amount to breach of provisions of the Act and petition, therefore, cannot be dismissed on that ground. The petitioner can amend the petition by striking them out from the array of the respondents.

20. Thus, in view of the well settled proposition of law, even though, respondents No. 2 and 3 are not necessary parties and are required to be deleted from the array of the respondents. However the mere fact that their names were not deleted by the petitioner earlier, will not entail the dismissal of the election petition as this defect is otherwise curable. Accordingly, respondents No. 2 and 3 are ordered to be deleted from the array of the respondents.

21. Amended memo be filed by the petitioner within one week.

22. Accordingly, EMP No.7 of 2018 stands disposed of in the above terms.

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

Smt. Jamna Devi & others .....Appellants.
Versus
Smt. Sarswati Devi & others .....Respondents.

RSA No. 339 of 2005
Reserved on: 31.10.2018
Date of decision: 16.11.2018.

**Code of Civil Procedure, 1908-** Order 23 Rule 3A**-** Compromise decree- Challenge thereto- Whether separate suit challenging it maintainable?- Earlier suit resulting in compromise before Lok Adalat- Plaintiff compromising suit through her Power of Attorney- Plaintiff filing subsequent suit and challenging Compromise decree on ground of fraud- Trial Court dismissing suit but First Appellate Court allowing appeal and decreeing her suit- Regular Second Appeal- Held- All questions with regard to lawfulness, validity of agreement or compromise as being void or voidable or whether compromise in question obtained by fraud, duress, coercion etc have to be raised before Court which passed decree on basis of such agreement or compromise. Court cannot direct parties to file separate suit in view of provisions of Order 23 Rule 3-A of Code - Separate suit challenging compromise decree not maintainable- Regular Second Appeal allowed- Decree of First Appellate Court set aside. (Paras 13 to 18).

***Cases referred:***
Dhan Sukh vs. Liaq Ram, 1997 (2) SLC 203
Karnail Singh & Ors. vs. Dalip Kaur & Ors., 1995 (2) CCC 588.
Kewal Krishan vs. Shiv Kumar & Ors., AIR 1970 P&H 176
Mukhtiar Singh vs. Arjun Singh, 1993 (Suppl) CCC 81
Pushpa Devi Bhagat (D) by Lr. vs. Rajinder Singh & Ors. AIR 2006 SC 2628
R. Rajanna vs. S.R. Venkataswamy & Ors., 2014 (15) SCC 471
Ram Kishan & Ors. Vs. Sardari Devi & Ors., 2003 (1) CCC 11
S.G. Thimmappa vs. T. Anantha & Ors., AIR 1986 Kar. 1
Samriti Gupta and another vs. State of H.P. and others, Latest HLJ 2016 (HP) 191
Y. Sleebachen and Ors. vs. State of Tamil Nadu & Anr., 2015 (5) SCC 747

For the Appellants: Mr. G. D. Verma, Sr. Advocate, with Mr. Romesh Verma, Advocate.
For the Respondents: Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

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**Tarlok Singh Chauhan, Judge**

The defendants are the appellants who aggrieved by the judgment and decree passed by the learned first appellate Court whereby it has reversed the decree of learned trial Court, have filed the instant appeal.

2. One Sanehru Devi widow of Labha Ram filed civil suit No. 37/91 against Khillo Devi (present respondent) claiming herself to be the sole widow of Labha Ram. Khillo Devi appointed Shakti Chand (appellant No. 2) as power of attorney and on that authority submitted a compromise before the Lok Adalat leading to the passing of a compromise decree Ext.P1 dated 05.02.1994. The compromise decree was subsequently challenged by Khillo Devi on the ground that one day prior to the passing of the compromise decree Khillo Devi has cancelled the power of attorney executed in favour of Shakti Chand vide document Ext. PW2/A dated 04.02.1994. Therefore, he (Shakti Chand) had no lawful authority to effect any compromise on the basis of the power of attorney, which already stood cancelled. Therefore, the decree passed by the Lok Adalat on the basis of the compromise was against law and having been obtained by fraud, is liable to be set aside.

3. The learned trial Court dismissed the suit, however, the said decree and judgment was reversed by the learned first appellate Court by declaring that decree in civil suit No. 37/91 dated 05.02.1994 of the learned Sub Judge Ist Class-II, Hamirpur was a result of fraud, misrepresentation and collusion between both the defendants and resultantly the same was set aside and the defendants were prohibited from claiming any interest under the decree.

4. Aggrieved by the judgment and decree passed by the learned first appellate Court the defendants have filed the present appeal which came to be admitted on the following substantial questions of law:-

1. Whether it is open for the lower appellate court to ignore the provisions of proviso and explanation of Rule 3 of Order 23 CPC in the instant case?
2. Whether compromise and decree Ext.P1 passed by Lok Adalat on 05.02.1994 having lawfully acquired sanctity of a judicial order, was correctly accepted by the trial court?
3. Whether the provisions of Order 23 Rule 3A were illegally interpreted by the lower appellate Court resulting setting aside a compromise decree?
4. Whether the documents Ext.P4 i.e. suit No. 37/91, Ext. P1 compromise decree, Ex.P2, P3, PX, PW5/B, PW5/A i.e. written statement, written agreement as per provisions of Order 23 Rule 3 CPC judgment of Sub Judge (I) Hamirpur, written statement of Khillo Devi, copy of power of attorney by Khillo Devi in favour of Shakti Chand, respectively were legally and correctly appreciated by lower appellate Court?
5. Whether the appreciation of law and facts made by lower appellate court of the case, is patently erroneous and defective in law and procedure?

**5**. However during the pendency of the appeal, Shri G.D. Verma, learned Senior Advocate, for the appellant, only raised question of the maintainability of the suit in view of the specific bar contained in Section 96(3) and Order 23 Rule 3 and 3-A of the Code of Civil Procedure (for short the 'Code').

6. In addition to relying upon the aforesaid provisions, Shri G. D. Verma, learned Senior Counsel, for the appellant has placed reliance upon the following judgments of the Hon'ble Supreme Court:-

1. Pushpa Devi Bhagat (D) by Lr. vs. Rajinder Singh & Ors. AIR 2006 SC 2628
2. In R. Rajanna vs. S.R. Venkataswamy & Ors., 2014 (15) SCC 471

3. In Y. Sleebachen and Ors. vs. State of Tamil Nadu & Anr., 2015 (5) SCC 747.

7. On the other hand, Shri Bhupender Gupta, learned Senior Advocate, would vehemently contend that a separate suit to assail the compromise, that too, on the ground of fraud was maintainable, especially, when it is settled law that fraud vitiate all transactions. He has placed reliance upon the following judgments:-

1. Kewal Krishan vs. Shiv Kumar & Ors., AIR 1970 P&H 176.
2. S.G. Thimmappa vs. T. Anantha & Ors., AIR 1986 Kar. 1.
3. Mukhtiar Singh vs. Arjun Singh, 1993 (Suppl) CCC 81.
4. Karnail Singh & Ors. vs. Dalip Kaur & Ors., 1995 (2) CCC 588.
5. Dhan Sukh vs. Liaq Ram, 1997 (2) SLC 203.
6. Ram Kishan & Ors. Vs. Sardari Devi & Ors., 2003 (1) CCC 11.

8. Section 96(3) and Order 23 Rules 3 and 3-A of the Code of Civil Procedure, read thus:-

**"Section 96(3)** – No appeal shall lie from a decree passed by the Court with the consent of parties."

**Section 23(3)**

**Compromise of suit** – Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties) or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith (so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit)

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

*Explanation* – An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule."

**"Section 23(3-A)**

**Bar to suit** – No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

9. Rule 3-A was introduced in Order 23 to give finality to litigation and to avoid multiplicity of suits by putting a bar on new suit on the ground that the agreement on which compromise decree was passed in the first suit was not lawful.

10. I find that substantial question of law is no longer *res intergra* in view of the authoritative pronouncement of the Hon'ble Supreme Court in ***R. Rajanna's case (supra)***, wherein the precise question before the Hon'ble Supreme Court was whether the validity of a decree passed on compromise could be challenged in a separate suit as is evident from para

2 of the judgment. The appellant therein had filed a suit for declaration to the effect that gift deed dated 12.08.1982 executed by one Ramaiah was void. The suit was decreed by the learned trial Court by holding that the gift deed in question to be null and void and hence not binding on the appellant. Aggrieved by the judgment and decree, appeal came to be filed before the Hon'ble High Court of Karnataka. According to the respondent a compromise petition was in terms of Order 23 Rule 3 of the CPC filed by the parties before the Court in the said appeal settling the dispute amicably. The appellant stoutly disputed that position and asserted that no such compromise was needed nor was the same entered into between the parties and such compromise was, in fact, termed as a forged and fabricated document. The appellant denied that he ever signed any such compromise petition and asked his advocate to file the same before the Court and would allege that even so the High Court had proceeded on the basis that a comprise had indeed taken place between the parties and consequently the judgment and decree passed by the learned trial Court was set aside and the appeal filed by the respondent came to be allowed. The appellant contested before the Hon'ble Supreme court that the order passed by the High Court was a result of fraud played upon the High Court.

11. Aggrieved by the judgment and order passed by the High Court, appellant filed suit before the Additional City Civil Judge, Bangalore, in which he prayed for setting aside the compromise recorded by the High Court and the decree passed on the basis thereof. The defendant/respondent No. 1 moved an application in the said suit under Order7 Rule 11(d) read with Section 151 of the code for rejection of the plaint on the ground that the suit in question was barred by Rule 3-A Order 23 of the Code. The application was allowed and consequently the plaint came to be rejected. The Court took the view that in light of the proviso to Order 23 Rule 3 CPC inserted w.e.f. 01.02.1977, a party aggrieved of a decree on compromise had to approach the Court that passed the decree to establish that no compromise had taken place between the parties which could provide a basis for the Court to act upon the same. In doing so, the Court placed reliance upon the decision of the Hon'ble Supreme Court in ***Pushpa Devi's case (supra)***.

12. After rejection of the plaint, the appellant filed miscellaneous applications before the Karnataka High Court for setting aside the compromise. It was alleged that no such compromise had taken place nor was any compromise petition was ever signed by the appellant. It was further alleged that appellant had given no instructions to his advocate for presenting any compromise petition and alleged that compromise petition was totally fraudulent and based on formed signature of the appellant apart from unauthorised, the counsel engaged by him had no authority to present or report any such compromise before the Court. The High Court of Karnataka without adverting to the provisions of Order 23 Rule 3-A CPC, dismissed the application and it was in this background that the Hon'ble Supreme Court held as under:-

> "7.It was after the rejection of the plaint that the appellant filed miscellaneous application IA Nos. 1 and 2 of 2011 in RFA No.223 of 1991 praying for setting aside of order dated 1st August, 1995 by which the High Court had allowed the appeal filed by the respondents and set aside the decree passed in OS No.5236 of 2005 on the basis of the alleged compromise between the parties. The appellant's case before the High Court was that no such compromise had taken place nor was any compromise petition ever signed by him. It was also alleged that the appellant had given no instructions to his advocate for presenting any compromise petition and that the alleged compromise petition was totally fraudulent and based on forged signature of the appellant apart from being unauthorised as the counsel

engaged by him had no authority to present or report any such compromise before the Court. The appellant also prayed for condonation of delay in filing the application for setting aside the compromise decree passed by the High Court.

8. The High Court of Karnataka has by its orders impugned in this appeal, dismissed IA No.1 of 2011 filed by the appellant without even adverting to the provisions of Order XXIII Rule 3 CPC and in particular Rule 3A which bars a suit to have a compromise decree set aside on the ground that the compromise on which the decree had been passed did not exist or take place. The High Court appears to have taken the view that even if the compromise was fraudulent since the appellant had filed a suit for declaration he ought to pursue the same to its logical conclusion. The High Court further held that even if the plaint in the suit filed by the appellant had been rejected in terms of Order VII Rule 11(d) of CPC, the appellant ought to seek redress against any such

order of rejection. The High Court has on that basis declined to consider the prayer made by the appellant for setting aside the compromise decree.

9. The precise question that falls for determination in the above backdrop is whether the High Court was right in directing the appellant to seek redress in the suit having regard to the provisions of Order XXIII rule 3 and Rule 3A of CPC.

10. Order XXIII Rule 3 and Rule 3A of CPC may at this stage be extracted for ready reference:

> *"**3. Compromise of suit**. - Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise [in writing and signed by the parties], or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise, or satisfaction is the same as the subject-matter of the suit]:*
>
> *[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]*
>
> *Explanation - An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 shall not be deemed to be lawful within the meaning of this rule."*

11. It is manifest from a plain reading of the above that in terms of the proviso to Order XXIII Rule 3 where one party alleges and the other denies adjustment or satisfaction of any suit by a lawful agreement or compromise in writing and signed by the parties, the Court before whom such question is raised, shall decide the same. What is important is that in terms of Explanation to Order XXIII Rule 3, the agreement or compromise shall not be deemed to be lawful within meaning of the said rule if the same is void or voidable under Indian Contract Act, 1872. It follows that in every case where the question arises whether or not there has been a lawful agreement or

compromise in writing and signed by the parties, the question whether the agreement or compromise is lawful has to be determined by the Court concerned. What is lawful will in turn depend upon whether the allegations suggest any infirmity in the compromise and the decree that would make the same void or voidable under the Contract Act. More importantly, Order XXIII Rule 3A clearly bars a suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful. This implies that no sooner a question relating to lawfulness of the agreement or compromise is raised before the Court that passed the decree on the basis of any such agreement or compromise, it is that Court and that Court alone who can examine and determine that question. The Court cannot direct the parties to file a separate suit on the subject for no such suit will lie in view of the provisions of Order XXIII Rule 3A of CPC. That is precisely what has happened in the case at hand. When the appellant filed OS No.5326 of 2005 to challenge validity of the compromise decree, the Court before whom the suit came up rejected the plaint under Order VII Rule 11 CPC on the application made by the respondents holding that such a suit was barred by the provisions of Order XXIII Rule 3A of the CPC. Having thus got the plaint rejected, the defendants (respondents herein) could hardly be heard to argue that the plaintiff (appellant herein) ought to pursue his remedy against the compromise decree in pursuance of OS No.5326 of 2005 and if the plaint in the suit has been rejected to pursue his remedy against such rejection before a higher Court.

12. The upshot of the above discussion is that the High Court fell in a palpable error in directing the plaintiff to take recourse to the remedy by way of separate suit. The High Court in the process remained oblivious of the provisions of Order XXIII Rules 3 and 3A of the CPC as also orders passed by the City Civil Court rejecting the plaint in which the Trial Court had not only placed reliance upon Order XXIII Rule 3A but also the decision of the Court in Pushpa Devi's case holding that a separate suit was not maintainable and that the only remedy available to the aggrieved party was to approach the Court which had passed the compromise decree. The following passage from the decision of Pushpa Devi case is, in this regard, apposite:

> "17. ..Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8- 2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few daysthereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second defendant was not

> maintainable, having regard to the express bar contained in Section 96(3) of the Code."
>
> We may also refer to the decision of this Court in Banwari Lal v. Chando Devi, 1993 1 SCC 581where also this Court had observed:
>
> "13.....As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order XXIII, or an appeal under S. 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1-A of Order 13 of the Code."

13. Bearing in mind the aforesaid exposition of law, more particularly, the observations made in para -10 of the aforesaid judgment, it is evidently clear that all questions with regard to lawfulness validity of the agreement or compromise as being void or voidable or where the compromise, in question, having been obtained by a fraud, duress, coercion etc., the same has to be raised before that Court which passed the decree on the basis of any such agreement or compromise. The Court cannot direct the parties to file a separate suit on the subject or no such suit will lie in view of the provisions of Order 23 Rule 3-A CPC.

14. The substantial question of law is answered in favour of the appellants. Resultantly, I find merit in this appeal and the same is allowed and the judgment and decree passed by the first appellate Court is set aside and the suit filed by the plaintiff-respondent is ordered to be dismissed as being not maintainable under the provisions of Section 96(3) and Order 23 Rule 3 an 3-A of the CPC.

15. However, before parting, it needs to be noticed that learned Single Judge of this Court in ***Dhan Sukh's case (supra)*** has taken a contrary view to the one taken by the Hon'ble Supreme Court in ***R. Rajanna's case (supra)*** and has held that a suit set aside a compromise decree on the ground of fraud and misrepresentation would still be maintainable even after insertion of Rule 3-A to Order 23 of the Code of Civil Procedure. Obviously, the view taken by the learned Single Judge is no longer good law in light of the ratio laid down by the Hon'ble Supreme Court in ***R. Rajanna's case (supra).***

16. Normally, the judgment of Coordinate Bench of this Court, in absence of any judgment to the contrary by Hon'ble Supreme Court or by Larger Bench of this Court would be binding on this Bench and, in case, of any difference of opinion would be required to be referred to a Larger Bench.

17. However, no such reference is necessary if the Hon'ble Supreme court has given a decision in the matter because as soon as the Hon'ble Supreme Court gives its decision, all the decisions of the High Court on the point are overruled and this legal position has been duly noticed by Hon'ble Division Bench of this Court in ***Samriti Gupta and another vs. State of H.P. and others, Latest HLJ 2016 (HP) 191***, wherein it was observed as under:

> "13. Before parting, we may clarify that the judgment in *Arti Gupta case (supra)* was rendered by the Hon'ble Full Bench of this Court and would normally in absence of any judgment to the contrary by the Hon'ble Supreme Court be binding on this Bench and in case of any difference of opinion would be required to be referred to a larger Bench. However, no such reference is necessary if the Hon'ble Supreme court has given a decision in the matter because as soon as the Hon'ble Supreme Court gives its decision all decisions of the High Court on the point are overruled. (Reference in this regard is given to D. D. Basu Commentary on the Constitution of India, 8th

Edition and to the judgment of the Hon'ble Supreme Court in *D. C. M. vs. Shambhu, AIR 1978 SC8*.)

14. Even otherwise, Article 141 of the Constitution provides that the law declared by the Hon'ble Supreme Court shall be binding on all courts within the territory of India. Therefore, once the Hon'ble Supreme Court has decided the issue by passing a reasoned order, a fortiori, the ratio decidendi declared in the said decision would be binding on all the Courts in the Country for giving effect to it while deciding the lis of the same nature. All the Courts are under legal obligation to take note of the said decision and decide the lis in conformity with the law laid down therein."

18. The appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

Kanwaldeep Singh Monga & ors. ...Petitioner
Versus
Simranpreet Kaur ...Respondent

Cr.MMO No. 386 of 2017
Decided on: 22.11.2018

**Code of Criminal Procedure 1973-** Section 482**- Protection of Women from Domestic Violence Act, 2005 (Act)**- Section 12 – Inherent Powers- Exercise of- Quashing of complaint- Husband and his relatives filing petition for quashing of complaint filed against them under Section 12 of Act on ground that respondent (Wife) is adamant and despite settlement effected between parties before Gurudwara sabha, she left along with her father and also took away her clothes, ornaments and vehicle- There is no domestic violence to her as she is residing with her parents of her own volition - Held- Wife found having already led her evidence in complaint- Petitioners to prove their defense only during trial of that complaint before Trial Court- Petition dismissed. (Paras 5 to 7)

For the petitioners: Ms. Seema K.Guleria, Advocate.
For the respondent: Mr. Deepak Kaushal, Advocate.

The following judgment of the Court was delivered:

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**Vivek Singh Thakur, Judge.** *(Oral)*

Present petition has been filed for quashing and setting aside the the complaint No.14/3 of 2017 titled Simranpreet Kaur Versus Kanwal Singh Monga & ors., pending before learned Chief Judicial Magistrate, Sirmaur District at Nahan, H.P., under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter to be referred as the 'Act').

2. The main ground for allowing the petition as taken in the petition is that the dispute between the parties is a matrimonial dispute and settlement whereof was tried by

the petitioners, but on account of adamant attitude of respondent, it could not be settled and the respondent had willfully left the company of the petitioner No.1, as is evident from the compromise dated 26th July, 2016, arrived at between the parties before Gurudwara Shri Guru Singh Sabha, H.P. (Annexure P-2), wherein it is recorded that respondent was taken by his father on his own volition, without any pressure and with healthy mind, along with car and gold items and clothes with understanding that she will stay with her parents till the settlement of dispute. It is further case of the petitioners that as the respondent is not living with the petitioners and has left the matrimonial house at her own in July, 2016, hence there is no question of beating or abusing her or neglecting her. It is also submitted that respondent has herself proclaimed not to live in the company of the petitioner No.1 or his father and therefore, prayer in her complaint made for providing shared household is also a tactics to create pressure upon the petitioners. It is also submitted that petitioners have never neglected the respondent and are still ready to take her back to her matrimonial house and are ready to maintain her and therefore, petitioners are not liable to pay any amount as maintenance to the respondent and false allegations of keeping the 'stridhan' by the petitioners have also been made in the complaint so as to drag them in unnecessary litigation in order to pressurize them so as to succumb to her illegal demands. It is submitted by learned counsel for the petitioners that from orders dated 16th October, 2016, 16th November, 2016 and 29th November, 2016, passed by the Sessions Judge, Sirmaur District at Nahan, it is evident that during pendency of the bail application of the petitioners as recorded unambiguously in the list of articles prepared by the police during investigation of the said case, that items of 'stridhan', handed over by the petitioners to the police, were further handed over to respondent Simranpreet Kaur on supurdari. Therefore, it is pleaded that the trial Court has wrongly taken the cognizance of the case under Section 12 of the Act in the complaint filed by the petitioners.

3. On perusal of the record requisitioned from the trial Court, it transpires that the complaint was filed by the respondent on 14th March, 2017, whereafter report from Protection Officer was called upon by the trial Court and after receiving the report, notices were issued to the petitioners on 23rd March, 2017 and thereafter petitioners had appeared in the case and had defended themselves through counsel engaged by them. During pendency of the complaint, interim maintenance was also allowed in favour of respondent vide order dated 8th November, 2017. The respondent has also produced her witnesses, who were also cross-examined on behalf of the petitioners and evidence of complainant was closed on 23rd December, 2017, whereafter case was listed for recording evidence of petitioners on 15th January, 2018, on which date it was further adjourned on the request of counsel for the petitioners for recording evidence on 20th March, 2018. On 20th March, 2018, adjournment was sought on behalf of the petitioners/respondents, on the ground that they were consulting with the other advocate and case was fixed for recording evidence of the petitioners on 18th April, 2018.

4. The present petition was filed in October, 2017 and during pendency of the petition, it was considered appropriate to call for the record for adjudication of present petition.

5. Certain allegations have been levelled by respondent/ complainant in her complaint, which are being refuted by the petitioners (respondents in complaint) on the basis of certain documents. The petitioners have also levelled counter allegations. Claims and counter claims of the parties require to be proved by them in accordance with law as applicable to the proceedings in question.

6. It is admitted case of the parties that after the marriage of petitioner No.1 and respondent No.1, there were certain disputes between the parties resulting into separate

living of husband and wife. Lodging of complaint by respondent against the petitioners is also undisputed and returning of articles of 'stridhan' by the petitioners as per list placed on record with this petition, has also not been refuted by the respondent/complainant. However, the documents placed on record along with this petition, are yet to be tendered in evidence before the trial Court. It is not a case where it can be said that on the basis of material before the Magistrate, ex-facie, no case was made out. There was material before the Magistrate in the shape of the report of the Protection Officer, causing issuance of notice to the petitioners. However, issuance of notice to the petitioners does not mean that allegations levelled by the respondent/complainant have been accepted by the trial Court or the same stands proved. All allegations including report of the Protection Officer are subject to proof and judicial scrutiny before the trial Court in accordance with law, for which the respondent/complainant has already led evidence and now it is turn of the petitioners to lead their evidence to rebut the same. All documents relied upon by the petitioners in present petition are required to be placed on record before the trial Court in the pending proceedings and the trial Court has to decide the case on its own merits on the basis of material produced before it. Therefore, at this stage, I find no ground for interference in the proceedings pending before the trial Court and accordingly, petition is dismissed with direction to the parties to appear before the trial Court on **26th December, 2018**, on which date the trial Court shall fix the date for further effective proceedings in the matter.

7. This Court has not made any observation on merits of the case and no opinion has been expressed about allegations and counter allegations levelled by the parties against each other. Any observation made with respect to any fact in present petition shall be confined only to the adjudication of present petition and the matter shall be decided by the trial Court without influencing with any such observation made hereinbefore. The Registry is directed to return the record to the trial Court along with copy of the order immediately. Copy of order also be sent to the trial Court fax/e-mail. Petition is disposed of in aforesaid terms. No order as to costs.

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

State of Himachal Pradesh & another …Appellants.

Versus

Inder Singh Verma (now deceased through the legal representatives) Promila Panwar & others …Respondents.

RFA No. 197 of 2014 alongwith
RFA Nos.198 to 206 of 2014
Date of Decision: November 27, 2018

**Land Acquisition Act, 1894**- Sections 18 & 23- Acquisition of land for public purpose- Reference- Market value- Determination- Held- When land in different villages having same nature and potentiality is acquired for common purpose under same Notification, claimants entitled for compensation at uniform rate irrespective of classification of land. (Para 10)

**Land Acquisition Act, 1894**- Sections 18 & 23- Acquisition of land for public purpose- Reference- Market value- Determination- State acquiring lands in villages 'N' 'S' and 'K' for construction of road under same Notification- Land Acquisition Collector awarding compensation to claimants of village 'K' at Rs.30,000/- per bigha- Reference Petitions-

District Judge enhancing compensation at rate of Rs.10,00,000/- per bigha- RFA- Nature and potentiality of lands situated in villages 'N' 'S' and 'K' found similar- All lands to be used for common purpose- Lands acquired under same Notification- Collector awarding Rs.10,00,000/- per bigha in respect of best quality of land for villages N and S- Held- Since lands of all these villages have same nature and potentiality claimants are entitled to compensation at uniform rates- District Judge was justified in enhancing compensation at market rate of Rs.10,00,000/- per bigha of claimants of village 'K' (Paras 6 to 15)

**Land Acquisition Act, 1894**- Section 25- Acquisition of land for public purpose- Market value- Determination- Held- Market value of Land cannot be determined by Reference Court lesser than value fixed by Land Acquisition Collector.(Para 10)

**Land Acquisition Act, 1894**- Section 25- Appeals against common award passed by Learned District Judge (Forests), Shimla- Common question of law – Determination of compensation- Award pertaining to village Nagrhi and Award pertaining to village Sari - Land Acquisition Collector determined highest value of the land @ Rs.10,00,000/- per bigha- As per Section 25 of the Act, Court cannot determine value of land lesser than value determined by Land Acquisition Collector. Where purpose of land acquisition is common like construction of road, compensation is to be awarded on uniform rates by considering entire land as a single unit irrespective of its classification. Held- Reference Court has not committed any irregularity by awarding same rate of Rs.10,00,000/- per bigha to land owners of Village Keer irrespective of its nature and classification. Appeals dismissed. (Para 14)

***Cases referred:***

Ali Mohammad Beigh and others vs. State of Jammu and Kashmir, (2017) 4 SCC 717
Dadu Ram vs. Land Acquisition Collector and others, (2016) 2 ILR 636 (HP)
Executive Engineer and another vs. Dila Ram, Latest HLJ 2008 (HP) 1007
G.M. Northern Railway vs. Gulzar Singh and others, Latest HLJ 2014 (HP) 775
H.P. Housing Board vs. Ram Lal and others, 2003 (3) Shim.L.C. 64
Himmat Singh and others vs. State of Madhya Pradesh and another, (2013) 16 SCC 392
LAC and another vs. Bhoop Ram and others, 1997 (2) SLC 229
Peerappa Hanmantha Harijan (Dead) By Legal Representative and others vs. State of Karnataka, (2015) 10 SCC 469
Smt. Gulai and etc. vs. State of H.P., AIR 1998 HP 9
Union of India vs. Harinder Pal Singh and others, (2005) 12 SCC 564

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| For the Appellants: | Mr. Shiv Pal Manhans, Additional Advocate General with M/s R.P. Singh & Raju Ram Rahi, Deputy Advocate Generals. |
| For the Respondents: | M/s Chander Paul Sood & Dibender Ghosh, Advocates, for the respective respondents. |

The following judgment of the Court was delivered:

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**Vivek Singh Thakur, J. (oral)**

All these appeals arising out of the common award dated 17.07.2013 passed by learned District Judge (Forests), Shimla, H.P. (hereinafter referred to as the Reference Court) are being decided by this common judgment as the common questions of law and facts are involved therein.

2. Land Reference Petition No.24-S/4 of 2012/06, titled as *Inder Singh & another vs. State of Himachal Pradesh & another;* Reference Petition No.25-S/4 of 2012/06, titled as *Inder Singh & another vs. State of Himachal Pradesh & another;* Reference Petition No.26-S/4 of 2012/06, titled as *Inder Singh vs. State of Himachal Pradesh & another;* Reference Petition No.27-S/4 of 2012/06, titled as *Med Ram & another vs. State of Himachal Pradesh & another;* Reference Petition No.28-S/4 of 2012/06, titled as *Bakshi Ram vs. State of Himachal Pradesh & another;* Reference Petition No.29-S/4 of 2012/06, titled as *Praveen Kumar vs. State of Himachal Pradesh & another;* Reference Petition No.30-S/4 of 2012/06, titled as *Inder Singh & others vs. State of Himachal Pradesh & another;* Reference Petition No.32-S/4 of 2012/06, titled as *Roshan Lal & others vs. State of Himachal Pradesh & another*; and Reference Petition No.33-S/4 of 2012/06, titled as *Kanhaya & others vs. State of Himachal Pradesh & another,* arising out of Award No.32 of 2005, dated 22.01.2005 passed by the Land Acquisition Collector and Reference Petition No.31-S/4 of 2012/06, titled as *Inder Singh vs. State of Himachal Pradesh & another,* arising out of Award No.36 of 2005, dated 26.02.2005 passed by the Land Acquisition Collector, with respect to the land of Village Keer, Tehsil Shimla (Rural), District Shimla, H.P., were clubbed together by the Reference Court and evidence was led in one lead case i.e. Reference Petition No.24-S/4 of 2012-06, titled as *Inder Singh & another vs. State of Himachal Pradesh & another.*

3. Brief facts of the case are that the appellant-State has acquired the land situated in 5 Villages, namely, Nagrhi, Salana, Lagru, Keer and Sari, for construction of Salana-Sari link road, by invoking the provisions of the Land Acquisition Act, 1894 (hereinafter referred to as the Act), after issuing Notification No.PBW-B(A) (7)-1-68/97 dated 01.11.1997, under Section 4 of the Act, last publication whereof, took place on 20.12.1997. After completing the process, Land Acquisition Collector had passed Award Nos.32 of 2005, dated 22.01.2005 and 36 of 2005, dated 26.02.2005, awarding uniform rates to the land owners of Village Keer @ Rs.30,000/- per bigha.

4. It is also noticeable that with respect to other four Villages, the Land Acquisition Collector had announced the Award during the years 2000-2001 causing the land owners of Village Keer to approach this Court by filing a CWP No.141 of 2003, titled as *Inder Singh vs. State of H.P.,* resultantly, leading to the announcement of Award Nos.32 of 2005 and 36 of 2005 by the Land Acquisition Collector.

5. Feeling aggrieved and dissatisfied with the Awards announced by the Land Acquisition Collector, land owners had preferred Land Reference Petitions detailed hereinabove, wherein, they had examined seven witnesses to substantiate their claim. Inder Singh (PW.1), Shankar Lal (PW.4), Kanhaya Lal (PW.5), Bakshi Ram (PW.6) and Roshan Lal (PW.7) are the land owner claimants. Whereas, Bhajan Dass (PW.2) is Patwari in the Office of Land Acquisition Collector and Geeta Ram (PW.3) is Investigator Grade-II in the office of Labour Bureau, Shimla. Appellant-State had examined one witness to dislodge the claim of land owners

6. The land owners have put reliance on Award No.15/2000, dated 30.12.2000 (Ex.PW.1/B) and Award No.1/2001, dated 02.02.2001 (Ex.PW.1/D), passed by the Land Acquisition Collector with respect to acquisition of land in Villages Nagrhi and Sari, wherein, the Land Acquisition Collector, on the basis of rates determined by the District Collector, has awarded amount of compensation on the basis of classification of land and value of land was assessed as under:-

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| (I) | Kuhal | Rs.10,00,000/- Per Bigha |

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|---|---|---|
| (II) | Bangar-I | Rs.5,50,000/- Per Bigha |
| (III) | Bangar-II | Rs.4,40,000/- Per Bigha |
| (IV) | Bangar-III | Rs.1,40,000/- Per Bigha |
| (V) | Banjer | Rs.70,000/- Per Bigha |
| (VI) | Ghasni | Rs.30,000/- Per Bigha |

7. Ajeet Kapoor (RW.1), Assistant Engineer, HP PWD, in his examination-in-chief, has stated that the land in question is situated at a distance of 10-11 kilometers from the Highway and it was a hilly area without any remarkable development and there was no Kuhal and thus he has justified the rate of compensation awarded by the Land Acquisition Collector. In his cross-examination, he has shown his ignorance about the fact that under the same Notification issued under Section 4 of the Act, land of other Villages, namely, Lagru, Salana, Nagrhi and Sari, was also acquired alongwith the land of Village Keer. He has also expressed his ignorance about any proceeding of acquisition in the present case and also about the value of land determined by the Land Acquisition Collector with respect to Villages Nagrhi and Sari. Therefore, there is no worth in statement of this witness.

8. In the Reference Petition preferred by the land owners, it is submitted in paragraph-1 that the land in Village Keer was acquired in pursuance to Notification No. No.PBW-B(A) (7)-1-68/97 dated 01.11.1997, issued under Section 4 of the Act alongwith the land of four Villages, namely, Lagru, Salana, Nagrhi and Sari, situated in Tehsil and District Shimla, H.P. In reply to the petition, this fact has been admitted to be correct in paragraph-1 and also in paragraph-6, wherein it is stated that land of all the five Villages, namely, Keer, Lagru, Salana, Nagrhi and Sari, was acquired under the same Notification. The said fact has also been reiterated in the evidence of Inder Singh (PW.1), which is not disputed in his cross-examination on behalf of the appellant-State.

9. It is further the case of the land owners that from Shoghi to Sari first Village is Nagrhi and last Village is Sari and Village Keer is situated in between these two Villages. This fact, stated in paragraph-6 of the Reference Petition, has not been denied by the appellant-State, rather in paragraph-6 of the reply, it is stated that in other four Villages except Village Keer, there was no sale transaction during the one year prior to the issuance of Notification under Section 4 of the Act and therefore, the District Collector had approved the same rate for other four villages on the basis of Village Keer, meaning thereby the nature and potential of land of these villages, by the Land Acquisition Collector, was found to be identical. Therefore, District Collector also had determined the value of the land in other four Villages on the basis of value of land in Village Keer. Not only this, in the evidence of Inder Singh (PW.1) filed by way of an affidavit, in paragraph-6, it is specifically claimed that potential of the acquired land in Village Keer is the same as that of the land acquired in Villages Nagrhi and Sari. This fact has not been disputed in the cross-examination of this witness nor this fact has been disputed in the statement of appellant-State's witness Ajeet Kapoor (RW.1).

10. As noticed above, in Award (Ex.PW.1/B) pertaining to village Nagrhi and Award (Ex.PW.1/D) pertaining to village Sari, Land Acquisition Collector had determined the highest value of the land @ Rs.10,00,000/- per bigha. As per Section 25 of the Act, Court cannot determine the value of the land lessor than the value determined by the Land Acquisition Collector. Further, where purpose of land acquisition is common like

construction of road, compensation is to be awarded on uniform rates by considering the entire land as a single unit irrespective of its classification.

11. The law awarding compensation at uniform rates when purpose of acquisition is common and acquired land is to be utilized in the same manner irrespective of its classification, is no longer *res integra* and it is well settled that in such a case, land owners-claimants would be entitled for compensation on uniform basis irrespective of nature, classification and category. [See: *Peerappa Hanmantha Harijan (Dead) By Legal Representative and others vs. State of Karnataka,* (2015) 10 SCC 469, *Himmat Singh and others vs. State of Madhya Pradesh and another,* (2013) 16 SCC 392; *Dadu Ram vs. Land Acquisition Collector and others,* (2016) 2 ILR 636 (HP); *H.P. Housing Board vs. Ram Lal and others, 2003 (3) Shim.L.C. 64; Union of India vs. Harinder Pal Singh and others,* (2005) 12 SCC 564; *Executive Engineer and another vs. Dila Ram,* Latest HLJ 2008 (HP) 1007; *LAC and another vs. Bhoop Ram and others,* 1997 (2) SLC 229; *Smt. Gulai and etc. vs. State of H.P.,* AIR 1998 HP 9; *G.M. Northern Railway vs. Gulzar Singh and others,* Latest HLJ 2014 (HP) 775.

12. The Apex Court in *Ali Mohammad Beigh and others vs. State of Jammu and Kashmir,* (2017) 4 SCC 717, has held that where the land under the acquisition in different Villages is identical and similar then the rate awarded for acquiring the land in adjacent Village, for the similar purpose can be a base for determining the same value of compensation to the adjoining village.

13. In the present case nature and potential of the land and purpose of the acquisition is the same more particularly acquisition is in pursuance to the common Notification.

14. It has come in the evidence that Village Keer is in between Villages Nagrhi and Sari and in evidence produced by the land owners it has come on record that the nature and potential of the land of these Villages is same to that of village Keer and for these two Village highest rate of compensation has been determined by the Land Acquisition Collector @ Rs.10,00,000/- per bigha. Therefore, keeping in view the provisions of Section 25 of the Act and the settled position of law uniform rate is to be given. Reference Court has not committed any irregularity, illegality or perversity by awarding the same rate of Rs.10,00,000/- per bigha to the land owners of Village Keer irrespective of its nature and classification.

15. In view of the above discussion, all these appeals are dismissed and the award passed by the District Judge (Forests), Shimla, is affirmed and the respondents/land owners are held entitled for compensation for the acquisition of their land @ Rs.10,00,000/- per bigha alongwith all statutory benefits. Pending application(s), if any are also disposed of in aforesaid terms.

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

Municipal Corporation Shimla ...Appellant.
Versus
Hari Nand and others ...Respondents.

CMP(M) No. 889 of 2018

Decided on: 30.11.2018

**Code of Civil Procedure, 1908-** Sections 2(2) & 114**-** Whether order of dismissal of review petition would merge with original decree. Held- When petition seeking review of original decree is dismissed by Court, it does not result in merger of said order with original decree- Aggrieved party must assail the original decree (Para 6)

**Code of Civil Procedure, 1908-** Sections 114- **Land Acquisition Act, 1894-** Sections 18 & 54 **- Limitation Act, 1963-** Section 5- Computation of period in filing appeal- Condonation of delay - Grounds- District Judge passing Award in respect of land acquired by State- State preferring Review against Award- Interregnum, assets and liabilities of that area stood transferred from State to Municipal Corporation Shimla (M C Shimla)- M C Shimla not being party to Reference or Review proceedings, seeking leave to file Regular First Appeal (RFA) against original Award and also for condonation of delay in filing RFA- Claimants resisting leave as well as condonation of delay on ground of appeal not maintainable against order of dismissal of Review- And appeal against original Award barred by limitation- Held- Assets and liabilities of area since stood transferred from State to MC Shimla, it can file appeal against original Award- Appellant challenging original Award also in addition to order passed in Review petition- Time spent in pursuing Review petition condoned- Applications allowed.(Paras 6 to 10)

***Cases referred:***

DSR Steel (Private) Limited Versus State of Rajasthan and others, (2012) 6 SCC 782

Eastern Coalfields Limited Versus Dugal Kumar, (2008) 14 SCC 295

Kasi Viswanathan Versus Jayalakshmi Ammal & Others, 2000 3 LW 844; 2000 (0) Supreme (Mad) 874

Manohar S/O Shankar Nale & Others Versus Jaipalsing S/O Shiviaising Rajput & Others, 2008 (1) SCC 520

Manohar Shankar Nale Versus Jaipalsing Shiviaising Rajput, AIR 2008 SC 429

Municipal Corporation of Delhi versus Yashwant Singh Negi, 2013 (5) Scale 447

Seema Mitra Versus Lotika Mitra, AIR 1995 MP 128

Shankar Motiram Nale Versus Shiolalsinig Gannusing Rajpur [(1994) 2 SCC 753

Shiv Charan Singh Versus the State of Punjab & Ors., (2007) 15 SCC 370; 2006(9) Supreme 350

State of Rajasthan Versus Shri Maharajkumar Yashwant Singh, 1965 (0) RLW (RJ) 74; 1965 (0) Supreme (Raj) 90

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| For the applicant/appellant: | Mr. Hemender Singh Chandel, Advocate. |
| For the respondent No.1: | Mr. Tek Chand Sharma, Advocate. |
| For respondents No.2 to 4: | Mr.Shiv Pal Manhans, Additional Advocate General with Mr.R.P. Singh and Mr. Raju Ram Rahi, Deputy Advocate Generals. |

The following judgment of the Court was delivered:

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**Vivek Singh Thakur, Judge.** *(Oral)*

**CMP No.6472 of 2018**

This application has been filed on behalf of the applicant/Municipal Corporation, seeking permission to assail the award dated 8th January, 2010, passed by

learned District Judge, Shimla, in Land Reference No.45-S/4 of 2006, titled as Hari Nand Versus State of H.P. and also order dated 30th December, 2017, passed in Review Petition No.2 of 2015, titled as Hari Nand Versus State of H.P. and others.

2. It is stated in the application that on passing of the impugned award, dated 8th January, 2010, the area concerned, wherein acquisition proceedings had taken place, was in direct control of the State of H.P. and therefore, reference petition was preferred against the State of H.P., wherein Municipal Corporation was not a party. After passing of the impugned award, State of H.P. had filed the Review Petition No.2 of 2015, seeking modification of the award passed by the Reference Court and this Review Petition was finally dismissed on 30th December, 2017, by this Court. During the pendency of the Review Petition, on 12th July, 2016, the entire assets and liabilities of the area concerned have vested with the applicant/Municipal Corporation and therefore, amount awarded by the impugned order is to be borne by the applicant/Municipal Corporation. After having information with regard to passing of the impugned award dated 8th January, 2010 and order dated 30th December, 2017, passed in Review Petition, the Municipal Corporation has proposed to assail the impugned award along with order passed in the Review Petition, by preferring an appeal, which ultimately caused to filing of present application along with appeal and application for condonation of delay in filing the appeal. In these circumstances, leave has been sought by the Municipal Corporation to assail the impugned award/order, passed in Land Reference Petition/Review Petition. Therefore, in these circumstances, I am of the considered opinion that after having vested with the liabilities of the concerned area, the applicant/Municipal Corporation has a right to assail the impugned judgment/order and therefore, deserves to be permitted to prefer an appeal instead of State of H.P.

3. Irrespective of the fact that Municipal Corporation was not a party before the Reference Court. But now, Municipal Corporation has entered in shoes of State of H.P. Therefore, present application is allowed and Municipal Corporation is permitted to assail the impugned judgment and order, by preferring the appeal. Application is disposed of.

**CMP(M) No.889 of 2018**

This application has been filed for condonation of delay in filing the appeal to assail the impugned award dated 8th January, 2010, passed by the Reference Court under Section 18 of the Land Acquisition Act, in Land Reference No.45-S/4 of 2006, titled as Hari Nand Versus State of H.P. and also order dated 30th December, 2017, passed in Review Petition No.2 of 2015, titled as Hari Nand Versus State of H.P. and others.

2. It is stated in the application that on passing of the impugned award, dated 8th January, 2010, the area concerned, wherein acquisition proceedings had taken place, was in direct control of the State of H.P. and therefore, reference petition was preferred against the State of H.P., wherein Municipal Corporation was not a party. After passing of the impugned award, State of H.P. had filed the Review Petition No.2 of 2015, seeking modification of the award passed by the Reference Court. The said Review Petition was finally dismissed on 30th December, 2017, by the High Court.

3. During the pendency of the Review Petition, on 12th July, 2016, the entire assets and liabilities of the area concerned have vested with the applicant/Municipal Corporation and therefore, amount awarded by the impugned order is to be borne by the applicant/Municipal Corporation. After having information with regard to passing of the impugned award dated 8th January, 2010 and order dated 30th December, 2017, passed in Review Petition, the Municipal Corporation has proposed to assail the impugned award along with order passed in the Review Petition, by preferring an appeal, which ultimately

caused filing of present application along with appeal and application for condonation of delay in filing the appeal.

4. In these circumstances, after counting the period of limitation from the date of passing the order in Review Petition, application, for condonation of 47 days delay has been filed.

5. The application has been contested by the respondents/claimants, on the ground that (a) appeal has also been filed against the order passed in the Review Petition, which is not permissible under the Law. Therefore, as the appeal itself is not maintainable, the application for condonation of delay is also not maintainable; (b) the delay is to be counted from the date of passing of the award by the Reference Court, not from the Review Petition and as both the remedies were available to the applicant/appellant i.e. filing of appeal or Review Petition against the award and predecessor of the applicant had chosen to avail remedy of Review Petition, appellant Municipal Corporation cannot be permitted to take benefit of the period spent during the pendency of Review Petition and therefore, there is inordinate delay of more than eight years in filing the appeal and thus, the application deserves to be rejected.

6. Learned counsel for the respondent has submitted that in appeal proposed to be preferred by the applicant after seeking condonation of delay, prayer for setting aside the judgment passed in review has been made and as the order of dismissal passed in Review Petition is not appealable, the application seeking condonation of delay for filing a such appeal is not maintainable and liable to be dismissed. **To substantiate his contention that appeal is not maintainable against the dismissal of review petiton,** he has relied upon the judgment passed by the Apex Court in ***Seema Mitra Versus Lotika Mitra reported in AIR 1995 MP 128***, wherein it has been held that there cannot be an appeal against the rejection of review application on merits or on default. Further reliance has been put on the judgment passed by the Apex Court in ***Manohar Shankar Nale Versus Jaipalsing Shiviaising Rajput, reported in AIR 2008 SC 429***, wherein it has been held that doctrine of merger of the order passed in Review Petition is not applicable in those cases, where Review Petition is dismissed.

7. It is true that full Bench of High Court of Madhya Pradesh in Seema Mitra's case supra, has held that there cannot be an appeal against the rejection of Review Application on merits, or on default, but with further clarification that the remedy would be only to challenge the judgment and order originally passed in Manohar Shankar Nale's case supra, the Apex Court has held that doctrine of merger will not have any application in case of dismissal of review petition, but it has not held that after dismissal of Review Petition, the aggrieved party cannot avail the remedy of assailing the impugned judgment by filing a statutory appeal. The question involved in the matter before the Apex Court in this case was relating to starting point of limitation for filing an execution petition and it was held that on rejection of Review Petition, the limitation would start from the date of passing of original judgment/order passed by the Court and not from the date of rejection of Review Petition.

8. Reliance has also been put upon the judgment passed by the High Court of judicature at Madras in ***Kasi Viswanathan Versus Jayalakshmi Ammal & Others, reported in 2000 3 LW 844; 2000 (0) Supreme (Mad) 874***, wherein it is observed that it is not open to the applicant to seek the remedy of appeal belatedly, who has availed the alternative relief available to him by filing a Review Petition, which stands dismissed.

9. The judgment, in Kasi Viswanathan's case, on facts, is not applicable in present case as in this case the party had alternative remedies available with it to assail the

impugned judgment either by filing a petition under Order 9, Rule 13 C.P.C. for setting aside the ex-parte decree or by filing a statutory appeal against the said ex-parte decree and the aggrieved party had availed one remedy by filing an application under Order 9, Rule 13 C.P.C. and in such a situation, it was held that the said party has no right to file appeal, whereas in present case, filing of Review Petition and preferring a statutory appeal against the impugned original order, are not alternative remedies, but such remedies can be available simultaneously without waiting the outcome of the another and in fact, this is the argument advanced by the respondent that instead of waiting for result of Review Petition, applicant should have also preferred a statutory appeal within the limitation period.

10. Referring the judgment passed by the Board of Revenue in ***State of Rajasthan Versus Shri Maharajkumar Yashwant Singh, reported in 1965 (0) RLW (RJ) 74; 1965 (0) Supreme (Raj) 90***, it is contended that where the appeal has not been preferred within the limitation period and Review Petition stands dismissed, the appeal preferred against the impugned order/judgment is not maintainable being barred by limitation. This judgment has been passed by Board of Revenue and thus, it does not even have the persuasive value. However, even otherwise, on facts, this judgment is also not applicable in present case as the question involved therein was altogether different. In this case, the Review Petition, preferred by the aggrieved party after expiry of limitation period for filing appeal, was dismissed and thereafter, the appeal was preferred with a claim that the appeal is within limitation from the date of rejection of Review Petition and in such a situation, it has been held that appeal was barred by limitation. In present case, the applicant is not claiming that appeal within the limitation, but the applicant is seeking condonation of delay by filing this application.

11. The respondent has also relied upon the judgment passed by the Apex Court in ***Shiv Charan Singh Versus the State of Punjab & Ors.,*** reported in ***(2007) 15 SCC 370; 2006(9) Supreme 350***, wherein relying upon another judgment of the Apex Court in ***Shankar Motiram Nale Versus Shiolalsinig Gannusing Rajpur [(1994) 2 SCC 753***, it has been held that an appeal filed against the rejection of application for review of judgment is incompetent and not maintainable. On facts, this judgment is also distinguishable as the appeal proposed by the applicant is not only against the rejection of Review Petition, but also against the original judgment and decree passed by the Court, against which the Review Petition has been dismissed.

12. Learned counsel for the applicant has put reliance on the judgment passed by the Apex Court in ***Municipal Corporation of Delhi versus Yashwant Singh Negi,*** reported in ***2013 (5) Scale 447,***wherein after dissenting from a judgment passed by the apex Court itself in ***Eastern Coalfields Limited Versus Dugal Kumar,*** reported in ***(2008) 14 SCC 295*** and relying upon another judgments passed by the apex Court in cases ***Manohar S/O Shankar Nale & Others Versus Jaipalsing S/O Shiviaising Rajput & Others,*** reported in ***2008 (1) SCC 520*** and ***DSR Steel (Private) Limited Versus State of Rajasthan and others,*** reported in ***(2012) 6 SCC 782***, it has been observed as under:-

> 4. "We find ourselves unable to agree with the views expressed by this Court in Eastern Coalfields Limited (supra). In our view, once the High Court has refused to entertain the review petition and the same was dismissed confirming the main order, there is no question of any merger and the aggrieved person has to challenge the main order and not the order dismissing the review petition because on the dismissal of the review petition the principle of merger does not apply. In this connection reference may be made to the judgment of this Court in Manohar S/O Shankar Nale and others v. Jaipalsing S/O Shivalsing Rajput and others (2008) 1 SCC 520,

wherein this Court has taken the view that once the merger will have no application whatsoever. This Court in DSR Steel (Private) Limited V. State of Rajasthan and others (2012) 6 SCC 782 also examined the various situation which might arise in relation to the orders passed in review petitions. Reference to paragraphs 25, 25.1, 25.2 and 25.3 is made, which are extracted below for ready reference.

"25. Different situations may arise in relation to review petitions field before a court or tribunal.

"25.1.One of the situations could be where the review application is allowed, the decree or order passed by the Court or tribunal is vacated and the [pie] appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree along is applicable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the court hearing the review petition.

25.2. The second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous which such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for the purpose of a further appeal, if any, maintainable under law.

25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated law, the original decree and not the order dismissed the review petition. Time taken by a party in diligently pursing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition".

13. Present case is covered by sub-para 25.3 of Yashwant Singh Negi's case, referred supra and therefore, this application for condonation of delay is not only maintainable, but also deserves to be allowed and the time spent for pursuing the remedy by way of review deserves to be excluded/condoned for filing the appeal. So far as the maintainability of the appeal against the rejection and dismissal of review petition is concerned, that shall be considered in the appeal itself. However, even otherwise, the appeal is not only against the rejection of review petition, but also against the original judgment and decree passed by the Court. Therefore, delay in filing the appeal is condoned. Appeal be registered. Application is disposed of.

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

Shakuntla Devi .....Petitioner.
Versus
State of H.P. .....Respondent.

Cr.MP(M) No. 1509 of 2018
Decided on : 4.12.2018

**Code of Criminal Procedure, 1973-** - Regular bail – Grant of- Applicant booked as co-accused for offences under Sections 302, 201, read with Section 120-B of Penal code seeking regular bail- Earlier bail application of applicant dismissed by Sessions court when case was under investigation- Applicant filing fresh application after presentation of chargesheet- On facts, applicant already enabled recovery of burnt clothes of deceased- No material suggesting her direct participation in commission of murder- She cooperated during investigation- Application allowed with conditions. (Paras 5 & 6)

For the petitioner: Mr. Satyen Vaidya, Sr. Advocate with
Mr. Vivek Sharma, Advocate
For the respondent: Mr. Hemant Vaid & Mr. Desh Raj Thakur, Addl. A.Gs. with Mr. Vikrant Chandel, Dy. A.G.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, J (oral)**

The instant petition, has been filed by the applicant/accused, under Section 439, Code of Criminal Procedure, wherethrough, she seeks, an order, for hers being released from judicial custody, whereat she is extantly lodged, for, hers allegedly committing an offence, punishable under Sections 302, 201, read with Section 120-B of the Indian Penal Code, in respect whereof, an FIR No. 56 of 2018, of, 30.4.2018, is, registered with Police Station, Jawali, District Kangra, H.P.

2. Prior to the institution of the instant bail application before this Court, the latter had instituted an application, cast under Section 439 Cr.P.C., before the learned Additional Sessions Judge (2), Kangra at Dharmshala, H.P., and, the latter had, on 10.7.2018, recorded an order, hence dismissing her bail application. However, since then upto now, the prosecution has filed, a, report under Section 173 Cr.P.C. before the learned Committal Court concerned, and, thereafter, the bail-applicant, has been charged for committing the afore offences, (i) whereupon the afore event hence obviously constitutes a changed circumstance, since, the, rejection of the earlier bail application, by the learned Additional Sessions Judge (2), Kangra at Dharmshala, H.P., upto, the institution of the instant bail-application before this Court, (ii) whereupon it is hence rendered maintainable.

3. The principal accused, inflicted the fatal blows' upon the deceased hence purportedly, by, user of stones, and, danda, both whereof stood respectively recovered at his instance, by the Investigating Officer concerned, through respectively drawn memos (i) AND, upon the afore purported recoveries, the prosecution ascribes qua him, the role of his committing an offence, punishable under Section 302 of the Indian Penal Code. However,

the bail-applicant, is also contended by the learned Additional Advocate General, to, also along with the afore, being an accessory, at, the fact, (ii) submission whereof is rested, upon, the fact, of, hers rather enabling effectuation, of, recovery of the burnt clothes, of the deceased. The alleged occurrence took place, in, the night, intervening 28.4.2018, and, 29.4.2018, and, the afore occurrence also took place in the house, jointly inherited by the bail-applicant, and, the afore principal offender, (iii) hence the learned Additional Advocate General contends, qua, hers' visibly being presumed, to be hence residing at the place of occurrence, along with her son(s), and, with hers not rearing any idea, of, alibi, hence he further contends, that, the afore submission rather gathering immense weight. However, for the reasons ascribed hereinafter, this Court negatives, his afore submission (a) the incident, occurring in the night, intervening 28.4.2018, and, 29.4.2018, being reported by the real daughter of the bail-applicant, to, the police, and, (b) in her statement, recorded under Section 161 Cr.P.C., hers' making clear echoings qua the bail-applicant rather unfolding to her qua the deceased, being murdered by her son ,one Matta Dass, (c) since the afore rendered statement also galvanized, the criminal machinery, and, when the daughter, of, the bail-applicant, is not residing along with the latter, rather, is residing, at her matrimonial home, (iv) hence the afore rendered statement by one Reena, encapsulating, therein the afore version, is, a palpable display, vis-a-vis, the prima facie innocence, of the bail applicant. Moreover, the effect, of, the afore inference, is qua even if the bail-applicant, has enabled the recovery, of the burnt clothes of the deceased, thereupon, no argument can be made by the learned Additional Advocate General qua hers being, an, accessory at the fact.

4. Be that as it may, even the postmortem report, vis-a-vis, the body of the deceased, rather stood, conducted on 1.5.2018, hence belatedly, since the ill-fated occurrence taking place, and, much subsequent to the afore rendered statement, recorded by the the bail-applicant, (i) hence the prosecution, has obviously precluded surfacing, of, material with respect to the timing, of occurrence or vis-a-vis the presence thereat, of, the bail applicant, (ii) whereupon all the afore inferences also acquire tenacity.

5. In summa, at this stage, the only offence prima facie ascribable, vis-a-vis, the bail applicant, is, the one embodied, in, Section 201, of, the Indian Penal Code.

6. The bail-applicant/accused is suffering judicial incarceration, for, seven months, hence bearing in mind the aforesaid factum, this Court deems it fit and appropriate, importantly, when the Investigating Officer has reported that the bail-applicant, has throughout associated herself, hence, in the relevant investigation, to, hence afford, the facility of bail in favour of the bail applicant/petitioner. Moreso, when at this stage, no evidence has been adduced by the prosecution, demonstrating, that in the event of bail being granted to the bail applicant/petitioner, there being every likelihood of her fleeing from justice or tampering with prosecution evidence, Accordingly, the indulgence of bail, is, granted to the bail applicant/petitioner, on, the following conditions:-

i) That she shall furnish personal bond, comprised in a sum of Rs. 5,00,000/- with two sureties in the like amount, to the satisfaction of the learned trial Court.

ii) That she shall join the investigation, as and when required by the Investigating agency;

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

iv) That she shall not leave India without the previous permission of the Court;

v) That she shall deposit her passport, if any, with the Police Station, concerned;

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

6. In view of above, petition stands disposed of. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

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

Rakesh ....Petitioner
Versus
Raj Kumari ....Respondent

CR No. 131/2018 a/w CR No. 132 /2018
Reserved on: 26.11.2018
Date of decision: 05.12.2018.

**Himachal Pradesh Urban Rent Control Act, 1987**- Section 14- Eviction suit by one co-owner- Maintainability-Held- Eviction suit filed by one co-owner without impleading other owners is maintainable unless tenant able to show conflict of interest amongst co-owners (Para 10)

**Himachal Pradesh Urban Rent Control Act, 1987**- Section 14(3)(c)- Eviction suit- Ground of- Building unfit and unsafe for human habitation- Held- Eviction of tenant from rented premises on ground of its having become unfit and unsafe for human habitation cannot be made subject to Landlord filing duly sanctioned building plans at Execution stage- Court cannot take any responsibility by passing an order that even though building is unfit and unsafe for human habitation, yet same should not be demolished (Para 14)

**Himachal Pradesh Urban Rent Control Act, 1987**- Section 14(3)(c)- Eviction Suit- Rebuilding and Reconstruction- Necessity of sanctioned building plans- Rent controller passing eviction order on ground of bonafide requirement of Landlord of doing reconstruction of building but subject to his producing duly sanctioned building plans at Execution stage- Appellate Authority modifying order and setting aside this condition- Revision- Held- Existence of sanctioned building plans is just a fact to determine bonafides of Landlord- It not condition precedent or sine qua non for passing eviction order- Order of Appellate Authority upheld- Hari Dass Sharma vs. Vikas Sood and others (2013) 5 SCC 243 relied upon. ( Para 13)

***Case referred:***
Lin Kuei Tsan Versus Ashok Kumar Goel 2015 (suppl.) HLR 2153 (ILR, 2015 (IV) HP 504)

For the Petitioner(s) : Mr. Rajender Sharma, Advocate,
For the Respondent(s) : Mr. Ashok Sood, Advocate.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge***

Since common question of law and facts are involved in these petitions and as the same have arisen from a common judgment, the same were taken up together for hearing and are being disposed of by a common judgment.

2. The petitioner is the tenant, who aggrieved by the order of eviction passed by the learned Rent Controller and affirmed by the learned appellate authority has filed the present revision petition.

3. Briefly stated facts of the present case are that respondent-landlady filed a petition under Section 14 of H.P. Urban Rent Control Act, 1987 (for short the Act) against the petitioner/tenant regarding the premises known as '*Violet Cottage*', Below Bus Stand, Shimla, consisting of two rooms and toilet in the first floor, which was let out to the petitioner/tenant at the monthly rent of Rs. 100/-. The eviction was primarily sought on the ground that the demised premises is bonafidely required for reconstruction of entire building on old lines which could not be carried out without getting the same vacated from tenant. The building was stated to be more than hundred years and in dilapidated condition.

4. The tenant contested the eviction petition by filing reply wherein preliminary objections regarding maintainability, non-joinder of necessary parties and the premises being in good condition were raised. On merits, it was pleaded that the rate of rent was Rs.50/- per month and the demised premises were a pucca structure and fit for human habitation.

5. On pleadings of the parties, learned trial Rent Controller framed the following issues:

"1. Whether the petitioner bonafide requires the demised premises qua reconstruction, if so its effect? OPP

2. Whether the demised premises have become unsafe and unfit for human habitation, if so, its effect? OPP

3. Whether the respondent is in arrears of rent since January, 2007 and is also liable to pay interest @ 9% per annum, if so, its effect? OPP

4. Whether the petition is not maintainable in the present form?

5. Relief."

6. After recording the evidence and evaluating the same, the petitioner was ordered to be evicted from the demised premises on the ground of its having become unfit and unsafe for human habitation and bonafide requirement and on arrears of rent of Rs. 18,790/- w.e.f. 01.01.2007 to 31.03.2016. However, it was further directed that the eviction order passed would not be put to execution unless the respondent / landlady produces before executing court the building plan duly sanctioned/approved by the competent authority and it would be (shall be) open to the respondent/tenant to apply for re-entry into the building in accordance with proviso (c) Section 14 (3) introduced by the amendment Act, 2009. The petitioner/tenant was also directed to pay the arrears of rent of Rs.18,790/- to the petitioner within 30 days from the date of the order failing which the landlady was held entitled for possession of the demised premises on the ground of arrears of rent as well.

7. Aggrieved by the order of learned Rent Controller both the parties i.e. landlady and tenant filed separate appeal before the appellate authority. The appellate

authority allowed the appeal filed by the landlady and the order passed by the learned Rent Controller putting the rider regarding the submission of approved site plan was set aside and the eviction petition was allowed as a whole and the tenant was ordered to be evicted from the demised premises on the ground of non-payment of rent and the building in question was required bonafidely for the rebuilding and reconstruction and rest of the findings of the learned Rent Controller were affirmed. Whereas the appeal filed by the tenant whereby he had assailed the findings of the learned Rent Controller came to be dismissed.

8. The petitioner/tenant has filed the instant revision petitions *inter alia* on the ground that the eviction petition filed by the landlady was not maintainable at her instance alone as it was duly proved on record that there were other co-owners of the building. It was also averred that till and so long the maps of the building had not been sanctioned by the Municipal Corporation after its rejection vide order dated 10.02.2010, the claim of the landlady could not be held to be bonafide and therefore, the learned Rent Controller had rightly placed an embargo or rider on the eviction of the tenant.

9. On the other hand, Shri Ashok Sood, Advocate, would argue that the grounds as raised by the petitioner do not fall for consideration as all these contentions already stand authoritatively decided by this Bench in ***Lin Kuei Tsan Versus Ashok Kumar Goel 2015 (suppl.) HLR 2153.***

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

10. As regards the question of there being other co-owners of the building, it is more than settled that even one co-owner can maintain an eviction petition unless the tenant is in a position to point out any conflict of interest *inter se* the different co-owners. This aspect of the matter was dealt in para -19 of the judgment [*Lin Kuei Tsan's case (supra)]* and it was held as under:-

> *"19. Indisputably, the premises in question were owned by the landlord and his wife Kamlesh and this fact has infact been mentioned in the eviction petition, though not in so many words. Even otherwise, it is more than settled that one co-owner can maintain an eviction petition. That apart, no prejudice has otherwise been shown to have been caused to the tenant by not arraying the co-owner so as to make a grievance. It was not disputed before me that the co-owner Smt. Kamlesh is no more in the land of living and, therefore, even this objection of the tenant therefore holds no water."*

11. Now, as regards non approval or non-availability of the duly sanctioned proved map, the learned counsel for the petitioner has strongly relied upon para 37 of the judgment [*Lin Kuei Tsan's case (supra)],* which reads thus:-

> *"37. Further, this Court cannot also loose sight of the fact that it was the landlord who in order to prove and establish his bonafides had himself pleaded that he was taking steps for approval of the building plans on old lines and this was one of the considerations which weighed with the learned Appellate Authority to conclude that the need of the landlord was bonafide. Therefore, at this stage the landlord cannot be permitted to resile from his pleadings or else this would itself cast a doubt on his bonafides."*

12. I am afraid this is not the ratio laid down in *Lin Kuei Tsan's case (supra)* and these observations were preceded with the very vital observations made in para 36, which read as under:-

*"36. I have considered the aforesaid submission and I am of the considered opinion that no exception to such condition can be taken by the landlord, particularly, when the landlord has not chosen to assail these findings by filing a separate revision petition. Even otherwise this condition is otherwise just and equitable."*

13. It is only in this background that this Court made the aforesaid observations in paragraph – 37, which cannot be read in isolation because the ratio of the judgment, in fact, is contained in para 26 to 28 of the judgment, which reads thus:-

*"26. The question whether the requirement of sanctioned building plan is sine qua non before ordering the eviction of the tenant came up for consideration before the Supreme Court in* ***Hari Dass Sharma vs. Vikas Sood and others (2013) 5 SCC 243*** *and the Hon'ble Supreme Court after discussing the case of* ***Jagat Pal Dhawan*** *(supra), held that under Section 14 (3) (c) of the Act, the requirement of having a duly sanctioned plan was not a condition precedent for maintaining a petition for eviction. The relevant observations of the Hon'ble Supreme Court are as follows:*

*"13. In Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors. (supra), this Court had the occasion to consider the provisions of Section 14(3)(c) of the Act and R.C. Lahoti J. writing the judgment for the Court held that Section 14(3)(c) does not require that the building plans should have been duly sanctioned by the local authorities as a condition precedent to the entitlement of the landlord for eviction of the tenant. To quote from the judgment of this Court in Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors. (supra): (SCC p. 194, para 6)*

*"6…….The provision also does not lay down that the availability of requisite funds and availability of building plans duly sanctioned by the local authority must be proved by the landlord as an ingredient of the provision or as a condition precedent to his entitlement to eviction of the tenant. However still, suffice it to observe, depending on the facts and circumstances of a given case, the court may look into such facts as relevant, though not specifically mentioned as ingredient of the ground for eviction, for the purpose of determining the bona fides of the landlord. If a building, as proposed, cannot be constructed or if the landlord does not have means for carrying out the construction or reconstruction obviously his requirement would remain a mere wish and would not be bona fide."*

*It will be clear from the aforesaid passage that this Court has held that availability of building plans duly sanctioned by the local authorities is not an ingredient of Section 14(3)(c) of the Act and, therefore, could not be a condition precedent to the entitlement of the landlord for eviction of the tenant, but depending on the facts and circumstances of each case, the Court may look into the availability of building plans duly sanctioned by the local authorities for the purpose of determining the bonafides of the landlord.*

*17. In fact, the only question that we have to decide in this appeal filed by the appellant is whether the High Court could have directed that only on the valid revised/renewed building plant being sanctioned by the competent authority, the order of eviction shall be available for execution. The High Court has relied on the decision of this Court in Harrington House School v. S.M. Ispahani & Anr.(2002) 5 SCC 229 and we find in that case that the landlords*

*were builders by profession and they needed the suit premises for the immediate purpose of demolition so as to construct a multi-storey complex and the tenants were running a school in the tenanted building in which about 200 students were studying and 15 members of the teaching staff and 8 members of the non-teaching staff were employed and the school was catering to the needs of children of non-resident Indians. This Court found that although the plans of the proposed construction were ready and had been tendered in evidence, the plans had not been submitted to the local authorities for approval and on these facts, R.C. Lahoti, J, writing the judgment for the Court, while refusing to interfere with the judgment of the High Court and affirming the eviction order passed by the Controller, directed that the landlords shall submit the plans of reconstruction for approval of the local authorities and only on the plans being sanctioned by the local authorities, a decree for eviction shall be available for execution and further that such sanctioned plan or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering the possession to the landlord and till then the tenants shall remain liable to pay charges for use and occupation of the said premises at the same rate at which they are being paid.*

*18. In the present case, on the other hand, as we have noted, the Rent Controller while determining the bonafides of the appellant-landlord has recorded the finding that the landlord had admittedly obtained the sanction from the Municipal Corporation, Shimla, and has accordingly passed the order of eviction and this order of eviction has not been disturbed either by the Appellate Authority or by the High Court as the Revision Authority. In our considered opinion, once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto."*

*27. Notably, the ratio of the judgment in* ***Hari Dass Sharma's*** *case (supra) has been repeatedly followed by this Court in* ***Karam Chand and others*** *vs.* ***Jasbir Kaur and others,*** *C.R. No. 125 of 2012****,*** *decided on 16.8.2013,* ***Roshan Lal Bhardwaj*** *vs****. Ashok Sud and another,*** *C.R. No. 4034 of 2013 decided on 4.10.2013****, R.R.Sharma vs. Gopla and others,*** *C.R. No. 4053 of 2013 decided on 24.10.2013****, Deepak Boot House and another*** *vs.* ***Dr. Piyare Lal Sood, 2014 (1) Shim. L.C. 47, Janmejai Sood*** *vs****. Ram Gopal Sood,*** *C.R. 62 of 2013 decided on 4.11.2014,* ***Vinod Kumar*** *vs.* ***Varinder Kumar Sood,*** *C.R. No. 60 of 2013 decided on 13.5.3015.*

*28. In view of the aforesaid exposition of law, the submission of the tenant even if assumed to be correct that the landlord does not have a sanctioned plan, holds no water as the same is not a pre-requisite for maintaining a petition for eviction.*

14. Apart from the above, it would be noticed that the petitioner has been ordered to be evicted from the demised premises on the ground of its having "unfit and unsafe" for human habitation. Once that be so, then in such circumstances, the petitioner cannot be allowed to remain in occupation of the premises that too only on the ground that

the building plan had not been sanctioned by the local authorities i.e. Municipal Corporation, Shimla. After all, who would be accountable and responsible in case the premises or a part thereof collapse or any other untoward incident takes place on account of dilapidated condition of the premises. The Court cannot take any responsibility by passing an order that even though the building is unfit and unsafe for human habitation, yet the same should not be demolished, which may be dangerous for the life and property of the inhabitants. Public interest demands that building be vacated forthwith so as to avoid any untoward incident in future.

15. In view of the aforesaid discussion, I find no merit in these revision petitions. Consequently, the same are dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stand disposed of.

**********

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

The State of Himachal Pradesh & anr. .....Petitioners.
Versus
Ishwar Chaudhary & ors. .....Respondents.

CWP No. 2319 of 2017
Reserved on : 11.9.2018.
Decided on: 07.12.2018.

**Constitution of India, 1950-** Articles14 and 16- **The Himachal Pradesh Youth Services & Sports, Youth Organizer Class-III (Non-Gazetted), Recruitment and Promotion Rules, 1997'-** Common Cadre Posts- Differential treatment- Permissibility- District sports officers(DSOs) and Coaches constituting common cadre with same pay scale- R & P rules making these posts interchangeable and coordinate- Revision in pay however enhancing pay scale of DSOs and placing Coaches in lower pay scale - Challenge thereto- Held- These were Coordinate posts in same pay scale under R&P Rules- No justification in making provision of two different scales for these posts later on- No intelligible differentia justifying different pay scale to same cadre posts- Coaches could not have been discriminated vis a vis DSOs -Order of Administrative Tribunal directing State to treat Coaches at par with DSOs with all consequential benefits upheld (Paras 13 to 15)

**Constitution of India, 1950-** Articles14 and 16- **The Himachal Pradesh Youth Services & Sports, Youth Organizer Class-III (Non-Gazetted), Recruitment and Promotion Rules, 1997'-** Different Cadre posts- Similar treatment- Permissibility- Youth organizers in lower pay band vis a vis Coaches- Coaches in higher pay scale- Rule placing them and Youth organizers in feeder cadre for promotional posts of DSOs- Held- Coaches and DSOs being in Common Cadre and Coordinate posts, Coaches cannot be in feeder category for promotion to posts of District Sports Officers- Writ petition dismissed. (Paras 16 and 17)

For the petitioners Mr. Vikas Rathore & Narinder Guleria, Addl. Advocate Generals.
For the respondents Mr. Bhuvnesh Sharma, Advocate, for respondents No. 1 to 9.
Nemo for respondent No. 10.

The following judgment of the Court was delivered:

**Dharam Chand Chaudhary, *J.***

The State, respondent in T.A. No. 633 of 2015 has assailed the judgment dated 29.12.2016 passed by learned Himachal Pradesh State Administrative Tribunal, whereby the respondents herein, writ petitioners, have been held entitled to the grant of pay scale/equivalence at par with District Sports Officers (re-designated as District Youth Services and Sports Officers) along with consequential benefits including promotion(s), if any, due and admissible to them with a prayer to quash the same in the exercise of the powers of judicial review vested in this Court.

2. The writ petitioners were appointed as Coaches on different dates, as detailed in the chart below along with their educational qualification:

| Sr. No. | Name | Qualification | Designation | Date of joining | Present Pay scale |
|---|---|---|---|---|---|
| 1. | Sh. Ishwar Chaudhary | B.A., N.I.S. (Wrestling) | Wrestling Coach officiated as Distt. Youth Services &Sports Officer w.e.f. 8.7.94 to 4.7.97. Rs. 1800-3200 Revised w.e.f. 1.1.1996 to Rs. 5800-9200. | 28.2.85 | Same. |
| 2. | Kanwar Singh | B.A. NIS (Volleyball) | Distt. Youth Services &Sports Officer (Officiating) Rs. 1800-3200 Revised Rs. 5800-9200 w.e.f. 1.1.1996 | 4.3.85 | Same |
| 3. | Ved Prakash | MA NIS (Table Tennis) | Distt. Youth Services &Sports Officer (Officiating) w.e.f. 22.7.94 onwards Rs. 1800-3200 Revised Rs. 5800-9200 w.e.f. 1.1.1996. | 4.12.84 | Same. |
| 4. | Sh. M.P. Vaidya | B.A. NIS (Cricket) | Distt. Youth Services &Sports Officer (Officiating) w.e.f. 8.7.94 onwards Rs. 1800-3200 Revised Rs. 5800-9200 w.e.f. 1.1.96 | 4.12.84 | Same |

| | | | | | |
|---|---|---|---|---|---|
| 5. | Prithvi Raj | B.A. NIS (Boxing) | Distt. Youth Services &Sports Officer (Officiating) w.e.f. 10/95 onwards Rs. 1800-3200 Revised Rs. 5800-9200 w.e.f. 1.1.1996 | 31.12.84 | Same. |
| 6. | Rajinder Dogra | B.A. NIS (Basketball) | Distt. Youth Services &Sports Officer (Officiating) w.e.f. 7/94 onwards Rs. 1800-3200 Revised R. 5800-9200 w.e.f. 1.1.1996. | 27.12.84 | Same |

3. They were appointed as such in the respondent No.2-department i.e. Director, Youth Services and Sports, Himachal Pradesh on the recommendation of the 3rd respondent-H.P. Public Service Commission as per the Recruitment and Promotion Rules 1980 as respondent No.2-department had not framed its rules at that time.

4. As a matter of fact, on coming into being The State of Himachal Pradesh in the year 1966, the posts of District Sports Officers and Coaches were under the department of Education and manned as per the rules framed by the said department. It is in the year 1982 the State Government has set up new Directorate of Youth Services and Sports (Respondent No. 2) at Shimla and the services of the District Sports Officers/Coaches stand transferred from the department of Education to the newly created Directorate. It is 1980 Rules, referred to hereinabove, remained in force and governing the service conditions of the District Sports Officers and Coaches in the newly created Directorate till 1997. It is in the year 1984/85 six posts of Coaches were created and filled up in terms of 1980 rules as aforesaid through the H.P. Public Service Commission. Initially in the department of Education there were common rules applicable to the post of Coaches/District Sports Officers, re-produced herein as under:

RECRUITMENT AND PROMOTION RULES FOR THE POST OF COACHES/DISTRICT SPORTS OFFICER IN THE DEPARTMENT OF EDUCATION, HIMACHAL PRADESH.

| | |
|---|---|
| 1. Name of the Posts | Coach/District Sports Officer. |
| 2. No. of posts | 5 |
| 3. Classification of posts: | Class-III |
| 4. Pay Scale. | Rs. 300-25-600 |
| 5. Whether selection post or Non-Selection Post | Selection post. |
| 6. Age for direct recruitment | 18 to 27 years. |
| 7. Minimum educational & other qualification required for | ESSENTIAL:<br>i) Bachelors Degree or its |

| | |
|---|---|
| direct recruits. | equivalent from a recognized University.<br><br>ii)Diploma/certificate in the concerned Game with at least one year duration.<br>OR<br>Diploma in Physical Education or Graduate in Physical Education with at least 6 months coaching certificate/ Diploma from a recognized University/institution.<br>DESIRABLE:<br>i) should have participated in a recognized University/ state Level meet.<br>ii)Knowledge of customs, manners and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions prevailing in the Pradesh. |
| 8. Whether age and educational qualification prescribed for direct recruits will apply in case of promotees. | Not applicable. |
| 9. Period of probation, if any. | 2 years subject to such further extension for a period not exceeding one year as any be ordered by the competent authority in special circumstances and for resume to be recorded in writing. |
| 10. Method of recruitment, whether by direct Recruitment or by deputation, promotion/transfer and the percentage of vacancies to be filled by various methods. | 100% by direct recruitment. |

| | |
|---|---|
| 11. In case of recruitment by Promotion, deputation/ transfer grades from which promotion, deputation/transfer to be made. | Not applicable. |
| 12. If a D.P.C. exists, what is its Composition. | Not applicable. |
| 13. Circumstances under which the Himachal Pradesh Public Service Commission is to be consulted in making recruitment. | As required under the law. |

5. It is seen that both the Coach and District Sports Officer were placed under the same pay scale of Rs.300-25-600. However, on the revision of the pay scale while the category of the District Sports Officers placed in the pay scale of Rs.800-1400, the Coaches in the pay scale of Rs.700-1300. Therefore, when six newly created posts of Coaches were advertised by respondent No. 2 through respondent No. 3, the pay scale in the advertisement was mentioned as Rs.700-1300. The writ petitioners though were appointed as Coaches in this very pay scale, however, kept on ventilating their grievance with the respondents in this regard. In the Meanwhile, in the State of Punjab and Haryana also, while the District Sports Officers were placed in the higher grade of Rs.800-1400 the Coaches were denied the same. The Coaches, as such, have filed Civil Writ Petition No. 5036 of 1984, title ***Ram Phal Thakran, Wrestling Coach*** versus ***State of Haryana & Others*** in the High Court of Punjab and Haryana which was allowed vide judgment dated 24.7.1990. The LPA preferred by the State of Haryana was also dismissed. On the other hand, the judgment in Ram Phal Thakran's ibid was relied upon by the tat eof Punjab and Haryana High Court in CWP No. 3284 of 1992, titled Teg Singh, Kabaddi Coach and others Vs. The State of Haryana and another, decided on 18.8.1992. The State in that case went in appeal to the Apex Court by way of filing SLP No. 8045 of 1992, however, the same also met with the same fate being dismissed on 12.12.1995. In this way both judgments i.e. Ram Phal's and Tek Singh's cases supra had attained finality. As a result thereof in the State of Haryana, the District Sports Officers and Coaches came to be placed under the same pay scale of Rs.2200-4000. On creation of respondent No. 2-department, ten posts of District Sports Officers were re-designated as District Youth Services and Sports Officers and the writ petitioners who initially were recruited as Coaches also given the charge of the posts so re-designated. The support in this regard can be drawn from the tabulated information below:-

| Sr. No. | Name &Designation | Present place of posting | Transferred to | Remarks |
|---|---|---|---|---|
| 1. | Chaman Singh, DYSSO | Nahan | Solan | On request. He will relieve Sh. R.L. Jandeva, Youth Coordinator, NYK of additional charge of the post of DYSSO. |

| | | | | |
|---|---|---|---|---|
| 2. | M.P. Vaidya, Cricket Coach | Chamba | Bilaspur | On request. He willhold the functional charge of the post of DYSSO, Bilaspur, relieving Sh. M.R. Sharma, Regional Coordinator, NYK of the additional charge of the posts of DYSSO. |
| 3. | Ved Prakash T.T. Coach | Kullu | Keylong | On administrative grounds. He willhold the functional charge of the post of DYSSO, Keylong relieving S.D.M. of additional charge of the post of DYSSO. |
| 4. | Ishwar Chaudhary, Wrestling Coach | Solan | Nahan | On administrative grounds. He will hold the functional charge of the post of DYSSO, Nahan. |
| 5. | Rajinder Dogra, Basketball Coach | Hamirpur | Una | On administrative grounds. He will hold the functional charge of the post of DYSSO, Una. |
| 6. | Kanwar Singh, Volleyball Coach | Solan | Chamba | On administrative grounds. He will hold the functional charge of the post of DYSSO, Chamba. |

6. Admittedly, the posts of District Sports Officers/Coaches were equated under the 1980 rules. The respondent-State, however, given the pay scale of Rs.800-1400 to four Coaches but denied the same to the writ petitioners who were recruited subsequently in the year 1984-85. On the other hand, respondent No. 2-department has framed its own rules namely 'The Himachal Pradesh Youth Services & Sports, Youth Organizer Class-III (Non-Gazetted), Recruitment and Promotion Rules, 1997'. The Youth Organizer in the department though had separate cadre and were under the lower pay scale i.e. Rs. 1500-2640 as compared to that of the Coaches i.e. Rs. 1640-2923 were equated thereby with the Coaches. They were also brought in the feeder category for promotion to the post of District Youth Services and Sports Officers to the extent of 50% along with the Coaches.

7. The 1980 rules came to be repealed on coming into being the 1997 rules, hereinabove. Since the petitioners were given the charge of the post of District Youth Services and Sports Officers but not paid them salary as was admissible to the holder of such posts and to the contrary junior person i.e. Youth Organizers were brought at par with them and in feeder category for promotion to the post of District Youth Services and Sports Officers, therefore, initially original application No. 2310 of 1999 was filed in the Himachal Pradesh Administrative Tribunal. On abolition of the Tribunal in the year 2008, the same was transferred to this Court. However, on re-establishment of the Himachal Pradesh State Administrative Tribunal in 2015, the same was again transferred there and registered as TA No. 633 of 2015.

8. The writ petitioners have sought a direction to quash the 1997 rules/the quota of 50% provided thereunder for promotion to the Youth Organizers against the post of District Youth Services and Sports Officers. A direction was also sought to the respondents to promote the writ petitioners against the post of District Youth Services and Sports Officers against the vacancies in existence even well before 1980 repealed rules.

9. In reply, the stand of the respondent-State was that the rules were framed by respondent No.2-department in the year 1997 and as such, original application filed in the year 1999 i.e. after two years not maintainable. Also that, petitioners who were appointed as Coaches in the pay scale of Rs.700-1300 have accepted the offer of appointment so made without raising any protest. It is also denied that the Coaches and District Sports Officers were borne on the same cadre. It is admitted that in terms of 1980 rules, the posts of Coaches/District Sports Officers were common but the appointments against each category of posts were being made separately. The petitioners, as such, were stated to be not entitled to the pay scale of Rs.800-1400 nor aggrieved in any manner by the rules framed in the year 1997.

10. Learned Tribunal on hearing learned Counsel representing the parties on both sides and also going through the record as well as taking into consideration the law laid down by the Punjab and Haryana High Court in *Civil Writ Petition No. 5036 of 1984*, titled ***Ram Phal Thakran, Wrestling Coach*** versus ***State of Haryana & others*** and ***Teg Singh & Others*** Versus ***The State of Haryana and another,*** CWP No. 3284 of 1992 and upheld by the Apex Court also held the Coaches entitled to pay scales/equivalence at par with District Sports Officers (re-designated as District Sports Officers) along with consequential benefits including promotion(s), if any.

11. The respondent-State though has challenged the impugned judgment, however, only on the grounds inter-alia, that 1980 rules were notified by the department of Education common for Coaches/District Sports Officers after 7-8 months of the revision of pay scale and as the pay revision has an overriding effect upon the R&P Rules so far as the pay scale are concerned, coupled with the factum of the pay scales for the post of Coaches were known to the writ petitioners, however, irrespective of it they accepted unconditionally the offer of appointment made to them, they were not justified in approaching the Tribunal at a stage when the respondent No.2-State had framed its own rules. While admitting that the 1980 Recruitment and Promotion Rules were common for District Sports Officers/Coaches, their cadre and seniority were separate. The respondent No.2-department had sent requisition to respondent No. 3 for selection of six Coaches in the pay scale of Rs.700-1300. The offer of appointment made to them was accepted unconditionally. Therefore, the judgment of Punjab and Haryana High Court in ***B.S. Yadav*** versus ***State of Haryana, AIR 1981 SC 561*** is stated to be not applicable in this case. It is, therefore, submitted that the claim of the writ petitioners qua their entitlement to the post of District Youth Services and Sports Officers with consequential benefits w.e.f. 1997 is false and as such has been sought to be rejected.

12. Mr. Vikas Rathore, learned Additional Advocate General while arguing that the impugned judgment is not legally and factually sustainable has sought the same to be quashed and set aside, Mr. Bhuvnesh Sharma, Advocate, learned Counsel representing the writ petitioners has urged that learned Himachal Pradesh State Administrative Tribunal has rightly appreciated the facts and circumstances of this case and also the law applicable. According to Mr. Sharma, the law laid down by the Punjab and Haryana High Court in Ram Phal's case, cited supra, is squarely applicable to the facts of this case, therefore, according to him the impugned judgment call for no interference by this Court.

13. Admittedly, the posts of Coaches/District Sports Officers initially were being manned by the department of Education. The common rules for the post of Sports Coaches /District Sports Officers were framed in the year 1980. It is seen that both posts were placed under the pay scale of Rs.300-25-600 meaning thereby that both posts were common and placed under the same pay scale. It is in the revision of pay scale in the year 1984 while the District Sports Officers were placed under the pay scale of Rs.800-1400, the

writ petitioners were placed under the pay scale of Rs.700-1300. In the State of Punjab and Haryana also, the common pay scales for Coaches and District Sports Officers i.e. Rs.700-1250 with selection grade of Rs.750-1400 to 20% post was revised as Rs.800-1600, however, only for District Sports Officers and not given to the Coaches. Therefore, with similar set of facts and circumstances one Ram Phal Thakran, Wrestling Coach has filed Civil Writ Petition No. 5036 of 1984 in the High Court of Punjab and Haryana. The writ petition was allowed. This judgment reads as follow:-

> "The petitioners in this writ petition, who are working as coaches in various games in the Sports Department of the State of Haryana, are claiming pay parity with the District Sports Officer working in the same department.
>
> The case as put forth in the writ petition is that the petitioners are working as Coaches in the Sports Department of the State of Haryana. The Coaches and the District Sports Officers formed one cadre in the department where they had joint seniority and a post of a Coach and that of the District Sports Officers are interchangeable. It has been further averred that prior to 1968 the pay scale of coaches and the district Sports Officers who formed a joint cadre was Rs. 250-500 which was revised to Rs.300-600 after 1968. Further it has been stated that with effect from 1st April, 1979 the pay scale of both Coaches and the District Sports Officers in the joint cadre was revised to Rs. 700-1250 with selection grade of Rs. 750-1450 to 20% posts of the joint cadre of the coaches and the District Sports Officers. However, vide order dated 2nd October, 1984 (Annexure P-4) the State Government had revised the grade of District Sports Officer at Headquarters from Rs. 700-1250 to Rs. 800-1600 with effect from 28th September, 1984. The grievance of the petitioners is that though the Coaches and the District Sports Officers formed one cadre; they had a joint seniority and their posts were interchangeable, yet they had been discriminated against by the State government, inasmuch as the pay scales of the District Sports Officers had been revised from Rs. 700-1250 to Rs. 800-1600, whereas the pay scale of Coaches has not been revised. According to the petitioners this action of the State Government was arbitrary and discriminatory and violative of Article 14 and 16 of the Constitution of India.
>
> Mr. J.L. Gupta, Senior Advocate, learned counsel for the petitioners, has submitted that since Coaches and the District Sports Officers formed one joint cadre; they had a joint seniority and their posts were interchangeable and they were getting the same pay scale as the District Sports Officers, the Government could not just revise the pay scales of the posts of District Sports Officers and not of Coaches. According to the learned counsel, the government must justify as to why while revising the pay scale of the District Sports Officers, the pay scale of coaches was not revised. He further submitted that since there was no justification to treat the
>
> Coaches differently than the District Sports Officers for the purpose of pay scales and there was no reasonable classification, between these two categories of Officers, the action was wholly arbitrary and violative of Article 14 and 16 of the Constitution of India. There is force in the submissions of the learned counsel for the petitioners.

On the other hand, Mr. Madan Dev, learned counsel for the State, argued that with effect from 28th September, 1984, when Annexure P-4 was issued, the cadre of the District Sports Officers and that of Coaches was separated and they had a separate seniority from the said date. Taking into consideration the duties performed by the District Sports Officers, their pay scale was revised. In the written statement it has been admitted that prior to the order Annexure P-4, which was issued on 2nd October, 1984, the Coaches and the District Sports Officers had a joint seniority and they formed one cadre. It has been further stated that it was only the senior most Coach who was made the District Sports Officer and the posts were not interchangeable.

Annexure P-2 with the written statement is gradation list as it existed on January 1, 1983 in the department of Sports, Haryana, wherein I find that the first three officers in the gradation list are District Sports Officers, whereas the officers at No. 4 is a Coach, Officers at Nos. 5 and 6 are again District Sports Officers (Officers Nos. 5 and 6 have been posted officer at Headquarter), whereas No. 7 is again a Coach. From this gradation list it is apparent that it was not necessarily that the senior most coach was being appointed as District Sports Officer.

Mr. J.L. Gupta, learned counsel for the petitioners, has drawn my attention to Annexure P-3, which is an order of the State Government dated 2nd March, 1984 showing that the post of District Sports Officer and Coach was interchangeable with each other. Be that as it may, once the Coaches and the District Sports Officers formed joint cadre right prior to 1966 to 1984, the coaches and the district Sports Officers were in the same pay scale having a joint cadre and joint seniority, I find no jurisdiction not to treat the Coaches equally with the District Sports Officers for the purpose of pay scales. Once these two categories of posts were held to be equal for the purpose of revision of pay scales, then there cannot be any discrimination between them for the purpose of revision of pay scale. I may also mention that the arguments of the learned counsel for the State that since these two classes of officers perform different duties, therefore, the pay scale of District Sports Officers was revised, has no force, inasmuch as, as stated above once these two classes were joint for the purpose of seniority and pay scale, then there cannot be any discrimination between them. Otherwise also, it is the quality and the responsibility of the post which was to be seen. In no way it can be said that the Coaches were in any way inferior to the District Sports Officers regarding the nature and the quality of the work and duties. The post of a District Sports Officer is not a higher or a promotional post for the rank of a Coach. It is not the case of the respondent State that District Sports Officers started performing some different or additional duties which they were not performing prior to issue of order Annexure P-4 dated October 2, 1984.

In view of what has been stated above, this writ petition is allowed and the State Government is directed to equate Coaches with the District Sports Officers for the purpose of pay scale and the petitioners who were Coaches be granted the same revised pay scale as that of the District Sports Officers from the same date as it was granted to the District Sports Officers. The arrears of the revised pay scale shall be released within a

period of three months from the date of the receipt of this order. There will be no order as to costs."

14. The judgment supra even was upheld by a division Bench of that very Court in LPA. The judgment in Ram Phal Thakran's case was followed by a Division Bench of the same High Court in CWP No. 3284 of 1992, titled *Teg Singh, Kabaddi Coach and others* vs. *The State of Haryana and another,* which was decided vide judgment dated 18.8.1992. This judgment was assailed in the Apex Court by way of filing petition for Special Leave to appeal (s) No. 8045 of 1993, title *State of Haryana & another* versus *Teg Singh & others*. However, the SLP was also dismissed meaning thereby that the judgment in Ram Phal Thakran's and Tej Singh's cases, cited supra, had attained the finality. Consequent upon the law so laid down the Coaches in the State of Punjab and Haryana were also placed under the pay scale of Rs.800-1600. The Tribunal, as such, has rightly placed reliance on the judgment cited supra. There is nothing in the grounds of appeal as to how learned Tribunal has committed any illegality or irregularity while placing reliance on the judgment in Ram Phal Thakran's and Teg Singh's cases supra. On the other hand, the submission that the Tribunal has erroneously placed reliance on the judgment of the Hon'ble Apex Court in AIR 1981 SC 561 appear to have been made merely for rejection for the reasons that the point in issue in the present *lis* is covered by the judgment of Punjab and Haryana High Court in Ram Phal's case, cited supra, which even was relied upon in Tej Singh's case also and the judgment in Teg Singh's case stood affirmed in the Apex Court also.

15. Now if coming to the factual matrix, as noticed at the outset, in 1980 Recruitment and Promotion Rules Coaches/District Sports Officers had common cadre and even in the same pay scale. Hence, co-ordinate posts. Therefore, there is no justification in making provision of two different scales for these posts later on. There is no intelligible differentia justifying the provisions of two different pay scales i.e. Rs.800-1400 for the posts of District Sports Officers whereas Rs.700-1300 for that of the Coaches which initially were common and under the same pay scale in the 1980 rules. The respondent-State has, therefore, definitely discriminated the category of the writ petitioners by making provisions of lower pay scale for them. Learned Tribunal has very appropriately taken note of letter dated 17.11.1984 of the Commissioner-cum-Secretary (Youth Services and Sports) to the Government of Himachal Pradesh addressed to Director, Youth Services and Sports, Himachal Pradesh requiring thereby to upgrade the posts of Coaches in the pay scale of Rs.700-1300 as District Sports Officers in the pay scale of Rs.800-1400. Learned Tribunal has also not committed any illegality while taking note of the 1980 Recruitment and Promotion Rules and also the amendment dated 2.11.1979 well before the revision of pay scales while arriving at a conclusion that the coaches and District Sports Officers had a common cadre with an identical pay scale of Rs.300-600. The Coaches, therefore, should have not been discriminated by placing them in the pay scale of Rs.700-1300 instead of Rs.800-1400 in the subsequent revision of pay scales.

16. So far as respondents No. 4 and 5 are concerned, they had joined as Youth Organizers in the newly created department, whereas the writ petitioners were already on the cadre of Coaches, therefore, could have not been treated at par with youth organizers so far as promotion to the post of District Youth Services and Sports Officer is concerned. Not only this, but the scale of respondents No. 4 and 5 being 570-1080 subsequently revised to Rs.1500-2640 is below that of the writ petitioners i.e. Rs.1640-2925. Otherwise also, when the coaches and District Sports Officers had a common cadre, therefore, the Coaches cannot be said to be in feeder category for promotion to the post of District Youth Services and Sports Officer. Learned Tribunal has also rightly concluded that there cannot be any estoppel against the law/statute and the claim for pay scale is rather recurring cause of

action, therefore, the contention to the contrary raised by respondents No. 4 and 5 on this score are not legally sustainable.

17. For all the reasons hereinabove, there is no merit in this writ petition and the same is accordingly dismissed. Consequently, the impugned judgment is affirmed. The interim order dated 8.1.2018 passed in CMP No. 8775 of 2017 will also stand vacated.

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

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

Naveen Kumar & Ors. .....Petitioners.

Versus

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

Cr. MMO No. 190 of 2018
Reserved on: 04.12.2018
Date of decision : 11.12.2018.

**Code of Criminal procedure, 1973**- Section 197- Sanction to prosecute- Held- sanction to prosecute is required only when the alleged act has reasonable nexus with official duty (Paras 8 & 9)

**Himachal Pradesh Panchayati Raj Act,1994-** Sections 19, 37 & 41- Code of Criminal Procedure, 1973 – Sections 197 & 482– Judicial functions of Panchayat- Jurisdiction- In dispute between landlord and tenant regarding possession and arrears of rent, panchayat visiting spot, breaking open locks and handing over possession to landlord- Tenant filing FIR for house trespass- Police filing cancellation report on ground that Panchayat acted under provisions of Act- Magistrate declining cancellation report and taking cognizance of offences- Challenge thereto on ground that members of Panchayat being public servants, cognizance could not have been taken for want of prosecution sanction- Held- Panchayat had no jurisdiction whatsoever in disputes relating to immovable property- Their act had no nexus with official duty- Prosecution sanction not required- Petition dismissed. (Paras 6 to 9)

**Cases referred:**

Devender Singh and others vs. State of Punjab through CBI 2016 (12) 87

Punjab State Wareshousing Corporation vs. Bhushan Chander and another, 2016 (13) SCC 44

For the Petitioners Mr. Jagan Nath, Advocate.

For the Respondents Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Addl. A.G., with Mr. Bhupinder Thakur Dy. A.G. for respondent No.1.
Mr. P. P. Chauhan, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge***

The petitioners were the office bearers of Gram Panchayat Mahadev and have sought quashing of FIR No. 66 of 2013, under Sections 447, 448, 452, 453, 380, 120-B of the IPC registered at Police Station BSL Colony and subsequent proceedings pending before the learned Additional Chief Judicial Magistrate, Court No. (I), Sunder Nagar, District Mandi, H.P.

2. The undisputed facts of the case are that one Brij Lal had moved an application to the Gram Panchayat on 18.05.2013 complaining that respondent No. 2 was not vacating his shop and not paying the arrears of rent and electricity bill. The Gram Panchayat issued notice to respondent No. 2 and having failed to put in appearance, he was proceeded exparte in those proceedings. The Panchayat in its proceedings on 06.08.2013 visited the spot and opened the lock which was affixed by respondent No. 2 on the shop and took into possession the articles which were in the shop. This led respondent No. 2 to file an application under Section 156(3) Cr.P.C. before the learned Additional Chief Judicial Magistrate, Court No. 1, Sunder Nagar, who directed the registration of FIR against the petitioners on 14.08.2013. The police after investigation filed a cancellation report taking a view that Panchayat officials/accused had acted under Section 19 of the Panchayati Raj Act, 1994 (for short the 'Act').

3. Respondent No. 2 filed objections to the cancellation report which was accepted by the learned Magistrate, who thereafter issued process against the petitioners.

4. It is vehemently argued by Shri Jagan Nath, Advocate, that the learned Magistrate has failed to appreciate the fact that the complainant i.e. respondent No. 2 illegally occupied the premises and despite several notices had not appeared before the Panchayat nor vacated the premises, therefore, no case could have been instituted against the petitioners, especially when they acted bonafidely in discharge of their official duties.

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

5. At the outset, it needs to be stated that the petitioners, at the relevant time, were officers of the Panchayat and being public servant, were entitled to the protection under Criminal Procedure Code, 1973 read with Section 197 of the Cr.P.C. (for short the Code), provided the petitioners while carrying out the act allegedly to be committed by them, were purportedly acting in the discharge of their official duties.

6. However, in the instant case, it would be noticed that the dispute before the Panchayat was with regard to arrears of rent of commercial property. The dispute, as per the record was that respondent No. 2 had not paid arrears of rent for 9 months and had not paid the electricity bill amounting to Rs.5681/- which apparently was more than Rs.2000/-. Under Section 41 of the Act, the Panchayat has jurisdiction only with respect to money suit, suit claiming compensation and damages and suit for recovery of movable property not more than Rs.2000/-. Meaning thereby, that the Panchayat has not been conferred with any power or jurisdiction to try dispute between landlord or tenant or dispute with respect to possession of commercial shop or dispute involving more than Rs. 2000/-.

7. Section 37 of the Act clearly provides that where the Panchayat has no jurisdiction, it has to return the complaint to the Magistrate having jurisdiction, therefore, once the petitioners had no jurisdiction to entertain the dispute there was no question that they could have got the shop vacated.

8. The protection afforded to public servant can only be said to be available when he acts or purport to acts in discharge of official duty, if his act is such as to lie within the scope of official duty. The question, therefore, would be that whether the act done by the petitioners was in discharge of official duty or by virtue of their office, so as to entitle them to the protection under Criminal Procedure Code, 1973 read with Section 197 of the Code, the answer to the same is obviously in the negative.

9. It is more than settled that sanction to prosecute under Section 197 of the Act is required only when the alleged act has reasonable nexus between the act done and official duty. Reference in this regard can be made to recent judgment of the Hon'ble Supreme Court in ***Devender Singh and others vs. State of Punjab through CBI 2016 (12) 87,*** wherein after taking into consideration the entire law on the subject, the principles emerged therefrom were summarized as under:

> "39. The principles emerging from the aforesaid decisions are summarized hereunder :
>
> **39.1. Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.**
>
> **39.2. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 CrPC has to be construed narrowly and in a restricted manner.**
>
> **39.3. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under section 197 Cr.P.C. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor it is possible to lay down such rule.**
>
> **39.4. In case the assault made is intrinsically connected with or related to performance of official duties sanction would be necessary under Section 197 CrPC, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 CrPC would apply.**
>
> **39.5. In case sanction is necessary it has to be decided by competent authority and sanction has to be issued on the basis of sound objective assessment. The court is not to be a sanctioning authority.**
>
> **39.6. Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before appellate Court. It may arise at inception itself. There is no requirement that accused must wait till charges are framed.**
>
> **39.7. Question of sanction can be raised at the time of framing of charge and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.**

> **39.8. Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.**
>
> 39.9. In some case it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial."

10. In ***Punjab State Wareshousing Corporation vs. Bhushan Chander and another, 2016 (13) SCC 44***, the Hon'ble Supreme Court again considered the entire law on the subject and thereafter concluded as follows:-

> "A survery of the precedents makes it absolutely clear that there has to be a reasonable connection between the omission or commission and the discharge of official duty or the act committed was under the colour of the office held by the official. If the acts, omission or commission of which is totally alien to the discharge of the official duty, question of invoking Section 197 Cr.P.C. does not arise."

11. Thus, what can be conveniently deduced from the law expounded above is that the protection given under Section 197 of the Act is to protect responsible public servants against the institution of vexatious criminal proceedings for offences alleged to have been committed by them, while they acting or purporting to act as public servant. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. However, this protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, the public servant acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity.

12. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to

consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

13. Now, adverting to the facts of the case, it is clear that the petitioners have admittedly evicted respondent No. 2 from the premises, that too, forcibly and without any authority of law, as such the action was not only illegal but also arbitrary. The petitioners could at best have advised the aggrieved party to approach competent Court or authority to have respondent No. 2 evicted in accordance with law but could not have under any circumstance taken law in their own hands and thereby forcibly evicted him i.e. respondent No. 2 from the premises.

14. Ours is a country governed by a rule of law which applies to the State and the citizens alike. The petitioners, at the relevant time, were office bearers of the Gram Panchayat and, therefore, could not have acted arbitrarily much less high handedly according to whims and fancies like autocrats. As observed above, the country is governed by the rule of law, and to put it in the immortal words of the 17th Century Church Man and Thomas Fuller "*Be you never so high, the law is above you*".

15. In a system governed by the rule of law there is nothing like absolute or unbriddled power exercisable at the whims and fancies of the repositories of such powers. There is nothing like a power without any limit or constraint. The petitioners while riding high on the fuel of power failed to realize that public offices both big and small are sacrosanct. Such offices are meant for use and not for abuse and in case the repositories of such offices spoils the rule, then the law is not that powerless and would step in.

16. The petitioners being office bearers of the Gram Panchayat betrayed complete ignorance to the fact that Gram Panchayat is creation of statute and is 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.

17. It needs no reiteration 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 etc.

18. In the instant case, there is no reasonable connection between the act of the petitioners and the discharge of their official duties and, therefore, they are not entitled to the protection under Section 197 of the Act as prima facie the petitioners have acted not just in excess of jurisdiction but illegally by entertaining the dispute between the landlord and tenant with respect to commercial shop and thereafter have proceeded to the spot and forcibly dispossessed the tenant (Respondent No. 2) by breaking upon the locks. Such acts do not fall within the colour of office, nor can the same be termed to have been performed in discharge of public duty.

19. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed.

20. However, before parting, it is made clear that observations made herein are solely for the purpose of deciding the present lis and shall not in any way be construed to be an opinion on the merits of the case.

**********

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

Shadi Lal Sharma ...Petitioner

Versus

Reserve Bank of India and others ...Respondents.

CWP No. 2618 of 2016
Reserved on: 27.11.2018
Decided on: 14.12.2018

**Administrative Law**- Executive functions- Policy matter- Fixing of cut off dates- Court's Interference- Held- Fixing of cut off dates for applicability of financial and administrative orders is within domain of Executive Authority and courts should not normally interfere with fixation of date done by it unless such order on face of it, appears to be blatantly arbitrary and discriminatory (Para 8)

**Constitution of India, 1950**- Articles 14 and 226- **Reserve Bank of India Act, 1934**- Section 58(4)- **Reserve Bank of India Pension Regulations 1990**- Regulations- 2 (2) and 28 – Fixation of pension- 'Full Pay' and 'Average pay' formulae- Anomaly- Writ Jurisdiction- Petitioner retiring in January 2013 and Department granting pensionary benefits on basis of half of his last basic pay drawn as per regulations- Subsequently Department revising pay with retrospective effect from 01-11-2012- Department though granting benefit of upward pay revision to petitioner for three months but revising his pensionary benefits on basis of average last basic pay drawn in ten months relying on Regulation 2(2)- Refixation lowering petitioner's pensionary benefits and department also effecting recoveries of excess amount- Interregnum, on finding anomaly, Department sending proposal for amending Regulations - Regulations stood amended by notification dated 28-08-2017 and making provision of half of last basic pay drawn also for fixation of pensionary benefits- But by administrative order Department enforcing amendment with prospective date from 6-10-2017- Challenge thereto- Held- Proposal of Bank to effect amendment in Regulations accepted as such by Government of India without any modification- Benefit of amended regulations could not have been further amended or altered by administrative circular- RBI did not seek approval of Central Government before deciding to implement Pension Regulations from prospective date or particular date- Action of respondents illegal- Writ Petition allowed- Respondents directed to refix basic pensionary benefits of petitioner on basis of last pay drawn with effect from 01-02-2013. (Paras 20 to 23)

***Cases referred:***

Reserve Bank of India and another vs. Cecil Dennis Solomon and another AIR 2004 SC 3196

V.T. Khanzode and others vs. Reserve Bank of India and another AIR 1982 SC 917

For the Petitioner: In person.

For the Respondents: Mr. Neeraj K. Sharma, Advocate.

The following judgment of the Court was delivered:

**Justice Tarlok Singh Chauhan, J.**

This writ petition has been filed for the following substantive reliefs:

(i) *That the impugned Circular dated 07.06.2016, Annexure P-3 may kindly be quashed and set-aside, by issuing writ of certiorari.*

*(ii) That sub para (2) of para 1 of impugned notification dated 28.08.2017 which fixes the date of operation of the amendment as 06.10.2017 may kindly be quashed and set-aside as petitioned in paragraph No.23 of this petition.*

*(iii) That the respondents may kindly be directed to re-fix the basic pension of the petitioner on the basis of 'last pay drawn' effective from 01.02.2013 and also pay commuted value of pension on that basis (last pay drawn).*

*(iv) That the respondent Bank may kindly be directed to refund Rs.1,14,111/- (Rupees One Lac Fourteen Thousand One Hundred Eleven) recovered from the petitioner illegally without giving any notice."*

2. The petitioner retired as an Assistant General Manager from the Reserve Bank of India, Chandigarh, Office on 31.01.2013 after putting in more than 32 years of service. At the time of retirement, the total emoluments of the petitioner as per the Administrative Circular No.4, dated 09.09.2010 for the purpose of basic pension was Rs.56,750/- and, therefore, the basic pension was fixed at Rs.28,375/- (before commutation of pension). The respondent-Bank vide Circular No.7 dated 11.4.2016 revised the upward pay and allowances of its employees with retrospective effect w.e.f. 01.11.2012. The petitioner vide letter dated 27.7.2016 was asked to give the details of the pension paid/payable or recoverable and also commuted value of pension paid and payable on the basis of the revised pay and allowances. At the same time, the petitioner's last emoluments/last pay drawn was re-fixed at Rs.1,05,600/-, yet an amount of Rs.95,301/- was fixed as an average pay for the purpose of re-fixation of basic pension and payment of commuted value of pension. It is the case of the petitioner that he has been denied the benefit of full pension as laid down under Regulation 28 of the RBI Pension Regulations, 1990 (as amended in the year 2012) and had instead been relied entirely on average pay method of calculation of pension prescribed under the Regulation/ Rule No.28 read with Regulation No.2 of RBI Pension Regulations, 1990 and due to adoption of this method, the Bank has partially given the benefit of revision of pay and allowances i.e. only for three months i.e. November, December, 2012 and January, 2013 in the revised basic pension of the petitioner and his emoluments for the purpose of pension were re-fixed at Rs.95,301/- (average pay) instead of Rs.1,05,600/- (last pay drawn). Due to this average pay method of calculation of pension, the respondent-Bank has decreased the monthly gross pension of the petitioner from Rs.54,117/- to Rs.52,068/- as on 30.06.2016 and has shown a cumulative recovery of Rs.1,14,111/- as an excess amount of pension paid to the petitioner between February, 2013 to June, 2016. This amount according to the petitioner already stands recovered from him, that too, without issuing any show cause notice.

3. It was further averred that the bank has not only re-fixed the petitioner's monthly basic pension to his disadvantage, but also decreased commuted value of pension payable from Rs.9,59,183/- to Rs.7,56,351/- by application of average pay method of calculation of pension and thus denied the benefit of full pension to the petitioner. However, during the pending disposal of this writ petition, the respondent-Bank issued a notification dated 28.08.2017 thereby notified amendment to Regulation 28 relating to 'last pay drawn' to the RBI Pension Regulations, 1990. This notification in fact would have completely redressed the grievances made by the petitioner, but then the operation thereof was made prospective from 06.10.2017 and did not apply to the employees of the respondent-Bank, who retired between the period 01.11.2012 and 05.10.2017, constraining the petitioner to file the instant petition.

4. The respondents have contested the petition by filing reply wherein various preliminary objections with regard to there being no cause of action, any violation of fundamental right, no case having been made out by the petitioner for exercise of extraordinary jurisdiction under Article 226, there being a disputed question of fact, maintainability, petition being misconceived etc. have been raised. Thereafter, as many as four preliminary submissions have been made. However, these need not be noticed as the contents thereof in fact have been reiterated in the reply on merits. It is averred that the petitioner's pension was calculated after taking into account the 'average emoluments' drawn by him from the month of April, 2012 to January, 2013 in terms of Regulation 2(2) and Regulation 28 of the Pension Regulations. The petitioner drew pre-revised salary for 7 months i.e. from April 2012 to October, 2012 and revised salary only for 3 months i.e. from November, 2012 to January, 2013. The benefits of the pay revision as per the instructions contained in Circular dated 07.06.2016, were given to the petitioner for the period April, 2012 to October, 2012 during which he drew pre-revised salary from the bank. Accordingly, his basic pension of Rs.28,375/- per month, which was calculated on pre-revised salary, was raised to Rs.47,651/- per month after pay revision. The revised pension of the petitioner was fixed at Rs.47,651/- and the 2/3rd pension after commutation was fixed at Rs.31,768/- with effect from February, 2013. Further, the petitioner was paid Rs.52,068/- (pension Rs.31,768 + dearness relief of Rs.20,300) in June, 2016. The pre-revised pension plus dearness relief for the month of June, 2016 was Rs.54,117/- (pension Rs.18,917/- + dearness relief of Rs.35,200/-). The decrease in the pension is on account of the increase in commuted value of pension from Rs.9,458/- to Rs.15,883/- leading to increase in total commutation value of pension by Rs.7,56,351/-. Thus, the cumulative recovery of pension from February, 2013 to June 2016 was Rs.1,14,111/-. It is denied that the respondent had re-fixed the petitioner's pension as last emoluments/last salary drawn at Rs.1,05,600/-. It was further denied that the respondent had denied the benefit of full pension as laid down under Regulation 28 of RBI Pension Regulations, 1990, but amendment in the Regulations was brought about w.e.f. 12.01.2013. The petitioner retired on 31.01.2013 and was sanctioned proportionate pension for 32 years as per the then Regulation 28 of Pension Regulations. Thereafter, as per amendment in Regulation 28 of Pension Regulations, the petitioner was given the benefit of full service w.e.f. February, 2013. It is further averred that the Central Government accorded approval to the Bank's proposal for amendment of Regulation 28 of the RBI Pension Regulations, 1990 vide letter dated 31.3.2017 according to which the rate of basic pension would be 50% of the average emoluments or the 'last pay drawn', whichever is more beneficial to the employee and the same was notified in the official gazette on 28.8.2017. Accordingly, the present method of calculation of pension of an employee is 10 months average or the 'last pay drawn', which is more beneficial to the employee. However, an Administrative Circular dated 26.10.2017 was issued by the respondents wherein in para-2, it is clearly circulated that amendment would be applicable only to the employees retiring from the Bank's service on or after October 6, 2017. However,

the same will not have any effect on the pension drawn by the employees prior to October 6, 2017.

5. The petitioner filed rejoinder wherein it has been averred that the respondent-Bank should have given effect to the stipulation/prescription contained in para-5 of the RBI Pension Regulations, 1990 while issuing impugned circular dated 7.6.2016 as the Committee of CBODs in its meeting dated 5.10.2011 had already approved adoption of 'last pay drawn' method of computation of basic pension. Further, amendments to the existing Regulations of RBI Pension Regulations, 1990 are not governed by clause (j) of sub section (2) of Section 58 of the RBI Act, 1934 (for short 'Act'), but had to be dealt with in accordance with the instructions contained in Regulation No.5. It is further claimed that cut-off-date fixed vide notification dated 28.8.2017 by the respondent-Bank is arbitrary, unfair, illegal and discriminatory.

6. The respondents have filed Sur-rejoinder reiterating the averments made in the reply and in addition thereto, it has been stated that cut-off-date in the impugned notification was fixed in terms of para-7 of the proposal (memorandum submitted to CCB), wherein it is stated that with a view to restricting the financial implication, the amendments were proposed to be implemented with a prospective date so that the arrears are not required to be paid and only future liabilities are accounted for. The bank vide letter dated 19.1.2017 requested the Government of India to approve the proposal to amend Regulation 28 of RBI Pension Regulations, 1990 and the Ministry of Finance vide its letter dated 31.3.2017 accorded its approval. It has further been stated that while amending Regulations, the respondents have followed the procedure as envisaged under Section 58 of the RBI Act and accordingly Regulation 28 was amended by the Central Board of the respondent-Bank after obtaining the prior approval from the Central Government. In terms of sub section-4 of Section 58 of the RBI Act, thereafter the Regulation was published in the Gazette of India dated 6.10.2017 to be laid on the table of both the Houses of the Parliament in October, 2017.

7. I have heard the petitioner and learned counsel for the respondents and have gone through the petition alongwith the accompanying documents annexed with it and also the records of the case that was directed to be produced.

8. There can be no dispute that in matters regarding fixation of cut-off-dates, the scope of interference of the Court is extremely limited. Cut-off-date is fixed by the executive authority keeping in view the economic conditions, financial constraints and many other administrative and other attending circumstances. This is within the domain of the executive authority and the Court should not normally interfere with the fixation of the cut-off-date by the executive authority unless such order on the face of it appears to be blatantly arbitrary and discriminatory. The Government must be left with some leeway and free play at the joints in this connection. But that does not mean that the Court does not interfere even with the cut-off-date, is arbitrary or the reasons for fixing the cut-off-date, are otherwise bad in any justifiable reasons.

9. Adverting to the facts, it would be noticed that it was the respondent-Bank, who of its own had sought the amendment in the Regulation and in this context, it would be necessary to reproduce the letter dated January 19, 2017 addressed by the respondent-Bank to the Government of India wherein it had sought its approval and the same reads thus:

*"RESERVE BANK OF INDIA*

*www.rbi.org.in*

*CO HRMD No.13440/21.01.00/2016-17 January 19,2017*
*Shri Sewa Ram Mehar*
*The Deputy Secretary to the Government of India*
*Ministry of Finance*
*Department of Financial Service*
*Jeevan Deep Building*
*Parliament Street*
*New Delhi – 110001.*

*Dear Sir,*

*RBI Pension Regulations, 1990 – Amendment to Regulation 28 - Rate of basic pension at fifty percent of the last pay.*

*At present in terms of Regulation 28 of RBI Pension Regulations, 1990 the rate of basic pension is fifty per cent of the average emoluments (i.e. average of pay drawn by an employee during the last 10 months of his/her service) subject to a minimum of Rs.3,500/- per mensem. Due to this method, the employees who retire after drawing salary partly on pre-revised scale and partly on revised scale during last 10 months of service draw basic pension at much lower rate compared to employees who retire after drawing salary on revised basic during last 10 months of service. The reduction in monthly pension depends on number of months they draw salary on revised pay scales. This has generated a lot of distress among the affected employees, several of whom have requested for review.*

*2. The RBI Pension Regulations have been framed on the lines of CCS (Pension) Rules, 1972. In Government pension is calculated at 50% of the emoluments of the last month or average emoluments received during last 10 months, whichever is beneficial to the employees. Accordingly, Bank vide letter DO HRMD No.2851/21.01/2011-12 dated October 11, 2011 had forwarded a proposal to amend Regulation 28 of RBI Pension Regulations, 1990 as per Annexure.*

*3. <u>As this will benefit only a few employees, the financial implication will be negligible. However, it will go long way in removing an anomaly which exists today. In view of this, Government is requested to kindly consider Bank's proposal to amend Regulation 28 of Pension Regulations as above and accord approval</u>.*

*Yours faithfully*
*Sd/-*
*(Ramesh Iyer)*
*Assistant General Manager,*
*Encl: As above."*

10. Now, in the teeth of what is contained in para-3 of the letter (supra), it does not lie in the mouth of the respondents to claim that since there was financial implications,

therefore, they granted the benefit of this amended Regulation from the date of notification i.e. 6.10.2017, without granting benefit to those employees, who retired between the period i.e. 01.11.2012 and 5.10.2017.

11. In addition thereto, it would be noticed that in response to the aforesaid letter dated 19.1.2017 seeking approval of the Government for amendment of the RBI Regulations with respect to the rate of pension at 50% of the average emoluments of last 10 months or last pay drawn, the proposal sent by the RBI was approved as such without any modification by the Government as is evident from the letter dated 31.3.2017, which reads thus:

Most Immediate

*"F.No.11/1/2017-IR*
*Government of India*
*Ministry of Finance*
*Department of Financial Services*

*Jeevan Deep Building*
*Parliament Street*
*New Delhi -110001*
*Dated, the March 31, 2017.*

*To*

*CGM(HR)*
*Reserve Bank of India,*
*Central Office Building,*
*Shahid Bhagat Singh Marg,*
*Mumbai.*

*Subject:* *RBI Pension Regulations, 1990 – Amendment to Regulation 28 – Rate of basic pension at fifty percent of the last pay.*

*Sir,*

*I am directed to refer to RBI's letter CO HRMD No.13440/21.01.00/2016-17, dated 19th Jan, 2017 and 20th March, 2017 seeking approval of the Government for amendment in RBI Pension Regulations w.r.t. the rate of basic pension at 50% of average emolument (of last 10 months) or the last pay drawn whichever is more beneficial to the employee.*

*2.* *The said proposal was examined in the Department in consultation with D/o Expenditure and it has been decided to convey the approval on the same.*

*3.* *This has the approval of competent authority.*

*Yours faithfully,*
*Sd/-*
*(Manish Kumar)*
*Under Secretary to the Government of India."*

12. In addition to the aforesaid, it may be noticed that there was no contemporaneous official record placed before this Court with regard to the actual financial implications in case the amendment in the Regulation 28 of the Pension Regulations was to be brought about from 3.10.2011. Even during the course of hearing, the respondents had to candidly admit that no such data was in fact available with the Bank and therefore there was no question for placing the same before the Board etc.

13. Thus, what stand established on the record is that the reasons assigned for applying the Regulations with effect from prospective date are not borne out from the records and are further not substantiated by any contemporaneous official record. Once that be so, then the decision to enforce the amended Regulation No. 28 prospectively i.e. unilaterally rather arbitrary.

14. Lastly and more importantly, the aforesaid Pension Regulations, 1990 could be framed only under Clause (j) of sub section (2) of Section 58 of the Reserve Bank of India Act, 1934, which reads thus:

> *"58.(2) (j) The constitution and management of staff and superannuation funds for the officers and servants of the Bank."*

15. The Pension Regulations so framed were admittedly after sanction of the Central Government and as observed above, the Central Government had approved the amendment of the RBI Regulations as it is as was proposed by the respondent vide its letter dated 19.1.2017.

16. It is more settled that Regulations once framed cannot be amended or altered by administrative circular. Reference in this regard can conveniently be made to the three Judges Bench decision of the Hon'ble Supreme Court in ***V.T. Khanzode and others vs. Reserve Bank of India and another AIR 1982 SC 917***, wherein it was observed as under:

> *"23. Having seen that the Central Board has the power to provide for service conditions of the staff by issuing administrative circulars, the next question for consideration is whether the Staff Regulations of 1948 were issued under Section 58 of the Act. The importance of this question lies in the fact that, quite clearly, if the 1948 Regulations are statutory, they cannot be altered by administrative circulars and, in that event, the impugned circular will not have the effect of superseding them. Having considered the entire material on this subject, including the correspondence that has transpired between the Reserve Bank and the Central Government, we find it difficult to take the view that the Staff Regulations of 1948 were framed in the exercise of power conferred by Section 58. One fact which stands out in this regard is that whereas Section 58 (1) envisages the making of regulations"with the previous sanction of the Central Government", the Regulations of 1948 do not purport to have been made with such sanction. Indeed, in so far as the ex facie aspect of the matter is concerned, the Regulations of 1948 do not purport to have been made under Section 58 at all. It is true that this by itself is not conclusive because, failure to mention the source of power cannot invalidate the exercise of power, if the power is possessed by the authority which exercises it. But, the common course of the manner in which the Central Board exercises its power when it purports to do so under Section 58 is not without relevance and has an important bearing on the question under consideration. The Employees' Provident Fund Regulations of 1935, the Note Issue Regulations of 1935 the*

*General Regulations of 1949, the Scheduled Banks' Regulations of 1951 and the Guarantee Fund Regulations,which were all framed under section 58, contain a preamble reciting that they were framed under that section and that they were framed with the previous sanction of the Central Government. By way of illustration, we may cite the preamble of the Reserve Bank of India General Regulations, 1949, which runs thus:*

> *"In exercise of the powers conferred by Section 58 of the Reserve Bank of India Act, 1934 (II of 1934) and in supersession of the Reserve Bank of India General Regulations, 1935, the Central Board of the Reserve Bank of India, with the previous sanction of the Central Government, is pleased to make the following Regulations..."*

*It is significant that such a recital is conspicuously absent in the Regulations of 1948. That renders it safe and reasonable to accept the statement contained in the counter affidavit filed on behalf of the Reserve Bank by Shri Shamrao Laxman Jathar Deputy Manager in the Department of Administration and Personnel to the effect that the Staff Regulations of 1948 are not statutory in character, not having been made under Section 58 of the Act of 1934. The rejoinder affidavit dated July 16, 1979 filed on behalf of the petitioners by Shri Jamnadas Gupta reiterates the contention that the Regulations of 1948 were framed under Section 58 (1) with the sanction of the Central Government. Support is sought to that contention from the correspondence annexed to the affidavit filed in support of the writ petition and the correspondence annexed to the rejoinder. Of particular importance is the statement contained in the 'Memorandum to the Central Board' dated January 21, 1949, submitted by the then Governor of Reserve Bank, Shri C.D. Deshmukh, on the subject of "Reserve Bank of India Regulations". That Memorandum contains a list of regulations which were made by the Central Board "with the approval of the Central Government". The very first item in the list is"Reserve Bank of India (Staff) Regulations". Having considered the correspondence bearing on the subject and particularly the aforesaid Memorandum, we see no reason to doubt the contention of the Bank that the Regulations of 1948 were not framed under section 58 and that they were not made with the previous sanction of the Central Government. The then Governor of the Reserve Bank of India, Shri C. D. Deshmukh, a distinguished Economist and Civilian, was perhaps justified in assuming from the correspondence that the Central Government has no objection to the proposed regulations, which explains his statement, that they were made with the "approval" of the Central Government. But, it is one thing to infer that the Regulations had the approval of the Central Government since no objection was raised by it to the making of the regulations and quite another that they were made with its previous sanction. The supplementary affidavit dated March, 1980 which was filed on behalf of the Reserve Bank by Shri Pradeep Madhav Joshi, Deputy Manager in the Department of Administration and Personnel, has dealt fully with the correspondence on the subject of previous sanction of the Central Government to the Regulations of1948. We are inclined to accept the statement contained in paragraph 9 of the said affidavit that the Memorandum of January 21, 1949 contains a "factual mistake" to the effect that the Staff Regulations, (which would include the Regulations of 1948) were made with the approval of Central Government. We therefore conclude that the Reserve Bank of India (Staff) Regulations of 1948 were not made under Section 58 of the Act and*

*that, in fact, the Central Board had not obtained the sanction of the Central Government to the making of those Regulations."*

17. Therefore, once the Central Board recommended for changes in the Pension Regulations including the cut-off-date for its implementation then sanction of the Central Government was mandatory because unless the recommendations for the amendment were approved, there is no binding force of such amendment. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Reserve Bank of India and another vs. Cecil Dennis Solomon and another AIR 2004 SC 3196***, wherein it was observed as under:

> *"8.... In Reserve Bank and Another v. S. Jayarajan (1995 supp(4) SCC 584) the view expressed in V.T. Khanzode and Ors. v. Reserve Bank of India and Anr. (1982 (2) SCC 7) was reiterated that the Staff Regulations are administrative in nature. The Central Board is authorized to take such administrative decisions and Central Government's approval/decision is not necessary. Therefore, if changes were to be introduced in the Staff Regulations and the Central Board takes a decision, there would not be any necessity for taking approval of the Central Government. But the position is different so far as the Pension Regulations are concerned. The said Regulations were framed with the sanction of the Central Government and are framed in exercise of the powers conferred by clause (j) of sub-section (2) of Section 58. If the Central Board recommended for changes in the Pension Regulations, sanction of the Central Government is mandatory. This aspect seems to have been lost sight by the High Court and the respondents cannot derive any advantage from the mere recommendations made by the Central Board suggesting changes to the Regulations. The Central Government has specifically dealt with the recommendations and has turned them down. Unless the recommendations for the amendment are approved, they have no binding force or application to make any claim thereon. Further, the respondents who claim that they were not claiming the benefit under the Pension Regulations could not point out any other source to which their claims could be linked. The respondents-employees were getting superannuation benefits accruing to them under the contributory provisions and gratuity schemes. The High Court was also in error in equating the case of resignation to voluntary retirement. The two are conceptually different in the service jurisprudence and different consequences would flow depending upon one or the other of the courses."*

18. Thus, what is evident from the aforesaid discussion is that the respondent-Bank vide its letter dated 19.1.2017 had itself requested the Central Government to accord approval in the amendment of Regulations 28 which at the relevant time provided for basic pension of 50% of the average emoluments (i.e. average of pay drawn by an employee during the last 10 months of his/her service) subject to a minimum of Rs.3,500/- per mensem. According to the respondent by implementing this method, the employees who retire after drawing salary partly on pre-revised scale and partly on revised scale during last 10 months of service draw basic pension at much lower rate compared to employees who retire after drawing salary on revised basis during last 10 months of service. The reduction in monthly pension depends on number of months they draw salary on revised pay scales. This had generated a lot of distress among the affected employees, several of whom had requested for review. The revision was sought to be justified by the respondents on the ground that the

RBI Pension Regulations had been framed on the lines of CCS (Pension) Rules, 1972 and in Government, pension is calculated at 50% of the emoluments of the last month or average emoluments received during last 10 months, whichever is beneficial to the employees.

19. It was on the aforesaid basis that the respondent-Bank had forwarded the proposal to amend the Regulation 28 of RBI Pension Regulations, 1990 so as to bring it at par or provide for pari-materia pension as was being given to the Central Government employees in terms of CCS (Pension) Rules, 1972. Evidently, this proposal was to apply to all sections of the retired employees as is evident from para-3 of the letter wherein the respondent-Bank itself had categorically mentioned that in case the amendment is carried out, then the benefit arising therefrom would be only to few employees and, therefore, the financial implication would be negligible and would go long way in removing an anomaly which exists today.

20. It is also not in dispute that the proposal of the bank was accepted as such by the Government of India without there being any modification as is evident from the letter dated 31.3.2017 (supra) wherein it was categorically observed that the proposal of the bank had been examined in the Department in consultation with D/o Expenditure and it had been decided to convey the approval on the same.

21. Once that be so, then obviously, the benefits of the amendment of the Regulations could not have been amended or altered by administrative circular. [Refer: ***V.T. Khanzode's*** case (supra]. Apart from the above, if the Central Board was of the view that the changes were required to be made in the Pension Regulations including cut-off-date for its implementation, then sanction of the Central Government was mandatory because unless the recommendations for the amendment were approved. There is no binding force of such amendment [Refer: ***Cecil Dennis Solomon's*** case (supra].

22. Indubitably, the respondent-Bank did not seek approval of the Central Government before deciding to implement the Pension Regulations from the prospective date or from a particular date. Therefore, its action is illegal and cannot therefore be withstand judicial scrutiny.

23. Accordingly, the impugned circular dated 7.6.2016 (Annexure P-3) is quashed and set-aside and resultantly, the impugned notification dated 28.8.2017 which fixes the date of operation of the amendment as 06.10.2017 is also quashed and set-aside and the respondents are directed to re-fix the basic pension of the petitioner on the basis of 'last pay drawn' effective from 01.02.2013 and also pay commuted value of pension on that basis i.e. last pay drawn. The respondent-Bank is also directed to refund Rs.1,14,111/- to the petitioner which was recovered from the petitioner illegally without giving him any notice.

24. The writ petition is disposed of in the aforesaid terms, so also the pending application(s) if any, leaving the parties to bear their own costs. Copy of judgment be sent to the petitioner free of cost on his address as given in memo of parties.

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

Uttam Ram .....Appellant/Complainant.

Versus

Devinder Singh Hudan and another .....Respondents.

Cr. Appeal No.431 of 2018.
Judgment reserved on : 12.12.2018.
Date of decision: 17th December, 2018.

**Negotiable Instruments Act, 1881 -** Sections 138 & 139 - Dishonour of Cheque- Complaint- Presumption of consideration- Held- Presumption that cheque was issued for considerations is rebuttable - Standard of proof required for such rebuttal is preponderance of probability and not proof beyond reasonable doubt- Preponderance of probabilities can be drawn not only from material on record but also by reference to circumstances upon which accused has relied. (Paras 11 & 20)

**Expression "Munshi" -** What it means?- Held, Munshi is a Persian word, originally used for a contractor, writer or Secretary and later on during Mughal Empire and British India, it was used for teachers, Secretaries and translators but never for an agent. (Para 27)

**Cases referred:**

Hiten P. Dalal vs. Bratindranath Banerjee (2001) 6 SCC 16
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
Krishna Janardhan Bhat vs. Dattatraya G. Hegde (2008) 4 SCC 54
Kumar Exports vs. Sharma Carpets, (2009) 2 SCC 513
M.S. Narayana Menon alias Mani vs. State of Kerala and another (2006) 6 SCC 39
Rangappa vs.Sri Mohan, (2010) 11 SCC 441,
Vinay Parulekar vs. Shri Pramod Meshram, 2008 Criminal Law Journal 2405

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| For the Appellant : | Mr. J.L. Bhardwaj and Mr. Sanjay Bhardwaj, Advocates. |
| For the Respondents: | Mr. Vinay Kuthiala, Senior Advocate with Mr. Diwan Singh Negi, Advocate, for respondent No.1. |
| | Mr. Sudhir Bhatnagar, Additional Advocate General with Mr. Bhupinder Thakur, Deputy Advocate General, for respondent No.2. |

The following judgment of the Court was delivered:

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**Tarlok Singh Chauhan, Judge**

The complainant is the appellant, who aggrieved by the dismissal of his complaint under Section 138 of the Negotiable Instruments Act (for short the 'Act'), has filed the instant appeal.

2. Precisely, the case set up by the appellant is that he was an orchardist, grower and was also having his own apple forwarding agency at places Gugra, Kutwa, Dohva and surrounding areas within Tehsil Anni, District Kullu, H.P. The appellant also used to supply apple cartons, apple trays and other allied packing material to his clients on cash and credit basis. The appellant also owned commercial rope way span which connected various apple orchards with the road head so as to provide facility to the growers to carry their produce from the orchards.

3. During the apple season in the year 2011, accused-respondent No.1 purchased apple crop of various growers in villages Kutwa, Dohva and surrounding areas in

Phati Buchhair, Tehsil Anni directly from orchards and thereafter the same was carried towards road head through the rope way span of the appellant. This was pursuant to a bargain entered into between the appellant and respondent No.1 wherein it was further agreed that respondent No.1 would purchase entire packing material from the appellant and thereafter forward the entire apple crop in the apple market through the forwarding agency of the appellant named and styled as "Uttam Ram Forwarding Agency, Gugra-Chowai". However, later on, the apple produce was forwarded by respondent No.1 through his personal arrangement, but the entire packing material was procured from the appellant on credit basis through an authorized agent namely Prem Chand son of Shri Kumat Ram. As per the agreement, the appellant supplied packing material to respondent No.1 and also paid a sum of Rs.2,00,000/- to him for meeting out the expenses of labour etc. which amount was not returned to the appellant.

4. Thereafter, in the month of September, 2011, accounts were finally settled between the appellant and the above named authorized agent of respondent No.1 and in terms thereof a sum of Rs.5,38,856/- was recoverable as on 12.09.2011 for the payment of which respondent No.1 issued a cheque No.942816 dated 02.10.2011 amounting to Rs. 5,38,856/-. The appellant presented the cheque for encashment, however, the same was returned by the bank for "insufficiency of funds" in the account of respondent No.1. The appellant thereafter contacted respondent No.1 over telephone, who assured him to make the payment within a few days, but to no avail. The appellant eventually presented the cheque for encashment at the Punjab National Bank, Anni, however, the same was returned unpaid for "insufficient funds" vide memo dated 11.10.2011. Thereafter, the appellant served respondent No.1 with a legal notice dated 22.10.2011 under registered cover which was sent to the official as well as home addresses of respondent No.1 and duly received by him on 27.10.2011. However, despite the receipt thereof, no payment was made, compelling the appellant to file a complaint under Section 138 of the Act.

5. The learned trial Court after recording preliminary evidence took cognizance and summoned respondent No.1. The appellant in support of its case examined three witnesses. Thereafter, the statement of respondent No.1 under Section 313 Cr.P.C. was recorded. Respondent No.1 examined one witness HHC Ranjeet Singh as DW-1 and closed his evidence.

6. The learned trial Magistrate after recording evidence and evaluating the same dismissed the complaint by concluding that since the cheque amount was more than the amount allegedly due on the date when the cheque was presented, therefore, in terms of Section 138 of the Act, the cheque cannot be said to be drawn towards the discharge of either the whole or part of any debt or liability.

7. It is vehemently argued by Shri J.L. Bhardwaj, Advocate, for the appellant that the findings recorded by the learned Courts below are perverse and, therefore, deserve to be set aside. Whereas, Shri Vinay Kuthiala, Senior Advocate, assisted by Shri Diwan Singh Negi, Advocate, for respondent No.1, would argue that the contradictions in the evidence of the appellant were sufficient to hold that respondent No.1 has not only probabilized his defence, but proved the non-existence of consideration through the appellant's evidence. Therefore, in such circumstances, no exception can be taken to the judgment of acquittal passed by the learned trial Magistrate.

8. I have heard the learned counsel for the appellant and have also gone through the material placed on record.

9. In order to appreciate the rival contentions of the learned counsel for the parties, it would be necessary to examine Sections 118(a) and 139 of the Act and the same are reproduced as under:-

> ***"118. Presumptions as to negotiable instruments.****-Until the contrary is proved, the following presumptions shall be made:-*
>
> *(a)* ***of consideration****- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;*
>
> *[1][****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.]"*

10. Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. These provisions were intended to discourage people from not honouring the commitments by way of payment through cheques. It is for this reason that the Courts should lean in favour of an interpretation which serves the object of the statue.

11. In ***M.S. Narayana Menon alias Mani*** *versus* ***State of Kerala and another (2006) 6 SCC 39***, the Hon'ble Supreme Court while dealing with a case under Section 138 of the Act held that the presumption under Sections 118(a) and 139 were rebuttable and the standard of proof required for such rebuttal was "preponderance of probability" and not proof "proved beyond reasonable doubt" and it was held as under:-

> "*29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words 'proved' and 'disproved' have been defined in Section 3 of the Evidence Act (the interpretation clause)....*
>
> *30.Applying the said definitions of 'proved' or 'disproved' to principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.*
>
> * * *
>
> *32.The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies.*
>
> *41....."23.....Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man"."*

12. Similar reiteration of law can be found in ***K. Prakashan*** *versus* ***P.K. Surenderan (2008) 1 SCC 258*** wherein it was observed as under:-

> *"13. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118 (a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118 (a) and 139 are rebuttable in nature……*
>
> *14. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability."*

13. To the same effect is the decision of the Hon'ble Supreme Court in ***Krishna Janardhan Bhat*** *versus* ***Dattatraya G. Hegde (2008) 4 SCC 54*** wherein the Hon'ble Supreme Court observed as under:-

> *"*32*…..Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.*
>
> * * *
>
> *34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is preponderance of probabilities……*
>
> * * *
>
> *45….. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced……."*

14. Earlier to that the Hon'ble Supreme Court in ***Hiten P. Dalal*** *versus* ***Bratindranath Banerjee (2001) 6 SCC 16***, compared the evidentiary presumptions in favour of the prosecution with the presumption of innocence in the following terms:-

> *"22…..Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.*
>
> *23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary……."*

15. Section 139 of the Act provides for drawing a presumption in favour of the holder and the Hon'ble Supreme Court in ***Kumar Exports*** *versus* ***Sharma Carpets, (2009) 2 SCC 513*** has considered the provisions of the Act as well as Evidence Act and observed as under:-

> *"14. Section 139 of the Act provides that 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.*

*15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Indian Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable) and (3) "conclusive presumptions" (irrebuttable). The term `presumption' is used to designate an inference, affirmative or disaffirmative of the existence a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".*

* * *

*18. Applying the definition of the word `proved' in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.*

*19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."*

16. The Hon'ble Supreme Court thereafter held that the accused may adduce evidence to rebut the presumption, but mere denial regarding of existence of debt shall not serve any purpose.

17. In ***Rangappa*** *versus* ***Sri Mohan, (2010) 11 SCC 441***, Hon'ble three Judge Bench of the Hon'ble Supreme Court had occasion to examine the presumption under Section 139 of the Act and it was held that in the event the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. It is apposite to refer to the relevant observations which read as under:-

"26*. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent,*

*the impugned observations in Krishna Janardhan Bhat v. Dattatraya G.Hegde (2008) 4 SCC 54 may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.*

*27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof."*

18. Bearing in mind the aforesaid exposition of law, it can conveniently be held that in terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in Section 3 of the Evidence Act.

19. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

20. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man.

21. Now, adverting to the facts of the case, it would be noticed that respondent No.1 had raised various defences, but, the same were turned down by the learned Magistrate. However, it was only on the basis of the contradictions that too in the evidence led by the appellant himself that respondent No.1 was ordered to be acquitted.

22. As per the complaint, it was stated that 5000 empty apple cartons were sold by the complaint(appellant) to accused (respondent No.1) at the rate of Rs.40/- each. It was further averred that the total amount of carriage was Rs.1,50,000/- at the rate of Rs.30/- per box which works out to 5000 cartons which were allegedly carried from Kutwa to Gugra

through rope way span of the appellant. However, in cross examination, the appellant stated that he had sold 7000-8000 cartons to respondent No.1. He further stated that he carried through his span as well as sent through his forwarding agency about 4000 apple cartons to respondent No.1.

23. Now, in case the testimony of CW-3 Prem Chand, who is claimed to be the 'Munshi' of respondent No.1, is adverted to, then it would be noticed that he stated that he purchased 5000-6000 apple cartons from the appellant out of which 2600 apple cartons were carried through the span of the appellant and also forwarded to the apple market through the forwarding agency of the appellant.

24. Now, what emerges from the evidence of the appellant are three separate and distinct versions on record regarding the number of apple cartons that were carried through the span of the appellant and forwarded through his forwarding agency. The appellant in the complaint states that the number of such cartons were 5000, however, while appearing as CW-2, he states that number of such cartons were 4000, whereas, CW-3 states that number of such cartons were only 2600.

25. Apart from the above, it would be noticed that the entire foundation of the complaint is receipt Ex.CW1/D, but then the same admittedly is not signed by respondent No.1 and has been signed by CW-3 Prem Chand and against that it has been written 'Munshi'.

26. Mr. Bhardwaj would claim that CW-3 'Munshi' had executed this receipt acknowledging that an amount of Rs.5,38,856/- was due and payable by respondent No.1. However, I find that nowhere in the complaint has CW-3 been referred to as a 'Munshi' which in common parlance is understood to be a 'secretary' or an 'assistant'.

27. 'Munshi', in fact is a Persian word originally used for a contractor, writer or a secretary and later on was used in the Mughal Empire and British India for native language teachers, teachers of various subjects especially administrative principles, religious texts, science and philosophy and also secretaries and translators employed by the Europeans. 'Munshi' could also be a scribe, clerk or an accountant, but the said term was never used for an agent. Even otherwise, the agency as defined under Section 27 of the Act was required to be established and proved by the appellant before CW-3 could in fact be held to be the agent of respondent No.1 so as to enforce the liability upon him.

28. Another contradiction in the case of the appellant is with regard to charges of carriage. As per the complaint, these charges were Rs.30/- per box, whereas, in cross-examination he admitted that in the year 2011 the charges of each box through span were Rs.15/- per box and at the time of his examination were Rs.20/-. Therefore, the trial Magistrate committed no error by concluding that the amount claimed in the complaint was much higher. Not only, there were contradictions with regard to number of cartons which were carried through the span of the appellant, even there were huge variations with respect to the the charges of carriage.

29. In ***Shri Vinay Parulekar*** *versus* ***Shri Pramod Meshram, 2008 Criminal Law Journal 2405***, the learned Single Judge of the Bombay High Court held that if some material is brought on record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal. The accused can prove the non-existence of consideration by raising a probable defence. If the accused is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus will shift to the complainant who will be obliged to prove it as a matter of

fact and upon its failure to prove will disentitle him to the grant of relief on the basis of negotiable instrument.

30. As repeatedly held by the Hon'ble Supreme Court the standard of proof so far as the prosecution is concerned, is proof of guilt beyond all reasonable doubt, however, the one on the accused is only mere preponderance of probability. Therefore, once the accused/respondent No.1 has probabilized his defence by showing the consideration to be improbable or doubtful, then obviously, in the given facts and circumstances, the appellant was obliged to prove the existence of consideration as a matter of fact and upon his failure to prove the same, disentitled him to the grant of relief on the basis of negotiable instrument.

31. In view of the aforesaid discussion, I find no merit in this appeal and accordingly the same is dismissed. Pending application, if any, also stands disposed of.

**********

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

Gaurav Thakur .....Appellant

Versus

Prem Singh and others .....Respondents

LPA No. 98 of 2015
Decided on: 22.11.2018

**Constitution of India, 1950-** Articles 14 & 226 **- CCS (CCA) Rules, 1964-** Rule 2(h)- Expression "Government Servant"- Who is? Held, such servant must hold civil post under Union or State Government or under any Local or other Authority - Mid-day meal work not holding any civil post and engaged under Scheme on payment of honorarium is not Government Servant. (Para 5) Title: Gaurav Thakur vs. Prem Singh and Others, Page-

**Constitution of India, 1950-** Articles 14 & 226- Part-time Water Carrier - Engagement- Scheme providing grant of additional marks to person whose no member of family is in Government Service - Private Respondent (R6) engaged by Department by giving additional marks though his mother was working as mid-day meal worker in same school- Engagement of (R6) upheld by justifying grant of additional marks to him by holding that his mother not being in Government Service - LPA allowed. (Paras 4 to 8)

**Case referred:**
Abhay Kumar Singh and others V. State of Bihar and others, (2015) 1 SCC 90

For the appellant: Mr. Shrawan Dogra, Senior Advocate with Mr. Umesh Kanwar and Mr. Harsh Kalta, Advocates.

For the respondents: Mr. Bhuvnesh Sharma, Advocate for respondent No.1.
Mr. Vikas Rathore and Mr. Narinder Guleria, Addl. A.Gs with Mr. J.S. Guleria and Mr. Kunal Thakur, Dy. A.G for respondents No. 2 to 6.

The following judgment of the Court was delivered:

**Dharam Chand Chaudhary, Judge** (Oral)

Judgment dated 26.06.2015 passed by learned Single Judge in CWP No. 206 of 2013 is under challenge in this appeal. The controversy as brought to the Court lies in a narrow compass, as we have only to consider that the engagement of someone as Mid Day Meal Worker under the scheme, Annexure A-1 to the appeal is a service in the Government or not. However, before coming to the point in issue, it is desirable to take note of the facts, in a nut-shell.

2. The appellant (hereinafter referred to as 'respondent No.6') and respondent No.1 (hereinafter referred as the 'writ-petitioner') both belong to village Sarad Lohari Tehsil Rakkar, District Kangra, H.P. There was a vacancy of Part-time Water Carrier in Government Primary School, Sarad Dogri, Tehsil Rakkar, District Kangra, H.P. The applications to fill up the said vacancy were invited from the eligible candidates. The writ-petitioner and respondent No.6 both being eligible had submitted their applications and were interviewed on 23.3.2011 by a Selection Committee comprising S.D.O(Civil) concerned, Headmaster of the school and the President, School Management Committee. Respondent No.6 having secured 24 marks as per the criteria prescribed and also on the basis of personal interview was selected and appointed as Water Carrier in the school. The appointment letter dated 27.2.2012 is Annexure R-4 to the reply filed in the writ petition by respondents No. 1 to 5. He reported for duties on 28.2.2012, as is apparent from Annexure R-4 to the reply. Meaning thereby that since February, 2012, it is respondent No.6 who is working as Water Carrier in Government Primary School, Sarad Dogri.

3. The writ-petitioner aggrieved by the appointment of respondent No.6 had preferred CWP No. 1944 of 2012, which was disposed of by a Division Bench of this Court with liberty reserved to the petitioner to file representation before the 3rd respondent and a direction to the said respondent to decide the same after affording the opportunity of being heard to the petitioner vide judgment dated 2nd April, 2012, Annexure P-13 to the writ petition. The representation made by the petitioner was considered by the competent authority and decided vide order dated 12.09.2012, Annexure P-15 with the observations that respondent No.6 has been selected by the Selection Committee and also appointed as Part-time Water Carrier, hence it was not deemed proper to interfere with the selection and appointment. This has led in filing another writ petition (CWP No. 206 of 2013) decided vide judgment, under challenge in this appeal.

4. On hearing Mr. Shrawan Dogra, learned Senior Advocate assisted by Mr. Umesh Kanwar and Mr. Harsh Kalta, Advocates on behalf of appellant-respondent No.6 and Mr. Bhuvnesh Sharma, learned counsel on behalf of respondent No.1-writ petitioner as well as Mr. Narinder Guleria, learned Additional Advocate General on behalf of the respondent-State and also going through the impugned judgment of learned Single Judge while interpreting the guidelines applicable for appointment as Part-time Water Carrier and also taking note of the factum of mother of respondent No.6, at the relevant time, was working as Mid Day Meal Worker, has concluded that in terms of Clause 7(4) of the guideline applicable for appointment as Part-time Water Carrier, it is the candidates belonging to a family of which no one is in government service alone entitled to get five marks. Learned Single Judge has construed the mother of respondent No.6 working as Mid Day Meal Worker being in Government service has held the five marks awarded to him in the capacity of a member of the family of which no member is in Government service, illegal and contrary to the scheme. We, however, are not in agreement with such interpretation given by learned Single Judge for the reason that the employment under "Mid Day Meal Worker Scheme" cannot be treated as service in Government by any stretch of imagination.

5. In view of Rule 2 (h) of CCS (CCA) Rules, the meaning of word "Government Servant" is as under:-

> "**Government Servant" means a person who-**
>
> (i) is a member of a service or holds a civil post under the Union, and includes any such person on foreign service or whose services are temporarily placed at the disposal of a State Government, or a local or other authority;
>
> (ii) is a member of a service or holds a civil post under a State Government and whose services are temporarily placed at the disposal of the Central Government;
>
> iii) is in the service of a local or other authority and whose services are temporarily placed at the disposal of the Central Government."

The definition as given to word "Government Servant" therefore makes it crystal clear that such a servant must holds a civil post under the Union or the State Government and also any local or other authority. Therefore, a mid day meal worker, who does not hold a civil post and rather is engaged under a scheme framed for the purpose of payment of the honorarium as discussed hereinabove cannot be said to have hold a civil post under the Union or State Government.

6. A Mid Day Meal Worker is engaged on payment of honorarium, which earlier was Rs.400/- per month and now Rs.1,000/-, after its revision in the year 2011. The services of Mid Day Meal Worker are required in the school only on the days when school remains open and not on holidays and also during vacations. Meaning thereby that a Mid Day Meal Worker renders services in a school only for a period less than 10 months in a calender year. Otherwise also, the engagement of Mid Day Meal Worker is under the scheme having no right or claim to seek regularization or any other benefit, admissible to a Government servant. True it is that the guidelines for appointment as Part-time Water Carrier provides for giving preference to the candidates belonging to the families of which no member is in Government/Semi-Government service. Respondent No.6, in view of discussion hereinabove and in our considered opinion, also belongs to a family from which no member is in Government service.

7. Now, if coming to the criteria regarding distribution of marks prescribed in the policy under Clause 7(iv), there is provision of awarding five marks to a candidate belonging to a family of which no one is in government service. We feel that Clause 7(3) and 4 of the guidelines reproduced in para 6 of the impugned judgment have to be read together and not in isolation. The word 'unemployed' in Clause 7(4) contemplates a candidate from whose family no-one is there in Government service.

8. We are not in agreement with the submissions made by Mr. Bhuvnesh Sharma, learned counsel that word 'unemployed' in Section 7(4) of the policy constitutes any employment and not confined to the employment with the Government, for the reason that the scheme framed either for engagement as Mid Day Meal Worker or appointment of Part-time Water Carrier are the Government sponsored schemes and any other meaning except the employment in Government service cannot be assigned words " No employees" therein. Therefore, for all the reasons hereinabove, the Selection Committee has rightly awarded five marks to respondent No.6 and being in merit, he has rightly been appointed as Part-time Water Carrier. He is working in the school for a period over six years and at this stage, otherwise also, it would not be proper to quash his appointment and order for fresh selection. Support in this regard can be drawn from the judgment of the Apex Court in

***Abhay Kumar Singh and others*** V. ***State of Bihar and others, (2015) 1 SCC 90***. The relevant extract of this judgment is reproduced as under:-

> "12. We have given due consideration to the rival submissions. It remains undisputed that the allegation of manipulation was duly enquired into and a finding was recorded against the appellants. Irrespective of the question whether the criteria adopted in making the selection on the basis of more height of candidates was valid, the fact remains that the appellants were held to have manipulated and got their height wrongly recorded more than their actual height. At the same time, responsibility for correct recording of the height was of the Department and after the appellants were duly selected and appointed, and were in service for four years, their termination, in facts and circumstances, would be too harsh. In these circumstances while we are not inclined to reinstate the appellants with back wages and continuity of service, we direct that the appellants be given fresh appointment as constables against available vacancies within three months from the date of receipt of a copy of this order."

9. In view of what has been said hereinabove, we allow the present appeal and quash the impugned judgment. Consequently, the writ petition is dismissed, so also the pending application(s), if any.

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

Shri Subhash Mahajan .....Appellant
Versus
The Land Acquisition Collector and another ...Respondents

RFA No. 161 of 2008
Reserved on : 26.09.2018
Decided on: 13.12.2018

**Land Acquisition Act, 1872** - Sections 18 & 23- Acquisition of Land for public purpose-Compensation-Reference-Reference Court denying compensation qua house built over acquired land on ground of claimant not proving that said structure existed on date of Notification issued under Section 4 of Act- Appeal- Claimant relying upon observation of Hon'ble Division Bench made in another litigation of house might be there on said land prior to Notification- Held, observation of Hon'ble Division Bench only prima-facie- Said judgment also directed District Judge not to take it into consideration while deciding main case-Khasra Girdawari not showing any house over acquired land till April, 1992 though allegedly built in 1981- Ex-parte decree of adverse possession obtained by claimant collusive in nature- No entry of house in Panchayat record- Notices issued by District Administration to owner in 1994-95 for stopping construction as land stood acquired and no construction could be raised over it- Spot inspection report of 1999 also revealing construction to be new without sanitation, electricity and water fittings and subsequent to Notification issued under Section 4 of Act- Appeal dismissed- Award upheld. (Paras12 to 17)

***Case referred:***

Gurdwara Sahib Vs. Gram Panchayat Village Sirthala, (2014) 1 SCC 669

| | |
|---|---|
| For the appellant: | Mr. Bhupinder Gupta, Senior Advocate with Mrs. Poonam Gehlot, Advocate. |
| For the respondent: | Mr. R.P. Singh and Mr. Kunal Thakur, Dy. A.Gs for respondent No.1.<br>Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lall, Advocate for respondent No.2. |

The following judgment of the Court was delivered:

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**Dharam Chand Chaudhary, Judge.**

This appeal is directed against the award dated 9.5.2008 passed by learned District Judge, Bilaspur in Land Reference Petition No. 2 of 1996, whereby the claim of the appellant (hereinafter referred to as the 'petitioner') for compensation with respect to the house he allegedly constructed on the land bearing Khasra No. 87/1 by way of spending huge money though has been acquired, however, no compensation paid.

2. The petitioner claims himself to be the owner of land bearing Khasra No. 87 situated in village Baloh, Pargana, and Tehsil Sadar, District Bilaspur H.P. The dispute is qua the compensation paid to him towards the market value of the house i.e. Rs.37,90,000/-, he allegedly had constructed well before the acquisition of the land bearing Khasra No. 87. The land was acquired by the beneficiary i.e. M/s Associated Cement Corporation Limited, Gagal, Cement Works, Barmana, District Bilaspur (H.P.), respondent No.1. The Notification under Section 4 of the Land Acquisition Act (hereinafter referred to as the 'Act' in short) was issued on 1.10.1992. The compensation of the acquired land though assessed and paid to the petitioner, however, not qua the house in dispute allegedly was in existence over the acquired land. A sum of Rs.80,00,000/- was, therefore, claimed as compensation on account of acquired house.

3. The respondents have contested the claim of the petitioner on the grounds *inter-alia* that the market value of the acquired land has been assessed correctly and the petitioner is not entitled to any enhanced amount of compensation. As regards, the market value of the house, it is stated that the house was constructed by the petitioner after the Notification regarding the acquisition of the land under Section 4 of the Act was issued. The petition, as such, was sought to be dismissed.

4. On the pleadings of the parties, learned reference Court below has framed the following issues:-

1. *Whether the petitioner has not been paid adequate compensation in respect of the land acquired? OPP.*
2. *Whether the petitioner is not entitled for the compensation in respect of the alleged house, tank and wall existing on the acquired land as alleged? OPP.*
3. *If issue No.2 is proved in affirmative, to what amount of compensation, the petitioner is entitled? OPP.*
4. *Whether the court has no jurisdiction to try this case? OPR.*

5. *Whether the house was not in existence at the time of issuance of acquisition notice under section 4 of the Act, if so, its effect? OPR.*

6. *Relief.*

5. Since the petitioner failed to produce any evidence to show otherwise that the market value of the acquired land assessed by the Land Acquisition Collector is on lower side, therefore, issue No.1 was decided against him. Issue Nos. 2 to 5 pertain to the alleged construction of house, tank and wall. Learned reference Court below while answering issues No. 2 and 3 against the petitioner, whereas, issue No.5 in favour of the respondents has concluded that the house was constructed well before the issuance of Notification under Section 4 of the Act, is not proved on record. He, therefore, was not held entitled to the compensation as claimed. Issue No.4 was decided as not pressed. As a consequence and recording findings on all the issues, learned reference Court below had initially dismissed the reference vide award dated 1.11.1999. The same was challenged by the petitioner in this Court in RFA No. 34/2000. A Co-ordinate Bench of this Court while taking note of the order passed in FAO No. 343/96 on 4th December, 1997 by a Division Bench of this Court holding therein that *prima-facie* the disputed house was in existence over the acquired land on the day when the Notification under Section 4 of the Act was issued, has remanded the case to learned reference Court below for re-determination of issue as to whether the claimant had constructed the house and therefore, was entitled to the compensation.

6. On the remand of reference petition, learned reference Court below has decided the same afresh vide award dated 9.5.2008, which is under challenge before this Court on several grounds, however, mainly that the evidence as has come on record has not been appreciated in its right perspective. The observations of this Court in the judgment passed in FAO No. 343/96 that the house in question was in existence over the acquired land on the day of its acquisition were also ignored. The judgment and decree Ext. P-A, whereby the petitioner has been declared owner of the land bearing Khasra No. 87 and also the house constructed thereon by way of adverse possession has also erroneously been ignored.

7. Mr. Bhupinder Gupta, learned Senior Advocate assisted by Mrs. Poonam Gehlot, Advocate has argued that cogent and reliable evidence available on record suggesting that the petitioner had constructed the house well before issuance of Notification under Section 4 of the Act is erroneously ignored. The judgment Ext.P-A and the opinion of the Architect PW-2 Rattan Lal regarding age of the house has been misread and misconstrued. The observations of a Division Bench of this Court dated 4.12.1997 passed in FAO No. 343/96 that *prima-facie* house in question in existence over the acquired land has erroneously been ignored and not taken into consideration also pressed in service. Such an approach, according to Mr. Gupta, has resulted in miscarriage of justice to the petitioner.

8. On the other hand, learned Deputy Advocate General and Mr. K.D. Sood, learned Senior Advocate assisted by Mr. Rajnish K. Lall, Advocate representing the respondents while repelling the contentions raised on behalf of the petitioner have concluded that the suit was instituted in September, 1982. The same was decreed *ex-parte*. The petitioner had based his claim qua he being owner in possession of land bearing Khasra No. 87 by way of adverse possession and as the defendants, the true owners, failed to put in appearance despite service, therefore, he obtained the decree, which is not only *ex-parte* but collusive also. The same, as such, is stated to be rightly ignored. Otherwise also, the Notification under Section 4 of the Act being issued on 1.10.1992 is after few days of the

institution of the suit which was allegedly instituted on 21.09.1992. The Notices Ext. R-1 to Ext. R-7 issued to the defendants in the suit, the true owners of the land bearing Khasra No. 87 to stop the construction, according to Mr. Sood, demolishes the entire case of the petitioner. The spot inspection report is dated 11.1.1999, however, nothing is there to suggest that the construction was in existence over the land in question. The judgment and decree Ext.P-A in the suit instituted by the petitioner being not only *ex-parte* and collusive but also procured one confer no right, title or interest qua the land bearing Khasra No.87, upon the petitioner as he is an encroacher and as such not entitled to seek declaration that he has acquired title in the land/property encroached upon by way of adverse possession in view of the judgment of the Hon'ble Apex Court in ***Gurdwara Sahib*** V. ***Gram Panchayat Village Sirthala, (2014) 1 SCC 669***.

9. On analyzing the rival submissions and also the evidence recorded in the reference Court below as well as the additional evidence on the directions of this Court consequent upon the order dated 24.06.2010 passed in an application under Order 41 Rule 27 of the Code of Civil Procedure (CMP No. 330 of 2010) at the very out set, it would not be improper to conclude that learned reference Court has not committed any illegality or irregularity while arriving at a conclusion that for want of cogent and reliable evidence that the petitioner had constructed the house over the acquired land well before the issuance of Notification under Section 4 of the Act is not at all proved. The judgment dated 4.12.1997 passed by a Division Bench of this Court in FAO No. 343/96 Ext.P-X2 has been heavily relied upon by learned counsel representing the petitioner. The observations in this judgment reads as follows:-

> *"After hearing both sides, we are of the view that there are no merits in the appeal. Prima-facie the view taken by the learned District Judge that prior to the issue of 4(1) notification the house was constructed, appears to be correct. The conclusion in that behalf was based upon the plaint dated 25.9.1992 in a suit filed by the respondent herein against one Prem Lal in which it was specifically averred that the house in question was constructed. As Section 4(1) notification was subsequent to the filing of the aforesaid suit, we are inclined to agree with the view taken by the learned District Judge that the balance of convenience was in favour of granting interim injunction in favour of the respondent herein. We, therefore, dismiss the appeal with no order as to costs."*

10. It is thus abundantly clear that the satisfaction recorded by this Court qua the existence of the house over the acquired land well before the issuance of Notification under Section 4(1) of the Act was *prima-facie*. Not only this, but the last para of this judgment clarifies that such observations made therein shall not be taken into consideration while deciding the main case. Therefore, it was left to the trial Court to have applied its mind in the given facts and circumstances and also the evidence available on record to record the findings as to whether the house was in existence over the acquired land well before the issuance of Notification under Section 4 of the Act or not. The judgment Ext. P-X2 is, therefore, hardly of any help to the case of the petitioner.

11. Now if coming to the copy of Khasra Girdawari Ext.P-X1 for the period August, 1987 to April, 1992. Except for April, 1992, there is no entry that over two biswas of land bearing Khasra No. 87, the house was in existence. Interestingly enough, the petitioner has neither been recorded owner nor in possession of the land bearing Khasra No. 87 in this document. Therefore, a stray entry recorded only in April, 1992 cannot be taken as a clinching proof of the construction of the house by the petitioner over the land in question before issuance of Notification under Section 4 of the Act.

12. Now if coming to the Civil Suit he filed for declaration that he has acquired title in the suit land by way of adverse possession. He being an encroacher in terms of law laid down by the Hon'ble Apex Court in ***Gurudwara Sahib's*** case cited supra was not legally entitled to seek declaration on the plea of adverse possession. In terms of ratio of this judgment, such a plea can be used as a shield and not as a sword. Therefore, had there been any evidence i.e. entries in the revenue record that he was in possession of the land in question, at the most entitled to the protection of his possession, leaving it open to the true owners i.e. the defendants in the suit to have resorted to the remedy available to them in accordance with law for seeking his eviction therefrom, being a trespasser. In the case in hand, however, he has failed to prove that he was in possession of the suit land. The judgment and decree Ext. P-A, which is not only *ex-parte* but appears to be collusive also cannot be believed as gospel truth to arrive at a conclusion that he is owner in possession of the suit land. Since the factum of existence of the house in the plaint remained unrebutted as the defendants opted for not putting appearance and to contest the suit and as during the course of proceedings in the reference petition, the petitioner has failed to produce cogent and reliable evidence suggesting that he is owner of the acquired and also that the house was constructed by him well before its acquisition, learned reference Court below has rightly concluded that he is not entitled to compensation with respect to the house he allegedly constructed.

13. Interestingly enough, the Notification under Section 4 of the Act was issued on 1.10.1992. As noticed supra, the suit in which judgment Ext. P-A has been rendered was instituted on 21.09.1992. Now coming to the the own testimony of petitioner, the construction work had commenced on 13.1.1980 and was completed in all respect in 1981. Had it been so, it is not known as to why entries to this effect have not been reflected either in the revenue record till April, 1992 or in the record of the Gram Panchayat, Municipality and any other authorities etc. As per his own version, he did not raise any loan for the construction of house, from where a huge amount of Rs.37,90,000/- spent by him for completion of construction. It is worth mentioning that a man of ordinary prudence would not spend such a huge amount on the construction of a house, that too, on the land of others, well before acquiring title therein. Therefore, it lies ill in the mouth of the petitioner that the construction work had commenced in the year 1980 and was completed in the year 1981. Even if any such construction was in progress, it was during the period 1994-1995, as is apparent from the perusal of notices Ext. R-1 to Ext.R-7, whereby the owners (defendants in the civil suit) were served with legal notice by none-else but the district administration that the land having been acquired, no construction be raised thereon. Reference in this regard can be made to the statement of Urmila Gian Bharti PW-3. The petitioner, as a matter of fact, is a liar and with a view to grab the money, he has laid such a false claim.

14. Now if coming to the tatima Ext. PW-2/A, no doubt, there is mention of house over the land measuring two biswas, which is a part of Khasra No. 87, however, the Kanungo and Patwari, who have prepared the same have not been examined. Who has proved the tatima Ext.PW-2/A, nothing to this effect has come on record.

15. Now if coming to the spot inspection report dated 11.1.1999. A bare perusal of the same amply demonstrate that there is no mention of so called house, found in existence on the spot nor anything to this effect recorded therein. As a matter of fact, during the spot inspection, no water and sanitary fittings were found in the said house nor were there any electricity fittings. The observations of learned trial Judge at the time of spot inspection that the house was recently constructed and not in the year 1981 as in that event

the water and sanitary fittings and also the electricity fittings would have also been there, are correct and in consonance with the circumstances which were prevailing on the spot.

16. In view of the discussion hereinabove, it would not be improper to conclude that the house in question was constructed after the issuance of Notification under Section 4 of the Land Acquisition Act. The construction work continued on the spot was sought to be stopped by way of issuance of notices Ext. R-1 to Ext. R-7. The evidence produced by the petitioner is false, fabricated and engineered. The same rather show that the house in question was constructed after the issuance of Notification under Section 4 of the Act. The petitioner, as such, is not entitled even to a penny to award the compensation for the house in question what to speak of a huge amount i.e. Rs.80,00,000/- as claimed. Learned reference Court below has rightly dismissed the petition. Being so, the judgment under challenge calls for no interference by this Court and the same is rather upheld.

17. For all the reasons stated hereinabove, this appeal fails and the same is accordingly dismissed. Pending application(s), if any, shall also stand dismissed.

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

Hanish Mohammed ....Petitioner.
Versus
State of Himachal Pradesh ...Respondent.

Cr.MP(M) No.1647 of 2018
Date of Decision: December 17, 2018

**Code of Criminal Procedure, 1973-** Section 438 **-** Pre-arrest bail - Grant-Antecedents of accused- Relevancy - Application of accused seeking pre-arrest bail rejected on finding him a previous convict and many others FIRs registered against applicant including two FIRs in that very year- Mere fact that nothing to be recovered from him in present case, irrelevant. (Paras 4 to 6)

For the Petitioner : Mr. Deepak Kaushal, Advocate.
For the Respondent : Mr. Shiv Pal Manhans, Additional Advocate General, and Mr. R.P. Singh & Mr. R.R. Rahi, Deputy Advocates General.

The following judgment of the Court was delivered:

**Vivek Singh Thakur, Judge (Oral)**

This bail application has been filed under Section 438 of the Code of Criminal Procedure, seeking anticipatory bail in FIR No.331/18, dated 27.11.2018, under Sections 379, 120B of the Indian Penal Code, 41,42 of the Indian Forest Act & 181 of the Motor Vehicles Act, registered at Police Station, Paonta Sahib, District Sirmaur, Himachal Pradesh.

2. As per the Status Report filed, the investigation is still in progress and that the petitioner is a habitual offender of committing the offences, as against him as many as

12 FIRs were lodged. Therefore, it is prayed that he is not entitled for any relief under Section 438 of the Code of Criminal Procedure.

3. It is pointed out by the learned counsel for the petitioner that out of these 12 cases, petitioner was acquitted in five cases and in two cases cancellation reports were submitted by the prosecution and three cases are still pending for trial before the Court/Gram Panchayat, whereas in one case FIR No.19/18, investigation is still in progress.

4. The details of the cases mentioned in the police report also contain the information that the petitioner was convicted in case FIR No.54/2008, under Section 379 IPC, read with Section 26 of the Indian Forest Act and was sentenced to undergo imprisonment for one year and pay fine of Rs.2,500/-, by Judicial Magistrate 1st Class (1), Paonta Sahib.

5. It is true that nothing is to be recovered from the petitioner. However, keeping in view the antecedents of the petitioner, particularly the fact that besides the present case there are two FIRs, which are found to have been registered against him during this year only, being FIRs No.202/18 and 219/18, I find that he is not entitled for grant of anticipatory bail. He is at liberty to seek regular bail, as the provisions of Section 438 Cr.P.C. are not meant for those who are habitual offenders and do not care for law and order.

6. Accordingly, the present application is dismissed, with a direction to the petitioner to surrender. He is at liberty to seek regular bail from the competent Court of law and in that eventuality the observations made by this Court, with respect to the past conduct of the petitioner, shall not come in its way, for considering his bail application, but the concerned Court shall consider the entire facts and the circumstances of the case, including the nature and gravity, and shall decide the application on its own merit, applying its independent mind.

Application stands disposed of.

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

Narotam Chand and another .....Appellants.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 581 of 2010.
Reserved on: 5th December , 2018.
Date of Decision: 17th December, 2018.

**Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**- Section 3(1)(x)- House trespass, Criminal Intimidation and calling by caste names- Proof- Special Judge convicting and sentencing accused of criminal intimidation and demeaning complainant by hurling caste abuses- Appeal- Evidence revealing accused coming to courtyard of victim, then Pradhan of Gram Panchayat and hurling caste abuses on her- Also intimidating complainant and her husband by wielding sticks and darat- Witnesses consistent in their deposition and corroborating each other qua prosecution case- Appeal dismissed- Conviction upheld. (Paras 9 to 16)

For the Appellants: Mr. Ajay Sharma, Advocate.
For the Respondent**:** Mr. Hemant Vaid and Mr. Desh Raj Thakur, Additional Advocate Generals.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal, is, directed by the convicts/ accused/appellant, against, the pronouncement made by the learned Special Judge, Hamirpur, H.P., upon Sessions Trial No.29 of 2009, whereunder, he convicted, besides imposed consequent sentence, upon, the convicts/accused/appellants, for theirs committing offences punishable under Section 506 of the IPC, and, under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. The facts relevant to decide the instant case are that on 16th May, 2009, at about 9.30 p.m., a telephonic information was given by Smt. Sudesh Kumari, Pradhan, Gram Panchayat, Tal at Police Station, Sadar Hamirpur to the effect that the accused had come to her house in an inebriated condition and were abusing her. Such information was entered in the Rapat Roznamcha, and, the police party headed by H.C. Duni Chand, NO.24, left for the spot. After the police party reached the spot, H.C. Duni Chand, recorded statement of the complainant Smt. Sudesh Kumar. It was reported by her therein that on 16th May, at about 9.15 p.m., she was present alongwith her family members in her house. There is a path leading from the back side of her house. Accused Narotam Chand and Darnashi was going by that path and was calling out filthy abuses. Her husband asked him the reason for doing so. Upon it, accused Narotam Chand told her husband, "Chimbey Apni Chimbi Ko Pradhan Bana Rkha Hey". Thereafter, accused Narotam Cahnd went away to his house calling out filthy abuses. It was also reported that after some time Narotam Chand and his brother, Sunil Kumar came in their courtyard and both were under the influence of liquor at that time. Narotam Chand was carrying a Danda and Sunil Kumar was armed with Darat. Her husband told them that they were under the influence of liquor and that they should go back to their house. However, both of them said to the complainant, "Sali Randi, Chimbi Jat Ki, Apney Aap ko Bari Pradhan Banti Hey, Tujhey to Pradhan Giri Karna Sikha Dengey". Thereafter they started hurling out threats to them and told the complainant that she has one son, who will be finished by them on the next day, and they would also lay her husband to asleep, and she would become a widow. They continued calling out filthy abuses and threatening to kill them. Upon hearing noise, Gian Chand, Rangha Ram and Smt. Chanchlo Devi came to the spot and in their presence also both the accused hurled out threats to kill them and continued calling her "Chimbi" and abused her in the name of caste in order to humiliate her. Upon the aforesaid statement, FIR was registered in Police Station. The police, thereafter carried and concluded all the investigation(s) formalities.

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

4. The accused/appellants herein stood charged, by the learned trial Court, for, theirs committing offences, punishable under Sections 451, 506 read with Section 34 of the IPC, and, Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. In proof of the prosecution case, the prosecution examined 14 witnesses. On

conclusion of recording, of, the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/ appellants herein, for theirs hence committing the aforesaid offences.

6. The appellants herein/accused, stand aggrieved, by the findings of conviction, recorded, by the learned trial Court. The learned counsel appearing, for, the appellants herein/accused, has concertedly and vigorously contended, qua the findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. PW-1, Joginder Singh, has, in his testification borne in his examination-in-chief, made, a communication hence bearing concurrence, with, his previous statement recorded in writing. He has thereunder ascribed qua the accused, hence, hurling abuses upon the victim, and, also echoed therein qua accused Sunil Kumar alias Sato wielding a darat in his hand, and, besides echoed qua co-accused Narotam, wielding a bamboo stick, and, theirs meteing threats to the life of the victim. Even though, in his cross-examination, conducted by the learned defence counsel, he has made minimal improvements therefrom, (i) comprised in his testifying qua his disclosing to the police, that he, at the relevant time, was closing the tap, echoing whereof, does not occur, in his previous statement recorded in writing, (ii) also though, he has proceeded to testify qua his making an echoing in his previous statement recorded, in writing qua the accused arriving, upto, the gate of his house, echoing whereof, also does not occur, in his previous statement recorded in writing, (iii) besides, he has also made a testification that the accused threatening, that, his wife should wipe out “sindoor” from her forehead because she had become a widow, testification whereof, also is not borne in his previous statement embodied in EX.DA, (iv) yet the afore improvements, made by PW-1 in his testification, borne in his examination-in-chief, vis-a-vis, Ex.DA, are obviously minimal, and, do not erode the substratum, of, the charge framed against the accused. Consequently, the afore improvements are discardable, conspicuously, when reiteratedly, the substratum of the charge, stands testified by PW-1, rather with apparent inter se visible harmony, vis-a-vis, his his testification borne in his examination-in-chief, and, his testification borne in his cross-examination, thereupon, credence is to be meted to his testification.

10. The victim, stepped into the witness box as PW-2, and, has, in her examination-in-chief, testified in concurrence, with her previous statement, borne in Ex.PW2/A, and, has also proceeded to identify darat, Ex.P-1, as stood shown to her, during, the course of her deposition being recorded in court, hence to comprise the relevant weapon

of offence, seized through recovery memo, borne in Ex.PW2/B, (i) besides also during the course of her deposition being recorded, she, identified bamboo stick, to also comprise the relevant weapon, of offence, seized under memo Ex.PW2/C, (ii) and, with her deposition borne in her cross-examination, not, unraveling qua hers either improving or embellishing, upon, her previous statement borne in Ex.PW2/A, thereupon, credence is to be meted to her testification, (iii) significantly, when her deposition corroborates the testification rendered qua the occurrence, by PW-1.

11. PW-3, likewise has rendered, a, testification qua the ill-fated occurrence, bereft of any stain of improvements or embellishments, vis-a-vis, his previous statement recorded in writing, nor he has contradicted the testification (I) qua the occurrence rendered by both PW-1 and by PW-2. It appears that this witness was declared hostile, given his in his examination-in-chief, rendering an echoing qua the ill-fated occurrence, taking place during the winter season, whereas, the incident rather taking place in the month of May, whereat hence winter season, does not befall, (ii) and, thereafter the learned PP was permitted to cross-examine the afore witness. In his cross-examination, by the learned PP, he has feigned ignorance qua the occurrence taking place, on 16.5.2009, and, thereafter, he has clarified that it was about 9 or 9.30 p.m. However, merely on anvil of his feigning ignorance qua the afore factum, it yet cannot be concluded that he has rendered, an invented version qua the occurrence, given, his clarifying that he used quilt for sleeping throughout the year, (iii) thereupon, his making, a, testification qua the incident taking place in the winter season, whereas, his further in his cross-examination, conducted by the learned PP, hence, testifying qua his using fan at the relevant time, AND, his not using fan in the winter season, (iv) thereupon, the echoing made by him, in his examination-in-chief, qua the incident taking place, during, winter season, is, rendered insignificant, more so, when he has further testified, qua only one ill-fated occurrence hence taking place against victim, one Sudesh Kumari. Furthermore, with the learned defence counsel, during, the course of his conducting, the, cross-examination of PW-3 hence not meteing any suggestion, vis-a-vis, him, rather containing any echoing qua his being an invented witness qua the occurrence, (v) contrarily, with the learned defence counsel, meteing a suggestion to him, qua his statement standing recorded twice, initially on the day of occurrence, and, thereafter on the day of recovery, (vi) thereupon, hence, therefrom an inevitable sequel, rather ensues, qua the defence, acquiescing, vis-a-vis, the fact qua PW-3, making, a, previous statement qua the occurrence, to the Investigating Officer, and, it being in respect of the charge, (vii) whereupon, it is to be concluded qua the testification borne in the examination-in-chief of PW-3, being readable qua the incident, embodied in the charge, (viii) and, conspicuously when he, has, for all aforestated reasons, clarified, that, the relevant occurrence, occurred in the month of may, and only one penal misdemeanor, being, perpetrated against the victim, and, thereupon, it stands concluded qua his meteing corroboration, to, the testifications of PW-1, and, of PW-2.

12. Moreover, corroboration to the testifications of PW-1, PW-2, and, PW-3, is, meted by PW-4, who in his testification, borne in his examination-in-chief, has rendered a version qua the occurrence, bereft of any gross improvements or embellishments, vis-a-vis, his previous statement recorded in writing, (a) thereupon, with inter se corroboration being meted by all the ocular witnesses to the occurrence, rather facilitates erection, of, a firm inference qua the charges being proven against the accused, conspicuously also with PW-7 rendering a testification, vis-a-vis, the occurrence, hence, in absolute concurrence thereof.

13. Be that as it may, PW-9, who visited the spot immediately after receiving a telephonic information, and, who on reaching the spot hence recorded the statement of the complainant, borne in Ex.PW2/A, (a) has also, in his examination-in-chief rendered a

testification qua his, thereat observing qua the accused being under the influence of liquor, and, theirs also manhandling him. Furthermore, with his making a communication, in his examination-in-chief, that, given the the accused causing breach of peace, hence, his arresting them under Sections 107 and 151 of the Cr.P.C., and, thereafter theirs being brought to the police station, and, being produced before the S.D.M., Hamirpur, on 17.5.2009, (b) testification whereof, borne in his examination-in-chief when remains uneroded of its efficacy, even during the course of his being subjected to an incisive cross-examination by the learned defence counsel, hence entails meteing, of, absolute sactity thereto.

14. An added momentum to the afore inference, is, mobilised by the Investigating Officer concerned, rendering a forthright testification, vis-a-vis, the validity, of drawing, of, memos, borne in Ex.PW2/B, and, in Ex.PW2/C, whereunder Ex.P-1 (darat) and Ex.P-2 (bamboo stick) hence stood respectively recovered, and, memos whereof also stand proven by PW-2, and, by PW-3. An inference qua adduction of cogent proof, in, respect of valid drawings thereof, by the Investigating Officer concerned, and, vis-a-vis, the authenticity, of, all the recitals borne therein, (a) is garnered by the memos being signed by PW-3, and, the accused, and, further Sudesh Kumar also proving, qua hers signing, the, afore memos, (b) besides hers identifying the afore exhibits, exhibits whereof stood shown to her, during, the course of her recording, her examination-in-chief, (c) preeminently also when no efficacious cross-examination is conducted, upon, either PW-2, and, PW-3, apparently qua the afore memos being not efficaciously drawn, or theirs appending signatures on blank papers, or theirs signing the afore memos, under,pressure exerted, upon, them by the Investigating Officer concerned, (d) nor with the accused denying the existence of their signatures thereon, hence, begets a sequel qua, hence efficacious proof being adduced, vis-a-vis, the valid drawing, of, the afore memos, and, qua recoveries of weapons of offence mentioned therein, hence, being validly effectuated thereunder, AND, qua hence corroboration, being meted to the testifications, rendered by the ocular witnesses to the occurrence.

15. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, also does not suffer from any gross perversity or absurdity of mis-appreciation, and, non appreciation of germane thereto evidence, on record.

16. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Sh. Krishan Kumar Kotvi .....Petitioner

Versus

State of H.P. & another ....Respondents

Cr. Revision No. 398 of 2015.
Reserved on: 3rd December, 2018.
Date of Decision: 17th December, 2018.

**Negotiable Instruments Act, 1881**- Sections 138 & 139- Complaint - Presumption of consideration – Proof - Held, presumption that issued cheque was for consideration is rebuttable- Complainant alleging disputed cheque having been issued by accused to discharge 'friendly loan'- However, defence evidence revealing said cheque having been given to father of complainant, "BD" qua sale consideration of sale deed executed between "BD" and wife of accused- "BD" had registered FIR against accused and investigation of that case revealing that sale consideration stood paid by accused- Held, presumption that disputed chqeue being issued for consideration, stood discharged- Revision allowed- Conviction set aside. (Paras 9 to 12)

For the Petitioner: Mr. Peeyush Verma, Advocate.
For Respondent No.1: Mr. Hemant Vaid and Mr. Desh Raj Thakur, Additional Advocate Generals.
For Respondent No.2: Mr. O.P. Sharma, Sr. Advocate with Mr. Naveen K. Dass, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The insant criminal revision petition stands directed by the accused/petitioner herein, against, the concurrently recorded verdicts, by both the learned Courts below, upon, Case No.10-D of 10/06, whereunder, the petitioner herein stood convicted, and, sentenced, for, his committing an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act).

2. Briefly, the case set up by the complainant is that the accused is known to him and he is carrying on the business in main bazaar Rohru under the name and style of "Krishna Jewellers'. In September, 2005, the accused approached him for financial help and requested to give Rs.4,50,000/- for running the business and upon good faith, the said amount was given to him, which was to be paid by 31.08.2006. He also issued the cheque bearing No.383111 of 31.08.2006 for the aforesaid amount. After the expiry of the period, when the complainant asked the accused to make the payment, the matter was delayed on one pretext or other. Thereafter, the said cheque was presented for its encashment, however, it was received back dishonoured due to reason that the payment had been stopped by the accused. Thereafter, a legal notice dated 20.09.2006 was also sent to accused through registered post as well as UPC, however, in collusion with the postal authorities, he did not receive the same. Till date, any payment has not been made, as such, it is prayed that the accused be punished in accordance with law.

3. The learned trial Court, on, finding sufficient material on record, to proceed against the accused, hence, issued notice to the accused. On his appearance before the learned trial Court, notice of accusation for his committing an offence punishable under Section 138 of the Negotiable Instruments Act, stood put to him. In proof of the case, the complainant examined two witnesses. On conclusion of recording of the complainant's evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded by the learned trial Court, wherein he claimed innocence and pleaded false implication. However, he has examined two witnesses in his defence.

4. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/petitioner herein.

5. The petitioner/accused is aggrieved by the judgment of conviction recorded against him, by both the learned courts below. The learned counsel appearing for the accused/respondent herein, has, concertedly and vigorously contended qua the findings of conviction recorded by the learned courts below, standing, not based on a proper appreciation, by them, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by them, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court in the exercise of its revisional jurisdiction, and, theirs standing replaced by findings of acquittal.

6. On the other hand, the learned counsel appearing for the complainant/respondent herein, has with considerable force and vigour, contended qua the findings of conviction recorded by the learned courts below, rather standing based on a mature and balanced appreciation by them, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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 dishonoured negotiable instrument, borne in Ex.CW1/A, embodies a sum of Rs.4,50,000/-. Since, the revisionist, does not contest, the occurrence of his signatures thereon, nor when he contests the authorship of all the scribings borne therein, (i) thereupon, the complainant, the holder of the afore cheque, hence, embodying the afore amount, is, to be rather construed to be receiving the afore dishonoured negotiable instrument, from, the revisionist, (ii) for hence, therethrough, rather ensuring, the, apt discharging(s) in whole or in part any debt or any other liability, and, ensuing from, a, commercial transaction which occurred inter se the complainant, and, the revisionist. However, the afore presumption, which stands statutorily embodied, in, the provisions borne in Section 139 of the Act, (iii) apparently, given the coinage “unless contrarily proved”, also occurring therein, renders the afore presumption, to be rather a rebuttable presumption. The provisions borne in Section 139 of the Act, stand extracted hereinafter:

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

9. For determining, whether the revisionist, hence, shattering the afore presumption, an allusion to the testimony of RW-2, is, important, wherein, in his examination-in-chief, he echoes qua one Bhagwan Dass, the father of the complainant, lodging FIR No.116/2007 of 25.07.2007, wherein, (a) recitals occur, vis-a-vis, hereat dishonoured negotiable instrument, being issued by the revisionist, vis-a-vis, the complainant, (b) and, its issuance being towards liquidation, of, sale consideration, vis-a-vis, an apposite registered deed of conveyance executed inter se one Bhagwan Dass, and, the wife of the revisionist, (c) and, his making further unfoldments therein qua upon his investigating the matter, his discovering, that the entire sale consideration, being liquidated by the revisionist, vis-a-vis, the afore Bhawant Dass, (d) and, in contemporaneity with the execution of the apt registered deed of conveyance. A further reading of the last portion of the testification of RW-2, borne in his cross-examination also reveals, qua an affirmative suggestion being put to him, by the counsel for the complainant, qua the FIR being lodged, by Bhagwan Dass, and, the complainant not being the informant, wherefrom, dehors the FIR being a photo copy of the original, an inference is rearable qua (a) with, the, cheque number recited therein rather holding similarity, vis-a-vis, the cheque number borne, in, the extant dishonoured negotiable instrument, (b) thereupon, the contradictory therefrom

averments, borne in the complaint, hence, visibly lose their apt efficacy. Reinforced momentum to all the afore inferences, is, garnered by factum qua neither the afore Bhagwan Dass nor the complainant adducing any evidence qua theirs instituting a civil suit, for, ensuring, the, rescinding, of, the registered deed of conveyance executed, inter se one Bhagwan Dass, and, the wife of the revisionist.

10. Be that as it may, even if the dishonoured negotiable instrument, is, issued in the name of complainant, yet, with the complainant being the son of Bhagwan Dass, (i) and, reiteratedly when a reference stands borne therein, qua, similar hereat cheque number, (ii) also with a reference being borne therein qua it being handedover to the complainant, the, son of the informant, (iii) apparently when the afore cast averment, in the FIR, remains unbelied, nor is contested by one Bhagwan Dass, (iv) thereupon, the defence reared by the revisionist qua the dishonoured negotiable instrument being purportedly issued towards, apt liquidation, vis-a-vis, the outstanding sale consideration qua the registered deed of conveyance executed inter se one Bhagwan Dass, and, the wife of the accused/revisionist, rather being cogently proven, (v) conspicuously given, even if it stood dishonoured, the, prime factum qua its issuance being towards liquidation qua any purported short fall, in the apposite sale consideration, (vi) whereas, the sale consideration appertaining to the apposite registered deed of conveyance, being effaciously proven to be liquidated, by the revisionist, to one Bhagwan Dass, (vii) thereupon, the revisionist was meritworthily hence bestowed, with a right to direct his bankers, to, upon, presenter of the cheque, hence, stop payment, vis-a-vis, its presentation. Also, the further corollary thereof, is, qua the revisionist hence shattering the afore statutory presumption attracted, vis-a-vis, the complainant, the holder, of Ex.CW1/A.

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

12. Consequently, the instant revision is allowed and the judgments impugned before this Court are quashed and set aside. In sequel, the accused/revisionist is acquitted of the offence punishable under Section 138 of the Act. All pending applications also stand disposed of. Records be sent back forthwith.

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

Ajay Kumar .....Appellant

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 547 of 2017.
Reserved on: September 17, 2018.
Decided on: December 17, 2018.

**Code of Criminal Procedure, 1973**- Sections 328 & 329- Insanity- Plea of - Adjudication- Procedure- Accused allegedly murdered his mother for not acceding to his demand of car-

During trial accused filing application and raising plea of insanity and consequential incapacity to defend trial- Sessions Judge dismissing application as not pressed- Accused convicted by Sessions Judge - Appeal- Accused raising plea of non-compliance with provisions of Sections 328 & 329 and vitiated trial- Held, averments in application itself were sufficient for trial Court to have recorded its satisfaction qua necessity of seeking expert opinion whether accused was of unsound mind and incapable to defend himself particularly when prosecution had not opted to file reply to said application before proceeding further with trial- Genesis of occurrence involving assault on mother with darat prima-facie sufficient to hold enquiry as envisaged under Sections 328 & 329 of Code- For non-compliance thereof trial vitiated- Appeal allowed- Conviction set aside- Matter remanded for retrial from stage of holding enquiry into plea of insanity of accused. (Paras 16, 19, 28 & 29)

***Cases referred:***
Dhani Ram vs. The State, 1982 Sim. L.C. 194

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| For the appellant | : | Mr. H.S.Rana, Advocate. |
| For the respondent | : | Mr. Vikas Rathore and Mr. Narinder Guleria, Addl. AGs. |

The following judgment of the Court was delivered:

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**Dharam Chand Chaudhary, J.**

Convict Ajay Kumar is in appeal before this Court. He has been convicted for the commission of offence punishable under Section 302 IPC and sentenced to undergo rigorous imprisonment for life and also to pay Rs. 10,000/- as fine vide impugned judgment dated 28.8.2017.

**Grounds of Challenge:**

2. Aggrieved by the impugned judgment, Ajay Kumar, convict has preferred the present appeal on the grounds inter alia that the findings of conviction recorded by learned trial Court are wrong and illegal. The same are based on surmises and conjectures. The contradictions, embellishments and paddings as emerge from the perusal of the evidence available on record render the prosecution story highly doubtful. The convict allegedly had no intention or knowledge of causing injuries to his mother. There being no animosity or motive to cause injuries to her is also not taken into consideration. The testimony of PW-1 and PW-2 has completely been misread, misconstrued and mis-interpreted. The plea raised by the convict in his defence that he is of unsound mind has erroneously been ignored irrespective of duly proved on record from the statement of DW-1 Dr. R.S.Dhatwalia and DW-2 Ravinder Kumar as well DW-7 Dr. R.C.Sharma and documentary evidence i.e. Ext. DW-1/A1 to Ext. DW-1/A4 and Ext. DB-1-DB-10. Learned trial Court on having come to know about the mental status of the accused during the course of trial erred legally and factually in not resorting to the procedure prescribed under Section 329 Cr.P.C. which prescribes for holding an enquiry to determine as to whether the accused at the time of occurrence was of unsound mind or not or that able to understand the nature of his defence and the evidence collected against him by the police. The failure on the part of learned trial Court to resort to such procedure has vitiated the trial as a whole. The impugned judgment, as such, has been sought to be quashed and set aside and accused acquitted of the charge framed against him.

**Facts of the case:**

3. The complainant herein is PW-1 Jaswant Singh. Accused is his son. He has one daughter also. Accused is married to PW-2 Madhu Bala. The complainant and his son, the accused were living together. The accused was running a shop of footwear at Ladrour bazaar in District Hamirpur. On 26.6.2015, he however, had not gone to the shop and remained on that day throughout in the house. The family had dinner at 9:30 PM and thereafter each and everyone went to their respective rooms for sleeping, however, accused came out of his room and went to that of his mother Sunita Devi, the deceased. He asked her as to whether they will purchase car for him or not. On the issue of car, he got enraged and started arguing with his mother. Each and everyone made him to understand that they will speak on the issue later and for the time being he must go and sleep but of no avail as he flared up and picked up a Darat (Sickle) lying there and assaulted the deceased thereby on her face, neck, chest and also other parts of her body. In the sudden attack, she sustained multiple injuries on her person. These acts were revealed by PW-1 Jaswant Singh to the doctor on duty in Community Health Centre Bharari, District Bilaspur where the deceased was brought in injured condition for treatment.

4. On the disclosure so made by PW-1 Jaswant Singh, the doctor on duty informed Police Station Bharari, District Bilaspur about the deceased brought to the hospital in injured condition for treatment. The police was asked to come to the hospital. The information so received was entered in daily diary vide rapat No. 46(A) dated 26.6.2015 at 22:35 hours/10:35 PM. Immediately thereafter, HC Pyare Lal (PW-21) accompanied by Constable Mukesh Kumar (PW-17) rushed to the Community Health Centre in official vehicle. The police party noticed Sunita Devi, the deceased brought there with injuries on her person for her medical treatment. In the opinion of the Medical Officer, she was not fit to make any statement. Her MLC is Ext. PW-14/B. PW-1 Jaswant Singh, the husband of the deceased was there, therefore, the I.O. HC Pyare Lal (PW-21) recorded his statement under Section 154 Cr.P.C. On the basis thereof, FIR No. 63/15 Ext. PW-17/A was recorded against the accused initially under Section 324 IPC. The deceased was shifted by HC Pyare Lal (PW-21) to District Hospital, Hamirpur for further treatment. The police officials i.e. HC Kewal Singh and lady Constable Sheetal were deputed with the deceased to District Hospital Hamirpur. The rapat rojnamcha in this regard is Ext. PW-12/C. The deceased, however, passed away on the way to I.G.M.C and Hospital. The rapat in this regard is Ext. PW-12/A. FIR initially recorded under Section 324 IPC was thereafter converted into under Section 302 IPC. The spot map Ext. PW-20/A was prepared. The wife of accused Madhu Bala had produced the Scythe Ext. P-6 used by her husband in assaulting the deceased. The same was taken in possession. The clothes of the accused he had worn at the time of occurrence were also taken into possession vide memo Ext. PW-17/C. The autopsy on the dead body of the deceased was got conducted in IGMC Shimla. The doctor PW-16 Dr. A.K. Sharma, conducted autopsy on the body of deceased vide report Ext. PW-16/B. The viscera of the deceased preserved by the doctor who conducted autopsy along with other samples lifted from the spot were sent to RFSL Mandi. The report Ext. PW-16/B reveals that blood of group “O” was available on the bed sheet and shirt of deceased Sunita Devi. The same matched with her blood sample. Human blood was also detected on the shirt of the accused, however, no blood could be detected on the trousers worn by him. Similarly, no traces of alcohol or narcotic drugs were also found present in the viscera nor in the blood and urine sample of the accused. In the opinion of the Medical Officer, the injuries on the person of the deceased could have been caused with the help of an object with sharp edges. In the opinion of the doctor, the injuries on the person of the deceased were cumulatively dangerous to life.

**Crux of the Investigation Conducted:-**

5. As per the further prosecution case, during the course of investigation, it transpired that accused Ajay Kumar had been insisting his parents to buy a car for him. They, however, bought a new Scooter for him. After some time, the accused again started insisting upon for providing him a Car. His mother, the deceased refused for the same. As per the prosecution story, since the accused had been considering his mother the deceased an impediment in the matter of having a Car from his father, he therefore, had not even been attending to his business in the shop at Ladrour for the last two days prior to the incident. On the fateful day i.e. 26.6.2015 also, the accused again floated his demand strongly. The deceased having been fed up with arguing continuously with the accused on this issue had retired to her bed room. The accused who had already enraged due to neglecting his demand of buying a car, ultimately lost his temper all of a sudden and as a result thereof inflicted blows with a darat on her person which he had picked up from the verandah of the house. The deceased was lying in her bed at that time. The accused had been caught hold by PW-1 Jaswant Singh, his father with the help of his daughter-in-law Madhu Bala (PW-2). The darat which had been thrown by the accused in the nearby fields was picked up by PW-2 Madhu Bala and kept in the verandah which she lateron handed over to the police.

6. On filing of the police report with such material collected by the Investigating Agency, charge under Section 302 IPC was framed against the accused. He, however, pleaded not guilty to the charge and claimed trial.

**Prosecution Evidence:-**

7. The prosecution in turn has examined 21 witnesses in all and also produced the documentary evidence. The material prosecution witnesses are PW-1 Jaswant Singh, father of the accused, his wife Smt. Madhu Bala (PW-2), Subhash Kumar, a neighbor (PW-3), Jagar Nath (PW-5) brother of PW-1, the complainant (Uncle of the accused), PW-7 Bishan Dass, the then Pradhan Gram Panchayat Barota, PW-8 Rattan Lal, another neighbourer, PW-9 Kirpal Singh, brother of the deceased and maternal Uncle of accused, PW-11 Sanjeev Kumar, again from neighbourhood of the accused, PW-14 Dr. Garima Thapa who had examined the deceased and given first medical aid as well as issued MLC Ext. PW-14/B. PW-15 Dr. Pankaj who had examined the accused brought there by the police vide MLC Ext. PW-15/B, PW-16 Dr. A.K. Sharma, Professor & Head, Department of Forensic Medicine, IGMC, Shimla who had conducted the post mortem vide report Ext. PW-16/B, PW-17 Const. Mukesh Kumar who went to the hospital along with IO PW-21 HC Pyare Lal on receipt of the information in the Police Station, PW-20 SI Surender Singh who had partly investigated the case and PW-21 HC Pyare Lal who is also the I.O.

8. The remaining prosecution witnesses are formal because PW-4 Manohar Lal, Jr. Engineer H.P. PWD Sub Division Bharari had prepared spot map Ext. PW-4/B on the request of the police. PW-6 HC Naresh Kumar was one of the members of the police party headed by PW-20 SI Surender Singh, the Station House Officer. PW-10 Prem Lal Patwari, Patwar Circle Barota prepared the jamabandi Ext. PW-10/B and tatima Ext. PW-10/C which were handed over to the police, PW-12 Const. Dinesh Kumar had proved the daily diary reports Ext. PW-12/A, PW-12/C and PW-12/D. Similarly, PW-13 HHC Baldev Raj had deposited the case property in RFSL Mandi vide RC No. 64/2015. PW-18 Dr. H.R. Rahi along with Dr. Sanjay had examined the deceased in the casualty department of IGMC, Shimla and declared her dead and PW-19 is HC Amar Singh who was posted as MHC at the relevant time.

**The defence of the accused:-**

9. The accused in his statement recorded under Section 313 Cr.P.C. has expressed his ignorance to the incriminating circumstances which were put to him because the answer to all the questions he has given is "I do not know".

10. The defence witnesses DW-1 Dr. R.S.Dhatwalia, DW-2 Ravinder Kumar, DW-3 Bainshu Ram, Superintendent Open Air Jail, Bilaspur, DW-7 Dr. R.C.Sharma, all have stated about the mental ailment of the accused and his abnormal behavior. DW-4 Ashok Kumar and DW-5 Naveen Kumar have also deposed about the mental ailment of the accused and the treatment he had been undertaking. DW-2 Ravinder Kumar has again appeared in the witness-box as DW-6 and produced the record of this case. He has proved the copies of such record which are Ext. DB-1 to DB-10.

**The conclusion drawn by the trial Court:-**

11. Learned trial Court on appreciation of the prosecution evidence and also the evidence produced by the defence and holding that the plea of insanity in his defence taken by the accused is not proved on record has convicted him while holding that in a gruesome and brutal attack the accused had brutally killed his own mother and thereby committed the offence punishable under Section 302 IPC. The convict-appellant has therefore been convicted and sentenced as pointed out at the outset.

**Rival Submissions:-**

12. Sh. H.S. Rana, Advocate, learned counsel representing the appellant-convict has vehemently argued that on having filed an application under Section 328 Cr.P.C. at the very initial stage of the proceedings in the trial i.e. on 1.12.2015, learned trial Judge had no option except to resort to the procedure prescribed thereunder and also under Section 329 of the Code i.e. to have got the accused examined by the doctor/Psychiatrist and obtained report qua soundness of his mind or mental retardation. According to Mr. Rana, it is after obtaining such medical report, a decision as to whether the trial had to proceed further or not was required to be taken. In the event of the accused being found to be of unsound mind/mentally retarded as well as not in a position to understood his defence, would have been referred to the hospital for treatment and while closing the proceedings, dealt with in accordance with the provisions contained under Section 330 of the Code. Learned trial Judge has, however, not resorted to such procedure prescribed under the Code on filing the application under Section 328 Cr.P.C. by the accused. The withdrawal of the said application at a stage when listed for pronouncement of order, according to Mr. Rana, is not fatal to the defence because the accused at that time was of unsound mind. The withdrawal thereof, as such, is of no consequence. It was rather for the trial Court to have held enquiry to satisfy itself as to whether the accused was of unsound mind or not. The evidence, as has come on record by way of the testimony of prosecution witnesses, including PW-17 Mukesh Kumar and PW-21 HC Pyare Lal, I.O. who have deposed about the abnormal behavior of the accused when reached on the spot has been ignored intentionally and deliberately by learned trial Judge. The abnormal behavior of the accused noticed by DW-3 Bainshu Ram, Superintendent, Open Air Jail, Bilaspur and DW-2 Ravinder Kumar posted as Pharmacist in the said Jail is also erroneously ignored. Mr. Rana, has also pointed out from the statements of the father of the accused PW-1 Jaswant Singh and PW-2 Madhu Bala, wife of the accused and also other neighbours who in so many words deposed about the un-natural and abnormal behavior of the accused. The statement of DW-4 Ashok Kumar who happens to be the cousin of accused (Bua's son) has also been erroneously ignored. According to Mr. Rana, DW-1 Dr. R.S. Dhatwalia and DW-7 Dr. R.C. Sharma, Head of Department of

Psychiatry, IGMC Shimla both had examined the accused, however, the evidence as has come on record by way of their respective statements is also not taken into consideration. The findings to the contrary recorded by learned trial Court are stated to be based upon hypothesis, conjectures and surmises. Mr. Rana has further pointed out that the question as to whether the defence of insanity under Section 84 IPC was available to the accused or not would have arisen had the enquiry been got conducted immediately after filing the application under Section 328 Cr.P.C. and before proceeding further in the trial, the opinion qua the mental ailment of the accused obtained from the experts/ Psychiatrists. Mr. Rana, has further urged that the provisions contained under Section 328 and 329 Cr.P.C. are mandatory in nature. Also that, on having brought to its notice that the accused was of unsound mind, learned trial Court should have proceeded to hold enquiry as per the procedure prescribed under the Sections ibid and could have proceeded further in the trial only after the receipt of the expert opinion.

13. It has, therefore, been urged that due to non-compliance of the procedure prescribed under Section 328 and 329 of the Code of Criminal Procedure, the entire proceedings have vitiated and as such, no findings of conviction could have been recorded against the accused. The impugned judgment, as such, has been sought to be quashed and set aside.

14. On the other hand, Mr. Vikas Rathour and Mr. Narender Guleira, Addl. Advocate Generals, while inviting our attention to the findings recorded by learned trial Court have contended that the same being well reasoned and there being no evidence suggesting that at the time of occurrence, the accused was not sane and rather mentally disturbed call for no interference in the present appeal.

**Our Findings:-**

15. Since during the course of arguments, a legal question that without determining the controversy as to whether the accused was of unsound mind and suffering from mental disorder and as such, without resorting to the procedure prescribed under Sections 328 & 329 Cr.P.C. further proceedings in the trial could have not continued, therefore, before coming to the merits of the case, it is the legal question so raised deserves to be decided first.

16. Admittedly, the trial when came to be listed in the Court below on 1.12.2015, on behalf of accused learned counsel representing him had filed an application under Section 328 Cr.P.C. The said application was adjourned to 15.12.2015 for reply and consideration. Perhaps, here learned trial Judge went wrong. True it is that as per the language employed under Section 329 Cr. P.C. if it appears to the Court that the accused is of unsound mind and may also be incapable of making his defence, the factum of innocence and incapacity to make his defence is required to be tried first by way of forwarding the accused to the hospital for his medical examination and seeking the expert opinion. On consideration of the medical evidence or any other evidence as would have been produced by the prosecution and also the defence, if learned trial Judge is satisfied that the accused is of unsound mind, a finding to that effect is required to be recorded and further proceedings in the case postponed as well as to refer him to Psychiatrist or Psychologist for further treatment.

17. In case, in view of the report of the Psychiatrist, the accused is found to be of unsound mind and prima-facie no case is made out from the material available on record, the trial Court may either to discharge him or deal in the manner as provided under Section 329 Cr.P.C.

18. In such a case, the trial Court is required to postpone the trial for such period as in the opinion of the Psychiatrist or clinical Psychologist is required for the treatment of the accused. Section 329 Cr.P.C. is reproduced hereunder for the sake of convenience:

1. **"**If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.

   **1A.** If during trial, the Magistrate or Court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind:

   **Provided** that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of -

   1. head of psychiatry unit in the nearest government hospital; and
   2. a faculty member in psychiatry in the nearest medical college;

2. If such Magistrate or Court is informed that the person referred to in sub-section (1A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under section 330:

   **Provided** that if the Magistrate or Court finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.

3. If the Magistrate or Court finds that a prima facie case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with section 330"

19. As noticed supra, the submissions in the application under Section 328/329 Cr.P.C. filed on behalf of the accused were sufficient for learned trial Court to have recorded its satisfaction qua the necessity of seeking the expert opinion as to whether the accused was of unsound mind or not for the reason that as recorded in the zimni order dated 15.12.2015, the prosecution had not opted for filing reply to the application as per the statement made by learned Public Prosecutor at Bar and recorded so in the above zimni order. We fail to understand as to what had remained there to learned trial Judge for further consideration in the said application. We rather feel that the genesis of occurrence

i.e. assaulting of mother by a son repeatedly with lethal weapon like darat and causing multiple injuries, grievous in nature on her person itself was prima-facie sufficient to hold the enquiry as envisaged under Section 328/329 Cr.P.C. On filing the application hereinabove on behalf of the accused, learned trial Court should have ordered the enquiry to be conducted to ascertain the insanity and unsoundness of mind of the accused by resorting to the procedure which is mandatory in nature prescribed under Section 328/329 Cr.P.C. In order to ensure the fair trial, such procedure even needs to be resorted to, on oral submissions itself in order to ensure the fair trial and the accused may not be condemned unheard.

20. True it is that after hearing arguments in the application, the same was fixed for pronouncement of order on 15.3.2016 when learned defence counsel has withdrawn the same. His statement was recorded and placed on record. The withdrawal of the application, in view of the reasons recorded hereinabove, is of no consequence nor has to be construed to conclude that the accused has now no legal right to assail the impugned judgment on this count. A Division Bench of this Court in ***Dhani Ram vs. The State, 1982 Sim. L.C. 194,*** in similar circumstances as the charge against the accused was under Section 302 and 309 IPC and a similar application under Section 329 Cr.P.C. filed with a prayer to hold enquiry as to whether the accused is of unsound mind or not forwarded the accused to Chief Medical Officer, Dharamshala for examination and report, and as for want of facilities for examination of such patient in the hospital at Dharamshala, the Chief Medical Officer expressed his inability to get the accused examined and submit the report, rather while apprising the trial Court that the accused had been taking treatment from Punjab Mental Hospital, Amritsar and obtained the report from mental hospital Amritsar that the accused was sane proceeded further with the trial, has held as under:

> "12. The various orders which have been passed in the case from time to time clearly suggest that the Judicial Magistrate, Palampur, as well as the learned Sessions Judge were of the view that provisions of Section 329 Cr. P.C. had to be invoked. The order dated 20th June, 1978, of Sessions Judge clearly states that the report of the C.M.O. Dharamsala be called as to whether the appellant Is sane and capable of defending himself. The prior order of the Sessions Judge or the Additional Session Judge also indicate that proceedings under Section 329 Cr. P.C. were being taken. There can be no manner of doubt that the mistake in writing the word 'normal' instead of the word 'abnormal' in the order dated 20.6.1978 is a typographical mistake. Recording of the statement of the appellant after the passing of this order is immaterial because, according to the opinion of the learned Session Judge, the appellant appeared to be abnormal. If this is the position then under Section 329 Cr. P.C. the Session Judge had to try the fact with respect to the unsoundness and incapacity of the appellant. The Session Judge was further proceedings in the case. As we have taken the view that on 26.6.1978 it appeared to the Sessions Judge that the appellant was of unsound mind, therefore, it was the bounden duty of the Session Judge to have decide this issue after considering the medical evidence and other evidence as is required under Section 329 Cr. P.C. in the present case the Sessions Judge had failed to do so. The Session Judge has not even recorded the statement of the doctor who had examined the appellant. The order of the Session Judge dated 3.5.1979 is thus illegal and proceeding after this order are vitiated. The provisions of Section 329 Cr. P.C. are mandatory and an omission to decide the preliminary issue shall vitiate the whole trial. A similar view was taken by a Division Bench of Punjab and Haryana High

Court in Mst. Satya Devi V. The State,[1969 Cri LJ 1424] wherein it was held that-

> "The provisions of Section 465 do not embrace an idle formality but are calculated to ensure to an accused person a fair trial which cannot obviously be afforded to an insane person and the nonobservance of those provisions must be held to convert a trial into a force. Courts must, therefore, guard against dealing with the matter of suspected sanity of an accused person in a perfunctory manner as such a course is bound to result in the trial Judge, more often than not coming to an incorrect conclusion about the sanity of the accused before him."

13. Thus, we are of the view that the trial in the present case is vitiated for the reasons that proper enquiry under Section 329 Cr. P.C. has not been held by the learned Session Judge and the learned Sessions Judge has failed to record a finding with respect to the insanity of the appellant. As the trial is vitiated, therefore, the present conviction and sentence cannot be maintained and this appeal has to be accepted.

14. The result of the above discussion is that the present appeal is accepted, the judgment of the learned Session Judge, Dharamsala, for re-trial in accordance with law. The appellant is directed to be produced before the learned Session Judge on 3rd May, 1982 and the Session Judge shall produced in the case and try to decide the case within a month."

21. It is seen that this case is on better footing as compared to **Dhani Ram's case** cited supra for the reason that here learned trial Court has not made any effort to go into the question of unsoundness of mind or otherwise of the accused after filing of the application under Section 328/329 Cr.P.C. and rather lingered on the same that too when no reply thereto was intended to be filed by the prosecution for a period over one year, being finally disposed of on 15.3.2016.

22. The testimony of PW-1 Jaswant Singh, the father of the accused, PW-2 Madhu Bala, the wife of the accused, PW-3 subhash Kumar, his neighbor having his house at a distance of 150 meters from that of the accused, PW-7, the Pradhan Gram Panchayat Barota, PW-8 Rattan Lal, again neighbor of the accused and PW-11 Sanjeev Kumar, again a neighbor having his house at a distance of about 200 meters from that of the accused, shows that the accused was suffering from mental ailment, hence not in a fit state of mind on the day of occurrence. He, as per the version of PW-1 Jaswant Singh and PW-2 Madhu Bala had not been attended to his business in the shop at Ladrour for the last two days. On the day of occurrence, he remained present throughout in the house. He, as per such evidence even had been undergoing Psychiatric treatment in Karmi Devi Mental Hospital, Hamirpur and IGMC Shimla for the last 10 years. According to Const. Mukesh Kumar (PW-17) who went to the place of occurrence accompanied by the I.O HC Pyare Lal (PW-21), the accused was in fury (ferocious mood) at his home and it is the people of the area who had controlled him. Also that, his behavior was violent and non-cooperative. Therefore, he had to be arrested during the same night in a case under Section 107/151, most probably to tackle the law and order situation and breach of peace on account of being in violent mood. HC Pyare Lal (PW-21) who firstly visited the place of occurrence and conducted the investigation has also stated that the accused was arrested by him in the proceedings initiated against him under Section 107/151 Cr.P.C. on that very day. He had recorded the proceedings under Section 107/151 Cr. P.C. and submitted the same to the Executive Magistrate concerned. The record of the said case was also available in the Police Station.

As per HC Pyare Lal (PW-21) also, he noticed that the conduct of the accused was furious. Though the suggestion that the father of the accused PW-1 Jaswant Singh had told him that the accused was suffering from mental ailment (insanity) has been denied by HC Pyare Lal (PW-21) as wrong. However, his admission that the accused was in ferocious mood and had to be arrested in the proceedings under Section 107/151 Cr. P.C. itself speaks in plenty about the actual and factual position. Even if such evidence having come on record after the dismissal of the application under Section 329 Cr.P.C. i.e. during the course of trial is not taken into consideration, ample material was on record by that time when the application moved showing prima-facie the abnormal behavior and conduct of the accused at the time of occurrence. Therefore, the possibility of the accused was not in a fit state of mind at the time of occurrence cannot be ruled out.

23. Interestingly enough, DW-3 Bainshu Ram, Superintendent, Open Air Jail, Bilaspur on noticing abnormal conduct and behavior of the accused continuously right from 29.6.2015, the date when he was lodged there had informed the S.H.O., Police Station Bharari vide letter dated 11.8.2015 Ext. DW-3/A about such behavior and conduct of the accused. Also that, he was sent to District Hospital, Bilaspur and IGMC, Shimla for treatment. The copy of letter Ext. DW-3/A was also sent to the father of the accused. He in turn had handed over the prescription slips Ext. DW-1/A1 to Ext. DW-1/A4 to this witness. These OPD slips pertains to Karmi Devi Mental Hospital, Hamirpur as has come in the statement of DW-1 Dr. R.S. Dhatwalia, Psychiatrist in the said hospital. Although DW-1 Dr. R.S.Dhatwalia could not recognize the accused in the Court, however, stated that the person to whom the OPD slips Ext. DW-1/A1 to Ext. DW-1/A4 pertain was likely to suffer from a major mental disorder. Since the OPD slips pertain to the ailment of the accused himself, being produced by his family members before DW-3 Bainshu Ram, Superintendent Open Air Jail, Bilaspur, therefore, such record coupled with the testimony of DW-1 Dr. R.S.Dhatwalia and DW-3 Bainshu Ram reveals that the accused was not of sound mind. Even if the statement of DW-1 Dr. R.S. Dhatwalia is ignored at this stage, in that event also, the letter Ext. DW-3/A written by DW-3 Bainshu Ram to Station House Officer, PS Bharari and to the parents of the accused leads to the only conclusion that prima-facie material qua the accused being of unsound mind had come on record well before filing of the application under Section 329 Cr. P.C. It appears that the prosecution has intentionally and deliberately withheld such material from the Court and not opted for filing reply to the application. Such illegal approach on the part of the prosecution is not at all appreciated nor is it in the interest of **fair trial**, a **Constitutional right** of the accused.

24. DW-2 is Ravinder Kumar. As a matter of fact, he was posted as Pharmacist in Open Air Jail, Bilaspur. On noticing abnormal behavior and conduct of the accused in Jail, coupled with the factum that he got himself involved in physical brawl with other inmates, he was taken to IGMC and Hospital Shimla for treatment in Psychiatric Department. It is thereafter his treatment in the said hospital, the accused came to his normal routine. The accused as to whether was taking medicine in routine manner or not at the time of occurrence would have surfaced had the enquiry been ordered to be conducted in the application under Section 329 Cr.P.C. DW-2 Ravinder Kumar has testified that the OPD slips Ext. DW-1/A1 to Ext. DW-1/A4 were supplied to the Jail authorities by the family members of the accused. The same according to him was part of record he had brought to the Court. The letter Ext. DW-3/A was sent to the SHO by the Jail authorities. The same in all probabilities, might have been received in the Police Station because the father of the accused had also received the same. Therefore, the factum of the receipt of letter Ext. DW-3/A would have also surfaced had the enquiry been ordered by learned trial Judge under Section 329 Cr.P.C.

25. DW-4 Ashok Kumar is cousin of the accused being his Aunt's son (Bua's son). On the day of occurrence itself, he had received the message of his maternal Uncle PW-1 Jaswant Singh about the necessity to take the accused to the Clinic of Dr. Dhatwalia at Hamirpur as he had broken the idols of Gods and Godesses hanging on the walls of the house on that day. According to DW-4 Ashok Kumar, the accused was under treatment of the said Hospital at Hamirpur. He, therefore, on the call received from his maternal uncle went to his house, however, noticed that his Aunt (Mami) was killed by that time. According to him, though he was present on the spot, however, not associated with the investigation of the case. DW-5 Naveen Kumar has also stated that on two occasions he accompanied the accused and his father to the hospital of Dr. Dhatwalia at Hamirpur for his check up. The mental condition of the accused allegedly had deteriorated after few days of his marriage. DW-7 Dr. R.C. Sharma is the Head of the Department of Psychiatric, IGMC & Hospital, Shimla. The accused was examined vide OPD slip Ext. DB-1 under his supervision by Dr. Ramesh his associate. The other OPD slips i.e. Ext. DB-2 to 4 and 6 to 9 according to him also pertain to the days when he was in OPD on duty. This record was also available on the day when the application under Section 329 Cr.P.C. was filed.

26. The accused was of unsound mind or not at the relevant time would have surfaced from the enquiry, had it been ordered to be conducted by learned trial Court. The procedure adopted by learned trial Court to consider and decide such application is, therefore, not as per law.

27. In view of the reasons hereinabove on filing of the application under Section 329 Cr.P.C. by the accused, the only option available to the trial Court was to have held the enquiry in accordance with the procedure prescribed thereunder for the reason that the manner in which the occurrence took place and the accused had brutally murdered his own mother prima facie shows that he was not in a fit state of mind. Otherwise also, the procedure prescribed under Section 329 Cr.P.C. is mandatory. Therefore, before proceeding further in the trial, learned trial Judge should have obtained the expert opinion qua the mental/psychological disorder, if any, of the accused by forwarding him to Psychiatrist, more particularly, when the prosecution did not opt for filing reply to the application. It is also not understandable as to what prompted learned defence counsel to have withdrawn the application. Anyhow, as noticed supra, the dismissal of the application as withdrawn cannot be construed to form an opinion that the accused is now not entitled to take such ground in the appeal. Nothing has been brought to the notice of this Court on behalf of the respondent-State that the accused never remained under treatment in Psychiatry Department of IGMC and Hospital Shimla and that he was never suffering from any mental ailment nor ever took any treatment.

28. We, therefore, find the present a fit case where from the date i.e. 1.12.2015 (the day when the application under Section 328/329 Cr.P.C. filed) onward the entire proceedings in the trial have vitiated. As a matter of fact, learned trial Judge should have first determined the question of unsoundness of mind of the accused and thereafter to proceed further in the trial. The impugned judgment which has been passed on the evidence recorded in contravention of the law is not legally sustainable. As a matter of fact, without ascertaining as to whether the accused was in a fit state of mind and in a position to make and understand his defence, no findings of conviction could have been recorded against him. The plea of insanity under Section 84 IPC if raised on behalf of the accused after determining the question ibid could have been considered during the course of further trial by the learned trial Court. The approach adopted by learned trial Judge has not only vitiated the proceedings in the trial but has taken away the legal and Constitutional right of the accused qua **fair trial** besides condemning him unheard.

29. For all the reasons hereinabove, this appeal succeeds on this score alone and the same is accordingly allowed. Consequently, the impugned judgment is quashed and set aside. The case, however, is remanded to learned trial Court for re-trial from the stage of holding enquiry into the facts that on the day of occurrence the accused was of unsound mind or not and thereafter to proceed further in the matter in accordance with law as per the procedure prescribed under Section 329 Cr.P.C. and in case learned trial Court ultimately arrives at a conclusion that the accused is not of unsound mind and has committed the offence while in his full senses, to proceed further against him and decide the case afresh by taking into consideration the evidence already available on record and also the evidence if any, produced by the prosecution and also the defence.

Before parting, we leave it open to learned trial Court to decide the question of release of the accused on bail during the course of enquiry to be conducted in accordance with the procedure prescribed under Section 329 Cr.P.C. and in case he is held to be of unsound mind, till his recovery from his ailment and during the period when on account of his mental disorder/ailment the proceedings in the trial are to be ordered to be suspended and resumed as and when he is cured from the ailment or otherwise, as the case may be.

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

Principal, D.A.V. Centenary Public School, Kumarhatti .....Petitioner
Versus
State of H.P. & others ....Respondents.

CWP No. 2995 of 2010.
Reserved on : 7th December, 2018.
Decided on : 17th December, 2018.

**Industrial Disputes Act, 1947- Section 2 (oo)**- Retrenchment- Held, termination of employee for any reason whatsoever except by way of disciplinary action, amounts to retrenchment. (Para 4)

**Industrial Disputes Act, 1947- Sections 25-B and 25-F**-Retrenchment- Held, employee who rendered continuous service for requisite period can be terminated/ disengaged only in accordance with Section 25-F of Act- Disengagement without serving notice and without paying retrenchment compensation, bad in eyes of law- Award of Labour Court directing reinstatement with back wages, upheld- Civil Writ Petition dismissed. (Paras 4 to 6)

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| For the Petitioner: | Mr. Rahul Mahajan, Advocate. |
| For Respondent No. 1: | Mr. Hemant Vaid & Mr. Desh Raj Thakur, Addl. AGs with Mr. Vikrant Chandel, Dy. A.G. |
| For Respondents No.2: | Mr. Anuj Gupta, Advocate. |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The hereinafter extracted reference, was, referred, to the Industrial Tribunal-cum- Labour Court, at Shimla, for, an adjudication being rendered thereon:-

> "Whether the plea of the Principal DAV Centenary Public School, Kumar Hatti, District Solan, that Ashwani Kumar S/o Shri Hari Nand Sharma (Accountant) worker left the job of his own accord w.e.f. 1.6.2002 and without serving any notice for absenteeism and abandonment, is legal and justified? If not, to what seniority, back wages, service benefits and relief, the concerned workman is entitled to?"

Upon, the afore extracted reference, the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla, meted an answer, vis-a-vis, the workman/respondent herein. The employer/petitioner herein hence being aggrieved therefrom, has, through the instant writ petition, cast a challenge thereon.

2. The workman/respondent herein, under, letter of 23.11.2000 hence stood appointed by the employer/petitioner herein, for, performing the avocation, of, an accountant. A perusal of the afore appointment letter, displays, that the initial term/tenure of appointment, against, the afore post hence being for a period of one year, and, a further recital, is, borne therein qua the service(s) of the workman/respondent herein, against the afore post, being likely to be regularized, after, expiry of the afore period or tenure, of, one year. In pursuance to the afore appointment letter, the, workman/respondent herein joined his duties, in the afore capacity, with, the petitioner herein/employer. The workman/respondent herein, hence, after completing, the, apt tenure of one year, against, the afore post, rather stood under, a, letter of 1.6.2002 hence meted an extension of two months, for, hence performing, his duties with the employer/petitioner herein, against the post of an accountant, whereagainst, he stood initially, appointed under Ex.PA.

3. However, a dispute arose inter se the workman, and, the employer, and, on failure, of, conciliation, of, the relevant dispute, rather sequelled, the hereinabove extracted reference, being made, for meteing, of, an adjudication thereon, vis-a-vis, the Industrial Tribunal-cum-Labour Court. The learned tribunal, aptly, on meteing apt deference, to the admission, borne in the cross-examination, of RW-1 qua the workman/respondent herein, not abandoning his job, rather his quitting it, given his not being selected, in pursuance, to the culmination, of, the relevant recruitment process, standing initiated by the employer, hence naturally answered the afore extracted reference, in the affirmative, and, granted the relief of reinstatement, and, alongwith back wages, to, the workman/respondent herein.

4. Be that as it may, without faulting, the, initiation, and, culmination, of, the recruitment process(es), embarked, upon, by the employer, for hence making appointment against the post of an accountant, and, in sequel whereto, one Dhani Ram Kapil, stood selected, (a) the paramount conundrum, which is enjoined to be affirmatively rested, is encapsulated in the workman/respondent herein, given, his on the afore anvil, hence standing terminated, from, the post of an accountant, whereagainst, he stood initially appointed, and, whereafter the afore extension, stood meted to him, (ii) whereupon, hence the respondent/workman, rather, falls, within, the ambit of the coinage "retrenchment", statutorily defined in sub-section (oo) of Section, 2 of, the Industrial Disputes Act (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter:-

> "(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include--

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non- renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or] (c) termination of the service of a workman on the ground of continued ill- health;]"

The afore findings rendered by this Court qua the respondent/workman standing retrenched, from, employment, by his employer, hence, also entails this Court, to determine, whether the length of service, rendered by the workman/respondent herein, under, his employer, rather falling within, the definition of Section 25-B, of the Act, provisions whereof stand extracted hereinafter:-

**25B. Definition of continuous service.**- For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock- out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer--

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) ninety- five days, in the case of workman employed below ground ina min; and

(ii) one hundred and twenty days in any other case."

It is not controverted by the employer, nor evidence exists on record, that, the respondent herein/workman, did not render the requisite statutorily enjoined period, of continuous service, under, his employer/petitioner herein. The effect thereof, is, qua, the mandate of Section 25-F, of, the Act, begetting its apt attraction hereat, provisions whereof stand extracted hereinafter:-

> 25F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until--
>
> (a) the workman has been given one month' s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
>
> (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [2] for every completed year of continuous service] or any part thereof in excess of six months; and
>
> (c) notice in the prescribed manner is served on the appropriate Government [3] or such authority as may be specified by the appropriate Government by notification in the Official Gazette].

(i) and, on reading, and, application whereof, it was incumbent, upon, the employer, to hence prior to dispensing with the services, of the respondent/workman, to hence mete absolute compliance, with the peremptory statutory conditions, as, stand delineated therein. However, evidence qua compliance therewith being meted, by the employer/petitioner herein, rather does not exist on record. Consequently, with, the peremptory mandate, of, the afore statutory provisions, being transgressed, thereupon, the retrenchment or disengagement or termination of services of the respondent herein/workman, by the petitioner herein/employer, is rendered both obviously faulted, and, vitiated.

5. In summa, the impugned verdict, rendered for reinstatement, in service, of the respondent herein/workman, by his employer/respondent herein, is not tainted with any vice of mis-appreciation of evidence, on record, nor is stained with any vice of gross mis-application, of, the germane applicable thereon, hence statutory principles.

6. Further more, the workman in his testimony, rendered an echoing qua, during, the period of his disengagement, his performing agricultural work, and, therefrom his rearing an income, echoing whereof remained unshattered, of, its efficacy, (i) given the employer failing to lead any evidence in rebuttal thereof, rather carrying an echoing qua the agricultural income, reared by the workman, during, the period of his disengagement or termination or retrenchment, being comprised in a sum equivalent, to the income, as, derived, by him, from his relevant employment, (ii) whereupon a firm inference, is sparked, qua the quantum of back wages assessed by the learned tribunal, vis-a-vis, the workman also not suffering from any gross fallibility.

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

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

Sh. Bishna (since deceased) through his legal heirs and others
.....Appellants/defendants.

Versus

Sh. Atma Nand and others .....Respondents/Plaintiffs.

FAO No. 393 of 2010.
Reserved on : 3rd December, 2018.
Decided on : 17th December, 2018.

**Code of Civil Procedure, 1908-** Order XIV Rule 2- Framing of issues- Held, before settlement of issues if court of view that suit can be disposed of on issue of jurisdiction or that otherwise it is barred by law, it may postpone settlement of other issues and decide aforesaid issue of jurisdiction or bar imposed by law, first- But when all issues of law and facts are settled, then court is enjoined to render findings on all such issues- Order of First Appellant Court setting aside judgment of trial Court on this ground and remanding suit, upheld. (Paras 9 & 10)

***Cases referred:***
Prithvi Raj Jhingta and another vs. Gopal Singh and another, 2006(2) Shim. LC 441

For the Appellants: Mr. R.K. Gautam, Sr. Advocate with Ms. Megha Kapur Gautam, Advocate.
For Respondents No.1 to 6, 8, 15, 22, 25 and 27 to 30:
Mr. Ajay Kumar, Senior Advocate with
Mr. Dheeraj. K. Vashista, Advocate.
For other respondents: Nemo.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

Through, the instant appeal, the appellants challenge the verdict recorded by the learned First Appellate Court, upon, Civil Appeal No. 34 of 2009, wherethrough, the learned First Appellate Court, after reversing, the verdict pronounced by the learned Civil Judge concerned, upon Civil Suit No. 201 of 1997, proceeded to make an order, of, remand to the learned trial Court, for its hence rendering a decision afresh, in accordance with law, upon, the afore civil suit.

2. Briefly stated the facts of the case are that the plaintiffs had instituted a civil suit for declaration with consequential relief of permanent injunction against defendants No.1 and 2 that they had been joint owners in possession of the land described in the plaint. The defendants No.1 and 2 had no right, title or interest over the suit land. They had been recorded in possession of the suit land vide orders dated 17.7.1984/19.6.1985 passed in case No.341/81, 343/84 and 344/84 by Assistant Collector 2nd Grade, Una. Such orders were stated wrong, illegal, void and not binding on the plaintiffs. The defendants had started interfering with the possession of the plaintiffs on the strength of such orders, w.e.f. July 1997. They had been requested not to do so, but without any result and, hence the suit for declaration and injunction. In the alternative the plaintiffs had sought relief of possession in case defendants were successful in taking forcible possession or had been otherwise treated in possession.

3. The defendants No.1 and 2 contested the suit and filed written statement, wherein, they have taken preliminary objection qua maintainability,estoppel, limitation, non joinder and valuation. It had also been averred that some of the plaintiffs were minor and suit on their behalf without appointment of guardians was incompetent. On merits, the

defendants had denied the ownership and possession of the plaintiffs of the suit land. The defendants had stated that they had been in possession of suit land for over 40 years prior to the institution of the suit. The possession of the defendants was open, hostile, continuous without interruption and hence adverse to the plaintiffs. The defendants had acquired rights of ownership by adverse possession. During the last settlement, Smt. Bimla Devi and other co-owners had applied for correction of entries of the books of the Collector. The settlement men had looked into the matter and had found the defendants in possession. The Assistant Collector 2nd Grade, after notice to the owners had proceeded to record the defendants in possession of the suit land vide order 17.7.1984/189.6.1985 passed in case Nos. 341/84, 343/84 and 344/84. Shri Parkash Chand one of the owners had also admitted the possession of the defendant before the A.C. 2nd Grade. The plaintiffs were bound by the orders passed by the A.C. 2nd Grade. The defendants had been in possession and hence question of their interference with the possession of the plaintiff could not arise for consideration. The suit had not been instituted by all the co-owners and hence suffered from the vice of non joinder.

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 owners in possession of the suit land? OPP.
2. Whether orders dated 7.7.84/19.6.85 allegedly passed by A.C. IInd Grade, Una in cases NO.341/84, 343/84 and 344/84 are wrong, null and void, as alleged? OPP.
3. Whether the suit is not maintainable? OPD.
4. Whether the defendants have became owners of the suit land by way of adverse possession? OPD.
5. Whether plaintiffs are estopped by their act and conduct to file present suit? OPD.
6. Whether the suit is barred by limitation? OPD.
7. Whether suit is bad for non joinder of necessary parties? OPD.
8. Whether suit has not been properly valued for the purpose of court fee, if so, what is correct valuation of the suit property? OPD.
9. Whether suit is liable to be dismissed on the ground mentioned in preliminary objection No.8? OPD.
10. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom, by, the plaintiffs/respondents herein, before the learned First Appellate Court, the latter Court allowed, the, appeal, and, reversed the findings recorded by the learned trial Court, and, hence, made a order of remand, vis-a-vis, the trial Court.

7. Now the defendants/appellants herein, have instituted the instant Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment, by the learned first Appellate Court.

8. A perusal of the order rendered on 6.12.1999 by the learned Civil Judge (Jr. Division) concerned, unfolds, qua thereunder, the, following issues being struck, upon, the contentious pleadings of the parties, at contest:-

"1. Whether the plaintiffs are owners in possession of the suit land? OPP.

2. Whether orders dated 7.7.84/19.6.85 allegedly passed by A.C. IInd Grade, Una in cases NO.341/84, 343/84 and 344/84 are wrong, null and void, as alleged? OPP.

3. Whether the suit is not maintainable? OPD.

4. Whether the defendants have became owners of the suit land by way of adverse possession? OPD.

5. Whether plaintiffs are estopped by their act and conduct to file present suit? OPD.

6. Whether the suit is barred by limitation? OPD.

7. Whether suit is bad for non joinder of necessary parties? OPD.

8. Whether suit has not been properly valued for the purpose of court fee, if so, what is correct valuation of the suit property? OPD.

9. Whether suit is liable to be dismissed on the ground mentioned in preliminary objection No.8? OPD.

10. Relief."

However, the learned trial Court rendered, hence, answers in the affirmative, upon, issues No.7 and 9, and, obviously further answered qua hence, the, other issues rather being rendered redundant, and, thereafter it proceeded to dismiss the suit, as abated. In an appeal carried therefrom by the aggrieved plaintiff, before the learned First Appellate Court, the latter, under, the impugned verdict, rather made an order of remand, vis-a-vis, the learned trial Court.

9. The apt conundrum which, is, enjoined to be put, to rest, (I) squarely rests upon attraction hereat, of, the statutory mandate embodied in Order 14, Rule 2 of the CPC, provisions whereof stand extracted hereinafter:-

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

In sub-rule (2) thereof, a clear statutory expostulation, is borne qua (a), when upon, the contentious pleadings of the parties at contest, issues both of law and facts hence being hence sparked, (b) and, conspicuously when at the stage prior to the strking of all the

issues, the Court, is of a firm opinion that the suit being amenable, for disposal, only upon an issue of law,(c) appertaining to the jurisdiction of the court, (d) or the suit being barred by any law for the time being in force, (e) thereupon, the trial Court concerned, being bestowed, with a jurisdiction, to postpone the settlement of issues of fact, until, the afore issue(s) of law, are/is, meted an adjudication thereon. However, hereat, under, the afore extracted order pronounced on 6.12.1999, apparently all the issues of facts, and, of law, rather stood conjointly struck, by the learned trial Court, (f) obviously, though hence, the learned trial Court, was bestowed with the apt jurisdiction, embodied in sub-rule (2) to Rule (2) of Order 14 of the CPC, to, prior to the striking of all the afore conjoint issues, of fact, and, of law, (g) to rather proceed to strike only issue(s), appertaining to the jurisdiction of Court, and, qua the suit being barred by any law for the time being in force, (h) and, upto meteing, of, a decision thereon, the trial Court, though, was bestowed with a further valid jurisdiction, to postpone, the settlement of issues, appertaining to the contentious facts, emerging inter se the litigating parties, (i) and, when adoption of the afore course, rather would hence validate any affirmative/disaffirmative findings recorded, upon, the afore issues of law, AND, would depending, upon, conclusion being meted thereon, also hold jurisdiction, to, non suit the plaintiff or proceed to strike also issues, of, fact. However, when hereat through the order rendered, on 6.12.1999, rather conjoint issues of fact, and, of law hence stood framed, thereupon, the learned trial Court was barred, to segregate the issues of facts, and, of law, rather was enjoined to render findings, upon, all issues of facts, and, of law, than to proceed, to render findings only, upon, issues appertaining to (a) jurisdiction of the court, or (b) civil suit being barred by any law for the time being in force, render affirmative findings, (c) and, thereafter proceed, to without answering the other issues, of, fact hence non suit the plaintiff. In coming to the afore conclusion, this Court finds support, from a judgment rendered, by the Division Bench of this Court, in a case titled as ***Prithvi Raj Jhingta and another vs. Gopal Singh and another***, reported in ***2006(2) Shim. LC 441,*** the relevant paragraph No.9 whereof stands extracted hereinafter:-

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

The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court being based, upon a proper and mature appreciation of the material on record. While

rendering the findings, the learned first Appellate Court has not excluded germane, and, apposite material from consideration.

10. In summa, the order of remand made by the learned First Appellate Court, bears consonance, with the afore extracted trite expostulations of law, borne in the judgment (supra), thereupon, the order impugned before this Court, is well merited. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. The order impugned before this Court, is, affirmed and maintained. The parties are directed to appear before the learned trial Court on 28th December, 2018. The learned trial Court is directed to dispose of the apposite civil suit, within, six months from today. 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, JUDGE.**

National Insurance Company Ltd. .....Appellant.
Versus
Surat Ram and others ....Respondents.

FAO No. 77 of 2017.
Reserved on :6th December, 2018.
Decided on : 17th December, 2018.

**Motor Vehicles Act, 1988-** Section 166- **Code of Civil Procedure, 1908** - Order XLI Rule 27- Additional evidence- Insurer intending to adduce report of Investigator in evidence by way of additional evidence at appellate stage- Held- Report of Investigator material for just decision- Matter remanded to Claims Tribunal with direction to take Investigator's report on record and then proceed in accordance with law. (Para 4)

For the Appellant: Mr. Jagdish Thakur, Advocate.
For Respondents No. 1 to 5: Ms. Nishi Goel, Advocate.
Respondents No.6 and 7 already ex-parte.

The following judgment of the Court was delivered

**Sureshwar Thakur, Judge.**

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts a challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-II, Solan, H.P., upon, Claim Petition No. 5-NL/2 of 2009, whereunder, compensation amount comprised, in, a sum of Rs.3,34,000/- along with interest accrued thereon, at the rate of 9% per annum, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer.

2. Without delving, into, the merits of the case, and, upon the merit(s) of an espousal, reared before this Court by the learned counsel for the insurer, for, hence negating, the, fastening, of, the indemnificatory, liability, vis-a-vis, it, (i) the fact germane to the afore espousal, is, comprised in the factum of this Court, while, rendering a pronouncement, upon, FAO No. 269 of 2011, as arose herebefore, against, the award

pronounced, upon, claim petition No. 5-NL/23 of 2009, titled as Surat Ram and others vs. Ramesh Kumar and others, petition whereof is alike the one, whereupon the impugned award is pronounced, (ii) rather proceeding, after accepting the owner's appeal, to hence remand the matter to the learned tribunal concerned, to render fresh decision(s), upon, the hereinafter extracted issues:-

> "2. If issue No.1 is proved in affirmative, to what amount and from whom the petitiners are entitled for compensation? OPP
>
> 4. Whether the vehilce in question was driven in breach of terms and conditions of policy?OPR-3"

The relevant portion of the order of remand made by this Court, upon, the afore FAO, reads as under:-

> "15. Having glance of the above discussion, the findings recorded by the Tribunal on issue No2, partly and issue No.4 are set aside and the case is remanded to the Tribunal below for recording findings afresh on the aforesaid issues. Needless to say, in order to prove issue No.2 (partly) and issue No.4, the tribunal shall afford opportunity to the driver and the owner to file replies and lead evidence. The insurer shall also be afforded opportunity to lead evidence. The Tribunal is directed to conclude the case, as above within three months from 1st July, 2016, on which date, the parties through their respective counsel are directed to cause appearance before the Tribunal."

3. A perusal of the zimni orders existing, on the file of the learned tribunal concerned, (i) reveals, that though the insurer was provided sufficient and adequate opportunities to adduce its evidence, upon, the afore issues, nonetheless, it omitted to do so. However, during the pendency of the instant appeal before this Court, the insurer, has cast an application before this Court, under, the provisions of Order 41, Rule 27 of the CPC, application whereof bears CMP No. 1922 of 2017, (ii) wherethrough, it seeks leave of the Court to adduce into evidence, the, Investigator's report, with, an echoing borne therein qua the driving licence held by the driver, of the offending vehicle, being both fake, and, unauthentic. Even though, the afore endeavour, is, belated, and remained unavailed, despite, opportunities being granted by the learned tribunal, upon its receiving the apposite petition, upon, an order of remand made, upon it, by this Court, (iii) yet when for want of leave being granted to the insurer, it would sequel an ill-consequence, of, the apt indemnificatory liability, being prima facie rather standing untenably fastened, upon, the insurer, (iv) thereupon, the granting, of, leave to place on record, the, investigator's report is imperative, hence, for ensuring the rendition of clinching findings, upon, the apt issue, (v) thereupon, the relevant document is both, just and essential for determining the relevant factum probandum. Consequently, CMP No.1922 of 2017 is allowed, in sequel, leave is granted to the insurer, to, place on record,, the, investigator's report.

4. Since, the investigator's report did not exist, on the file of the learned tribunal, given it standing placed, on record, before this Court, hence, for enabling the learned tribunal, to receive, from the contesting litigants, hence, evidence qua its validity or invalidity, it is deemed fit, to, after quashing the findings, recorded upon issue No.2 and 4, and, upon the relief clause, to remand the matter, to the learned tribunal, (i) with, a direction upon it, to, permit the adduction into evidence, of, the investigator's report, and, to

enable its being proven, in accordance with law, (ii) and, to also enable the litigating parties to lead rebuttal evidence, and, thereafter the learned tribunal, is, directed to, pronounce a fresh decision, upon, the aforesaid issues. The aforesaid exercise be done within three months from today. The parties are directed to appear before the learned tribunal, on 4th January, 2019. All pending applications also stand disposed of. Records be sent back forthwith.

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

1. FAO No. 127 of 2018.
Jagdish Chand .....Appellant.
Versus
Master Rohit alias Ravi & Ors. ....Respondents.

2. FAO No.113 of 2018.
Jagdish Chand .....Appellant.
Versus
Ganesh Devi & Others ....Respondents.

3. FAO No. 125 of 2018.
Jagdish Chand .....Appellant.
Versus
Puran Chand & others ....Respondents.

4. FAO No. 126 of 2018.
Jagdish Chand .....Appellant.
Versus
Swaran Singh and others ....Respondents.

FAO No. 127 of 2018 along
with FAO Nos. 113 of 2018,
125 of 2018 & FAO No. 126 of 2018.
Reserved on: 6th December, 2018.
Decided on : 17th December, 2018.

**Motor Vehicles Act, 1988-** Sections 149 & 166- Motor accident- Claim applications- Gratuitous passengers- Proof- Claim applications clearly mentioning that occupants were going to pay obeisance- No averment that any goods were also being carried along with them- Offending vehicle being goods carrier, travelling of passengers was not permissible- Held, vehicle was being plied in breach of terms of policy- Imposition of liability on owner of vehicle justifiable- However, award(s) partly modified with direction to insurer to first satisfy award(s) and then recover amount from insured. (Paras 3 to 5)

***Cases referred:***
Deedappa v. National Insurance Co. Ltd., (2008)1 SCC (Cri) 517
National Insurance Co. Ltd. v. Baljit Kaur, (2004)2 SCC 1

| | |
|---|---|
| For the Appellant(s): | Mr. Surender K. Sharma, Advocate, in all appeals. |
| For Respondent(s) No. 1: | Mr. R.K. Sharma, Sr. Advocate with Mr. Arun Kumar, Advocate in all appeals. |
| For Respondent(s) No.2: | Mr. Pritam Singh, Cahndel, Advocate in all appeals. |
| For Respondent(s) No.3: | Nemo (in all appeals) |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

All the aforesaid appeals are being disposed off, by a common judgment, as they appertain to a common incident, besides common questions of fact, and, law are involved in these appeals.

2. The owner of the offending vehicle, being aggrieved, by the impugned awards, respectively, pronounced, upon, MACT NO. 196/2015, MACT No. 195 of 2015, MACT No. 191 of 2015, and, MACT No. 192 of 2015, whereunder, the liability of compensation amount respectively assessed, vis-a-vis, the respective claimants, hence, stand fastened upon him, hence, casts a challenge, vis-a-vis, the affirmative findings recorded, upon, issues appertaining therewith, issues whereof stand extracted hereinafter:-

> " 4. Whether the offending vehicle was over loaded with 21 passengers at the time of the accident against its seating capacity? OPR-1
>
> 5. Whether the offending vehicle was being driven in violation of the Motor Vehicle Act/rules as alleged? OPR-1"

3. The insured/owner of the offending vehicle, in his endeavour to negate the findings returned, upon, the afore issues, by the learned tribunal, was enjoined to adduce clinching evidence on record, (a) in trite display qua the passengers concerned, while travelling in the ill-fated vehicle, rather being at the relevant time, hence standing carried thereon along with their goods loaded therein. However, pleadings reared in the respective claim petitions, contrarily, make a candid display qua rather the respective claimants, being aboard, the, ill-fated vehicle, for theirs paying obeisance, at, a temple, (b) also in the apt averment, borne in the apposite paragraph 24, of, the respective claim petitions, no averment is borne therein, qua theirs while being aboard, the, offending vehicle, theirs also carrying, their goods therein. The afore averred averments hence constitute, an, admission qua the claimants obviously, at the relevant time, travelling as gratuitous passengers, in the vehicle registered, as a goods carrier, (c) as evident, on a reading of the copy of the registration certificate, issued qua the offending vehicle, and, as embodied in Ex. RC, (d) thereupon, when the contract of insurance, respectively borne in Ex.RB, rather permits carrying therein of passengers along with their goods, being also borne therein, (e) thereupon, the afore averred acquiesced capacity of the passengers, constitutes a pervasive, and, deep fundamental breach, of the contract of insurance, executed, inter se, the owner, and, the insurer of the offending vehicle, (f) thereupon, the fastening of the apt indemnificatory liability, upon, the owner of the offending vehicle by the learned tribunal, is both meritworthy, and, tenable.

4. Even though, this Court, has, for reason aforesaid, hence concluded qua the fastening of the apt indemnificatory liability, upon, the owner of the offending vehicle rather

not suffering from, any infirmity, nonetheless, in consonance with the verdicts of the Hon'ble Apex Court rendered in case titled as ***National Insurance Co. Ltd. v. Baljit Kaur,*** reported in ***(2004)2 SCC 1*** as also in a case titled as ***Deedappa v. National Insurance Co. Ltd.,*** reported in ***(2008)1 SCC (Cri) 517***, the insurer company shall satisfy the award, and, shall have the right to, in accordance with law, hence recover, the, amount deposited by it, along with interest, from, the owner of the vehicle i.e. appellant(s) herein.

5. For the foregoing reasons, all the aforesaid appeals filed by the owner of the offending vehicle are dismissed. However, the awards impugned before this Court, are, in the aforesaid manner, hence modified. All pending applications also stand disposed of. Records be sent back forthwith.

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

The Oriental Insurance Company Ltd. .....Appellant.
Versus
Durga Dass and another ....Respondents.

FAO No. 4054 of 2013.
Reserved on : 5th December, 2018.
Decided on : 17th December, 2018.

**Motor Vehicles Act, 1988-** Sections 157 & 166- Held, when registration of vehicle is transferred along with insurance certificate, certificate of insurance and policy shall be deemed to have been transferred in favour of transferee from date of transfer. (Para 2)

For the Appellant: Mr. Deepak Bhasin, Advocate.
For Respondent No. 1: Mr. Ajit Jaswal, Advocate vice Mr. Neeraj Gupta, Advocate.
Respondent No.2 already ex-parte.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal, Shimla, H.P., upon, M.A.C.T. No. 4-S/2 of 2009, whereunder, compensation amount comprised, in, a sum of Rs.1,47,804/-alongwith costs, and, interest accruing thereon, borne in, a, the rate of 9% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimant, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing or the appellant/insurer, (i) does not contest, the validity, of, the affirmative findings, rendered by the learned tribunal, upon, issue No.1, appertaining to the relevant accident, being, a, sequel of rash, and, negligent manner, of, driving of the offending vehicle, by one Ramesh Kumar, respondent No.2 herein, (ii) nor he

casts any challenge, upon, the quantum of compensation assessed, vis-a-vis, the claimant, besides, he does not contest the disaffirmative findings rendered, upon, the apposite issue appertaining to the driver of the offending vehicle, not, possessing, a, valid and effective driving licence, at the relevant time, to hence drive the offending vehicle, (iii) rather his contest is limited to the extant qua with the contract of insurance, borne in Ex.RW1/A, being executed inter se the insurer, and, one Malkiyat Singh, and, with the afore Malkiyat Singh neither standing impleaded as a party, nor his instituting a reply to the petition, (iv) whereas, he was solitarily entitled to be indemnified by the insurer, for the injuries, sustained by the claimant, in the relevant mishap, (v) given only the afore Malkiyat Singh, being privity to the contract, of, insurance, borne in Ex.RW1/A, thereupon, rather rendered his impleadment to be both, necessary, and, imperative. However, the aforesaid submission, would, contain immense vigour, (vi) only when the insurer, had, proven that Malkiyat Singh, was a fictitious person, and, the contract of insurance, borne in Ex.RW1/A was fictitious, or stood engendered by vice, of, misrepresentation, (vii) evidence whereof, is, grossly amiss hereat, and, further when rather the further transfer, of the offending vehicle has evidently occurred subsequent, to, the occurrence, vis-a-vis, Rameshwar Singh, and, when the transfer has resulted in the apt R.C. being drawn, vis-a-vis, Rameshwar Singh, (viii) thereupon, when, at the relevant time, hence Rameshwar Singh was driving the offending vehicle, (ix) and, when he has been aptly concluded, to be holding, an effective driving licence to drive it, (x) besides, when the name of Rameshwar Singh, occurs in Ex. RW1/B, to be rather the addressee, appertaining to the insurer one Malkiyat Singh, (xi) thereupon, there was no absolute need for begetting impleadment of Malkiyat Singh, as a party to the lis, even when he was privy to the contract of insurance, rather when Ex.RW1/A stood tendered into evidence by the insurer, and, also its standing drawn, vis-a-vis, the offending vehicle, thereupon, dehors it being issued, vis-a-vis, Malkiyat Singh, rather renders the insurer, for being saddled with the liability, to, indemnify, the, compensation amount.

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

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

National Insurance Company Ltd. .....Appellant.
Versus
Daleep Singh and another ....Respondents.

FAO No. 258 of 2012.
Reserved on : 7th December, 2018.
Decided on : 17th December, 2018.

**Motor Vehicles Act, 1988**- Section 166 - Motor accident- Claim application- Recitals of FIR- Relevancy- Held, contents of FIR giving manner of occurrence of accident cannot be relied upon if not proved by informant. (Para 2)

For the Appellant: Ms. Devyani Sharma, Advocate.
For Respondent No. 2: Mr. Nimish Gupta, Advocate.

Respondent No.1 ex-parte.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal, Chamba, H.P., upon, MAC No. 179/2011/2010-T, whereunder, compensation amount comprised, in, a sum of Rs.1,41,000/- alongwith interest accrued thereon, at the rate of 7.5% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimant, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing for the appellant/insurer, has, contended with much vigour before this Court (i) that, with, at the relevant time, the, claimant hence traveling as, a, gratuitous passenger, in, the offending vehicle, whereas, the contract of insurance borne in Ex. Rx, prohibiting, the carrying, upon, the offending vehicle, and, in the afore capacity, rather the claimant, (ii) thereupon, with, hence, evident fundamental breach of contract of insurance, borne in Ex. Rx, rather erupting, (iii) thereupon, the fastening of the apt indemnificatory liability, upon, the insurer being amenable for reversal. However, the aforesaid espousal is not borne, by the apt evidence existing on record, given (a) the claimant while appearing as PW-6, hence testifying, qua, at the relevant time, his trudging, at the relevant site of occurrence, and, thereat, the offending while, while being driven in a rash and negligent manner, by respondent No.1 (before the tribunal), its striking him; (b) further his testifying that in sequel thereto, his sustaining injuries, on his person; (c) the afore echoing borne in his testification, qua the ill fated occurrence, though, is contrary to the one, borne in the FIR, embodied in Ex.PW2/A, lodged at the instance of Narender Kumar, wherein, rather echoings hence supportive of the afore espousal reared, before this Court by the learned counsel for the appellant, hence, exist; (d) yet no reliance can be meted to the recitals borne in Ex.PW2/A, given, the informant thereof, one Narender Kumar not stepping into the witness box, for, hence proving the afore echoings, borne in Ex.PW2/A. The effect thereof being, the uneroded testification of the claimant, carrying therein obviously contra therewith recitals, as, borne in Ex.PW2/A, getting hence cogently proven. The corollary of the aforesaid inference, is, qua the claimant proving, that, his at the relevant time, hence, not traveling as, a, gratuitous passenger in the offending vehicle, rather his proving qua at the relevant time, his rather trudging on the road. Further, sequel thereof, is that the fastening of the apt indemnificatory liability, upon, the insurer, not being ingrained with any gross fallibility.

3. The learned counsel, appearing for the insurer, has also contended, that with the offending vehicle, not, at the relevant time, possessing the apt route permit, hence, the fastening of the apt indemnificatory liability, upon, the insurer, rather warranting interference. The afore contention, is, dispelled by the existence on record, of, a copy of route permit, borne in Ex. Z-1, and, with no evidence being adduced by the insurer, that, the afore route permit, at the time of its issuance, was not, accompanied by the apt fitness certificate, issued by the licencing authority concerned, thereupon, it is to be firmly concluded qua the fastening of the apt indemnificatory liability, upon, the insurer rather being both, apt and tenable.

4. Even though, the claimant, has admitted qua , in sequel, to his sustaining injuries on his person, his not being entailed with any disability, yet the effect thereof, is

qua, it, not impairing the claim, for, compensation, as, assessed, vis-a-vis, the claimant, by the learned tribunal, (a) given its appertaining, to, the requisite expenditure incurred by the claimant towards, purchase of medicines, (b) towards special diet, and, towards services of an attendant, and, other ancillary charges, (c) and also the claim of compensation, assessed under the head of transportation charges, likewise also does not merit any interference. Moreover, the assessment of compensation, vis-a-vis, the claimant, under, the head "shock, pain suffering and discomfort", comprised in a sum of Rs.50,000/- is also just and fair. Accordingly, it also does not merit any interference.

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

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

Ms. Leena Dhingra and others ...Appellants
Versus
Collector Land Acquisition & another ....Respondents.

RFA No. 157 of 2015.
Reserved on : 5th December, 2018.
Decided on : 17th December, 2018.

**Land Acquisition Act, 1894 -** Section 18 & 23- Acquisition of Land for public purpose- Reference- Market value- Assessment- Collector discarding one year average of area on ground of its being based on 'sale of land with structures' whereas only vacant land being acquired by Government- Collector segregating value of structures vis-à-vis land and then determining market value of vacant land at Rs.4,310/- per square meters- Reference- Facts revealing valuation report not separately depicting valuation of land or structures- Held, it was not open to Collector to segregate amount mentioned in exemplar sale deed- Market value enhanced on basis of one year average. (Para 4)

For the Appellants: Mr. Arvind Sharma, Advocate.
For the Respondents: Mr. Hemant Vaid and Mr. Desh Raj Thakur, Addl. A.Gs.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The claimants/appellants herein, standing aggrieved, by the award pronounced by the learned Reference Court, upon, Land Reference No. 14-S/4 of 2011, hence, motioned this Court, through the instant appeal, cast under the provisions of Section 54 of the Land Acquisition Act.

2. The claimants, had, in the apposite reference petition transmitted to the learned Reference Court, by the Collector concerned, hence, projected qua theirs being entitled to compensation borne in a sum of Rs.15,000/- per sq. meter. The afore projection, stood aptly declined, by the learned Reference Court, given (a) no sale exemplar bearing

proximity in location, vis-a-vis, the lands brought to acquisition, being adduced into evidence, (b) nor also any apposite sale exemplar, being tendered into evidence, for, bearing out the further trite principle(s) qua there existing proximity inter se execution thereof, and, the issuance of the notification, whereunder the claimants' land, stood, brought to acquisition.

3. Be that as it may, the learned counsel appearing for the appellants/claimants, has contended with much vigour, before this Court, (i) that the Collector concerned was enjoined to revere, the, apposite one year average market value, of, lands appertaining, to, the Halqua concerned, wherewithin, the acquired lands were located. He contends that the one year average market value, of, lands appertaining, vis-a-vis, the halqua concerned, and, as, determined by the District Collector, Shimla, hence, to stand comprised, in a sum of Rs.5,495.39 per square meter, rather comprised the just, reasonable, and, equitable parameter, for, on anvil thereof, making hence assessment, of, fair compensation, vis-a-vis, the acquired land.

4. The one year average market value, as drawn by the District Collector, Shimla, bears out, the afore submission addressed before this Court, by the learned counsel for the appellant However, the Collector concerned, had discarded the afore one year average market value of land, as determined by the District Collector, Shimla, on the ground (a) qua the sale consideration(s), appertaining, vis-a-vis, the, apposite sale exemplar(s), as, borne in the mind by him, in his making the afore computation rather also carrying therein, the, value of structure(s) existing, upon, the relevant lands; (b) thereupon, the Collector concerned, after, deducting from the sale consideration, the value, of, structure(s) existing, on the land(s) qua wherewith sale deed(s) stood executed, thereafter proceeded to assess compensation, vis-a-vis, the acquired lands, borne in a sum of Rs.4,310/- per square meter. The afore method adopted by the Collector concerned, would carry immense formidability, upon, there existing on record (a) the apt valuation report(s) prepared by the valuer(s) concerned, vis-a-vis, the apposite sale exemplar(s), (b) with, clear depictions therein, that, the value of the structure existing upon the land, qua wherewith the sale deeds stood executed, being prepared both with respect to the structure(s) as well as qua the land(s), whereon, the structure(s) existed, (c) and, therefrom it would be further decipherable qua hence obviously, the, value of the structure being or being not borne, in mind by the valuer concerned, for, hence, his obviously drawing, the, valuation report(s) qua therewith.The aforesaid evidence is abysmally lacking, thereupon, it is to be concluded, that, the Collector concerned, has arbitrarily proceeded (d) to conclude that the value of the structure(s) existing on the lands qua wherewith the apposite sale exemplar stood executed, being solitarily borne in mind, by the valuer(s) concerned, and, the lands whereon they existed, being discarded, (e) and, thereupon, the learned Collector concerned, has, further proceeded, to, arbitrarily, discard the value of the land whereon, the structure(s) existed, (f) whereas, the value of the structure as well as of the land(s), whereon they existed, were both required to be hence borne in mind, by the valuer(s) concerned, in his/their making value(s) thereof. The clinching effect thereof, (g) is that, it was grossly inappropriate, for the Collector concerned, to proceed to segregate, the apt component(s), of, the structure(s) existing on the land(s), in respect whereof, the apposite sale exemplar(s) stood executed, from, the apposite lands, whereon, they existed, (h) AND, thereupon, it appears that in consonance therewith rather the District Collector Shimla, has, apparently aptly computed the one year average value of the land, to stand borne, in a sum of Rs.5,495.30 per square meter.

5. Be that as it may, even if assumingly, the afore conclusion, may not be well rested, nonetheless, all the apposite sale exemplars, on anvil whereof, the District Collector,

Shimla, hence, computed the one year average market value, of, land(s), existing in the halqua concerned, to be borne in a sum of Rs.5,495.39 per square meter, (I) when evidently appertain to the month of May, of, the year 2006, (ii) whereas, the lands of the claimants, were brought to acquisition in July, 2007, hence, after more than a year elapsing, since, the execution of the aforesaid sale exemplars. Consequently, the aforesaid elapse of time, hence, since the execution of the apposite sale exemplars, and, the issuance of the statutory notification, for bringing to acquisition, the lands of the claimants, obviously entailed some per centum of hikes being meted towards escalation, in costs or prices of lands, existing in the halqua concerned, from, Rs.4,310/- per square meter, (iii) and, the afore per centum of escalation, does also obviously, support the computation, of, one year average market value, drawn by the District Collector, Shimla, to hence stand borne in a sum of Rs.5,495.39 sq. meter.

6. For the foregoing reasons, the instant appeal is allowed, and, the market value of the acquired land, is, assessed at Rs.5,495/- per square meter, irrespective of the kind, and, nature of the land, at the time of notification, issued under Section 4 of the Act, and, on the aforesaid adjudged market value of the land, the appellants/landowners are also held entitled, to all the statutory benefits. Consequently, the impugned award is modified to the above extent only. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Smt. Jaya Sharma .....Appellant/Plaintiff.
Versus
Sh. Prabhat Chand and others ..Respondents/defendants

RSA No. 349 of 2005.
Reserved on : 6th December, 2018.
Decided on : 17th December, 2018.

**Indian Evidence Act, 1872-** Sections 64 & 65- Photocopy- Held, photocopy is not primary evidence- Contents of photocopy cannot be read in evidence unless permission to adduce its secondary evidence is sought and allowed by Court. (Para 7)

For the Appellant: Mr.Neeraj Gupta, Advocate.
For the Respondents: Mr. Prashant Sharma and Mr. Ajeet Sharma, Advocates vice to Mr. Rajiv Jiwan, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the impugned verdict recorded, upon, Civil Appeal No.47 of 2003, by the learned First Appellate Court, whereby, it reversed the verdict pronounced by the learned trial Court, upon, Civil Suit No.86/1 of 2001, whereunder, the latter Court, had, decreed the plaintiff's suit, for rendition of a decree, for, permanent prohibitory injunction.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for permanent prohibitory injunction against the defendants. It is averred that she is resident of ward No.1 near temple Shree Naina Devi Ji and is in possession of suit property. It was averred that late Shri Roshan Lal, father-in-law of the plaintiff was owner of huge property including building at different places at Shree Naina Devi Ji consisting of more than 80 rooms. Defendant No.1 had contracted second marriage which was illegal and void, and, therefore, to keep peace in the family in 1986, Roshan Lal, father-in-law of the plaintiff had given the suit property to the plaintiff, who was put in possession of the same also and continued in possession of the same. Roshan Lal died in 1998 and the plaintiff had been enjoying the suit property given in her maintenance and as a charge created against this property. It was further alleged that in March, 2001, defendants started interfering in peaceful possession of the plaintiff over the suit land and plaintiff approached the Municipal Panchayat of Shri Naina Devi Ji in which compromise was arrived at and it was agreed that the management of the suit property will remain in the hands of the plaintiff who will be entitled to all the income from the suit property and will pay allowances to her husband for his maintenance. It was further alleged that in the first week of August, 2001, defendants started interfering in possession of the plaintiff and she lodged a complaint with S.D.M. Bilaspur and in October, 2001, the defendants have again threatened to dispossess her forcibly from the suit property, hence, the suit filed by the plaintiff.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections qua maintainability, cause of action, estoppel and jurisdiction They also pleaded that the plaintiff was not the wife of defendant No.1. Defendants further pleaded that the plaintiff was not resident of Shree Naina Devi Ji, nor she was in possession of the suit land. The property of deceased has been inherited by defendants, whereas, the plaintiff has no right, title or interest in the suit property. It was also pleaded that the plaintiff is residing near Ghanahati, District Shimla, where she is employed as a teacher and suit property was never given to her by any person, and as such, the suit is liable to 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 plaintiff is entitled for permanent injunction as prayed for? OPP.
2. Whether in alternative the plaintiff is entitled for the possession, as prayed for? OPP
3. Whether the suit was not maintainable as alleged? OPD.
4. Whether the plaintiff has no legal enforceable cause of action, as alleged? OPD.
5. Whether the plaintiff is estopped to file this suit as alleged? OPD.
6. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the defendants/respondents herein before the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded by the learned trial Court.

6. Now the 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, this Court, on 15.7.2005, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

a) Whether the Lower Appellate Court has committed grave error of law in holding Ex.PA to be inadmissible evidence for want of production of original by ignoring the admissions made by the defendant No.1 was signatory to the Ex.PA? Was not Ex.PA material document liable to be considered for determining the controversy involved in the proceedings when defendant No.1 himself admitted the said document to be correct and also acknowledged the conditions mentioned therein?

b) Whether the Lower Appellate Court has committed grave procedural error I reversing the well reasoned findings of the Trial Court with wrong premises that such findings are based on inadmissible documents i.e. Ex. PA?

c) Whether the Lower Appellate Court has acted with material illegality and irregularity in recording the findings that marriage between the plaintiff and defendant No.1 was also void marriage when there was neither any issue nor such dispute arose from the pleadings of the parties?

**Substantial questions of Law No.1 to 4:**

7. The entire fulcrum of the lis, hence, engaging the parties at contest, is, squarely rested, upon, valid, and, permissible proof, being adduced by the plaintiff, vis-a-vis, the execution of Ex.PA, (i) given thereunder hers rather staking a claim for rendition of a decree, for permanent prohibitory injunction. Ex.PA is a photo copy. The recitals borne in Ex.PA, and, the signatures of all the signatories thereto, obviously, when are borne in a photo copy, thereupon, per se, the, afore obviously, is, not primary evidence, vis-a-vis, the relevant factum probandum. The further effect thereof is qua Ex.PA being inadmissible in evidence, (ii) besides all the contents thereof not carrying any probative vigour or any evidentiary worth, (iii) the afore stains gripping Ex.PA, were, however erasable, upon, the plaintiff being permitted to, upon, hers begetting satiation of the principles enshrined in Section 65, of, the Indian Evidence Act, to, adduce, hence, Ex. PA, as secondary evidence, vis-a-vis, original thereof. The records appertaining to the civil suit No. 86/1 of 2001, omit to make disclosures qua the aforesaid endeavour being recoursed by the plaintiff. Consequently, the rigor of the statutory bar, against, the afore photo copy being inadmissible in evidence, with, the further concomitant effect of all, the, recitals borne therein, being unreadable, besides not carrying any evidentiary worth rather begetting their mightiest attraction, vis-a-vis, Ex.PA.

8. However, the learned counsel appearing for the appellant/plaintiff has contended with much vigour (i) that with the defendant in his cross-examination, hence, admitting, the execution of Ex.PA, and, in his cross-examination, also his, making further echoing that it stood drawn, vis-a-vis, the suit property, (ii) thereupon, the rigor of the afore statutory bar being relaxed, and, thereupon, Ex.PA, dehors the apt recoursing being made by the plaintiff, the afore being admissible and readable in evidence. The aforesaid contention addressed before this Court by the learned counsel, for the appellant is

unmeritworthy, for the reasons, (a) that a closest reading of Ex.PA, rather making a vivid, and, graphic echoing, qua Ex.PA also carrying, the, signatures, of, the Pradhan of the Gram Panchayat concerned, besides the signatures of other co-signatories thereto also existing thereon, (b) the existence of afore signatures therein, necessitated, candid apposite proof rather emanating from the Pradhan of the Gram Panchayat concerned, besides enjoined proof of signatures of all the co-signatories thereof, comprised in each of them, stepping into the witness box, for hence proving, the, existence of their valid signatures thereon. However, neither the Pradhan of the Gram Panchayat concerned nor all the signatories thereof, (c) apart from the plaintiff or one Prabhat Kumar, hence stepped, into the witness box, for hence proving, the, existence(s) thereon, of, their respective valid signatures thereon, (d) whereas, proof qua therewith was imperative, for thereafter securing clinching finding, qua Ex.PA, being free from any taint of concoctions, spuriousness, and, fictitiousness. Contrarily, non adduction of the aforesaid evidence, does, prima facie render Ex.PA, to, stand ingrained, with vices of spuriousness, and, fictitiousness, and, the further effect thereof is qua Ex.PA, hence, being neither admissible or readable in evidence nor the plaintiff being entitled to derive any capitalization therefrom.

9. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court being based, upon, a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondents/defendants, and, against the plaintiffs/appellants.

10. In view of the above discussion, there is no merit in the instant Regular Second Appeal, and, it is dismissed accordingly. In sequel, the judgement and decree rendered by the learned District Judge, Bilaspur, H.P., upon, Civil Appeal No. 47 of 2003, is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Brahma Nand .....Appellant/Plaintiff.
Versus
Teju Ram (deceased) through his
legal representatives Surat Ram and others .....Respondents/Defendants.

RSA No.262 of 2006.
Judgment reserved on: 11.12. 2018.
Date of decision: 18th December, 2018.

**Indian Easement Act, 1882-Sections 15 & 18**- Customary easement- Essentials- Held, person claiming customary easement has not only to prove elements required under Section 15 of Act, but also that custom set up is ancient, continuous, reasonable, certain and compulsory. (Para 8)

**Indian Easement Act, 1882-Section 15**- Prescriptive easements- Held, claimant should exercise it under some claim existing in his favour independently of all others- Though his

user need not be exclusive- He must prove pre-existing easement, its peaceful enjoyment as an easement and as matter of right continuously for period of 20 years. (Paras 8 & 10)

**Indian Easement Act, 1882**-Customary easement vis-à-vis Prescriptive Easement- Distinction- Held, customary easement embraces needs of variable persons belong to class or locality- Whereas right by way of prescription is always personal. (Para 8)

**Indian Easement Act, 1882**-Customary easement vis-à-vis customary rights- Held, easement belongs to determinate person or persons in respect of his or their land and fluctuating body like inhabitants of locality cannot claim an easement- Whereas customary rights are public rights annexed to place in general. (Para 13)

***Cases referred:***

Lachhi and others vs. Ghansara Singh, AIR 1972 HP 89

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| For the Appellant | : | Mr. Romesh Verma, Advocate. |
| For the Respondents | : | Mr. N.K.Sood, Senior Advocate with Mr. Aman Sood, Advocate |

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge***

The suit filed by the plaintiff for permanent prohibitory injunction has been declined by both the learned Courts below and aggrieved thereby, he has filed the instant regular second appeal. The parties hereinafter shall be referred as 'plaintiff' and 'defendants'.

2. The plaintiff filed a suit for permanent injunction against the defendants on the allegations that he is owner in possession of land comprised in Khata-Khatauni No.20/27, Khasra Nos. 16, 17, 18, 19, 21, 22, 23, 60, 61, 62, 63, 64, 77, 78, 79, 80, 82, 84, 117, 118, 120, 228, 292/1, 294, 295 and 305. It was averred that the entire suit land bears apple orchard out of which about 800 plants are on bearing stage and rest of the plants are at the age of 2 to 5 years. The plaintiff had also constructed a huge building in the orchard. The defendants hail from village Gumna which is about one and half kilometres away from the suit land and Devidhar Road is situated below the suit land. The suit land has been fenced with barbed wire and wall etc. It was further averred that the village of the defendants is situated above the suit land and there are two common paths from the time of ancestors for passing far away from the suit land. One of the paths passes through the Torsa Khad and another towards Devidhar side. The defendants are using the said path since the time of their ancestors, but recently, just to approach the main road through short-cut, the defendants started creating new path through the suit land which belongs to the plaintiff and the defendants have no right, title or interest to create new path through the suit land. It was also averred that the defendants falsely reported the matter to the police and the police did not find any path at the spot. The defendants threatened to create path through the suit land, so the plaintiff filed petition under Section 107/150 Cr. P.C. in the Court of SDM, Rohru. The defendants illegally uprooted 250 plants and potato crop from the suit land and after dismantling fencing and wall around the suit land caused damage of Rs.10,000/- to the plaintiff. The defendants did not resist from their illegal acts, hence, the suit.

3. The defendants contested the suit and raised preliminary objections about competency, plaintiff not coming to the Court with clean hands, estoppel and cause of

action. On merits, it was averred that the old general public path starts from 'Shiv Mandir and passes through points a, b and c which have been shown in tatima by red dots and thereafter it passes through point 'd' and reaches at point 'e' and merges in Khasra No. 158 which is public thoroughfare. The aforesaid path was being used by the defendants and other general public continuously, openly, peacefully and without any interruption to the knowledge of the plaintiff since the time of their ancestors i.e. more than 60-70 years and this right of use of the path has matured in customary right of easement and the plaintiff has got no right to obstruct and block the said path. It was further averred that there was no other path for use by the defendants for reaching their houses and agricultural fields. The ancestral path of the defendants had been blocked by the plaintiff by digging and fencing with barbed wire which is a link between the hill top situated village Gumna and 'Shiv Mandir'. The defendants averred that the matter about obstruction of the path was brought to the notice of SDM, Rohru and Tehsildar, Chirgaon, who visited the spot and found that the plaintiff has caused blockade to the old ancestral path of the defendants by digging and fencing it with barbed wire at place Bhamani and also found that this blockade is a source of chronic nuisance to the residents of village Gumna and school children and also recommended stringent action to clear the path. The local police also visited the spot and found that the plaintiff had caused blockade to the ancestral path and petition under Section 133 Cr.P.C. had been presented against the plaintiff in the Court of SDM, Rohru. The dispute was between points 'B' and 'C' i.e. Khasra Nos. 305 and 294 which were previously 'Banjar Kadim' and the plaintiff planted apple plants in February, 2004. The defendants further averred that the path via 'Todsa Khad Nullah' passes through a dense forest and is full of monkeys and other wild animals and it is not possible for school children to pass through that path and in rainy season this 'Khad' is always in spate and during winter season this path is loaded with snow for 4 months and distance of this path to village Gumna is about 5 kilometres whereas the disputed path shown in tatima is only about 1.5 kilometres from 'Shiv Temple' to Gumna village. Devidhar is about 3 kilometres ahead of 'Todsa' and for that the defendants will have to go Devidhar and thereafter to come 'Todsa' which is about 9 kilometres. The Panchayat head quarter of residents of village Gumna, School, Health Sub-Centre and Food Distribution Society are at village 'Todsa' and the disputed path is the only shortest convenient path to the defendants and other residents of village Gumna.

4. On the pleadings of the parties, the following issues were framed by the learned trial Court on 07.05.2004:-

"1. Whether the plaintiff is entitled to the relief of injunction as prayed? OPP.

2. Whether the suit of the plaintiff is not legally competent? OPD.

3. Whether the right of the defendants has measured as easementary right over the disputed path which has been shown in the Tatima? OPD.

4. Whether the plaintiff has obstructed the ancestral path of the defendants by digging and fencing with barbed wire, as alleged? OPD.

5. Whether the plaintiff has no cause of action? OPD.

6. Relief."

5. After recording evidence and evaluating the same, the suit filed by the plaintiff came to be dismissed and the appeal filed against the same was also dismissed by the learned first appellate Court constraining the plaintiff to file the instant appeal which was admitted on 03.01.2007 on the following substantial question of law:-

"Whether the defendants had not specifically claimed the passage through the land of the appellant/plaintiff by way of easement of prescription and, therefore, the finding returned by the two Courts below that they have acquired easementary right by prescription to pass through the land of the plaintiff, is bad?

6. Looking to the nature of question as framed, it would first be necessary to refer to the pleadings of the defendants regarding "easement". This plea is contained in para-2 of the written statement which reads thus:-

*"2. That the plaintiff has not come to the Court with clean hands because he has concealed the material and vital facts from this Ld. Court. That as a matter of fact the old general public path starts from Shiv Mandir and passes through point a, b and c which has been shown in spot tatima by red dots and thereafter it passes through point d and reaches at point e and merges in Khasra No.158 which is public thoroughfare. The aforesaid path being used by the replying defendants and others and other general public continuously, openly, peacefully without any interruption to the knowledge of the plaintiff since the time of their ancestors i.e. for more than 60-70 years till now and this right of use of the path has matured in the customary right of easement and the plaintiff has got no right to obstruct and block the said path under the guise of this civil suit. There is no other path, which can be used by the defendants and other general public for reaching their houses and agricultural fields. The path in dispute has been shown in the tatima of spot prepared by the Halka Patwari, which is enclosed herewith."*

7. It would be evidently clear from the above that what the defendants have claimed is a customary easement of pathway. Whereas, the learned trial Court gave no specific findings regarding nature of the easement. However, it was held that the defendants were using the path since the time of their ancestors openly, peacefully and uninterruptedly and this ancestral path of the defendants had been blocked by the plaintiff by digging and fencing it with barbed wire, therefore, he was not entitled to the injunction. Whereas, the learned first appellate Court specifically held that since the defendants had been using the path as a right for the last 20 years, therefore, they had acquired easmentary right to the user of the path. Therefore, in the given circumstances, the further question that arises for consideration is whether customary easement of pathway is the same as easement by prescription.

8. This question is no longer *res integra* in view of the judgment rendered by this Court in ***Lachhi and others*** *versus* ***Ghansara Singh, AIR 1972 HP 89***, wherein it was held that the persons claiming customary easement have not only to prove the elements required under Section 15 of the Act, but also something more, namely, that the custom set up was ancient, continuous, reasonable, certain and compulsory. For easement by prescription, it is not necessary that the user should be exclusive, but the claimant should exercise it under some claim existing in his own favour independently of all others. A customary easement embraces the needs of variable persons belonging to a class or locality while a right by prescription is always personal. It shall be apposite to refer to the relevant observations as contained in para-6 of the judgment which read thus:-

"6. *Before parting with this case, however, I would like to stress the distinction which exists under law between an easement based on prescription and an easement founded on custom. The basis of every right of easement by whatsoever method it may have been acquired, is theoretically a*

*grant from the servient-owner. It may be expressed, as is mentioned in Sections 8 to 12 of the Act, or it may be implied from the circumstances as in Section 13 of the Act. or it may be presumed from long and continued user for a certain period as in Section 15 of the Act, or it may be inferred from a long and continued practice of user by a certain class of the public in certain locality. It is then to be seen on the basis of proper evidence as to what type of easement, if any, can be claimed by the plaintiff. Persons claiming a customary easement have not only to prove the elements required under Section 15 of the Act but also something more, namely, that the custom set up was ancient, continuous, reasonable, certain and compulsory. For easement by prescription, it is not necessary that the user should be exclusive, but the claimant should exercise it under some claim existing in his own favour independently of all others. Different persons may have a right of pasture over a land, but the plaintiff can nonetheless claim a right independent of others, provided the necessary conditions are satisfied. A customary easement, as is obvious, embraces the needs of variable persons belonging to a class or locality, while a right by prescription is always personal. These observations I have made, so that the evidence is properly appreciated, while the case goes back to lower Courts."*

9. Thus, it is evidently clear that the learned first appellate Court failed to understand and draw distinction between the customary and prescriptive easement and, therefore, the judgment rendered by it is palpably wrong as it proceeds on the premise as if the case set up by the defendants was one based on prescriptive easement and not customary easement. In fact, the learned first appellate Court has not understood or rather misconstrued the concept of "easement" as set up by the defendants as it proceeded to record in para 19 of the judgment that the user of the path by the defendants was open, continuous and without interruption, but has not given any specific finding with regard to custom set up being ancient, continuous, reasonable, certain and compulsory. The learned first appellate Court has failed to draw a distinction between customary right from customary easement and proceeded on the premise that easement by prescription and customary easement are one and the same things,whereas, it is not so.

10. An easement can become absolute by prescription if the following conditions are satisfied:-

(i) there must be a pre-existing easement which must have been enjoyed by the dominant owner;

(ii) the enjoyment must have been peaceful;

(iii) the enjoyment must have been as an easement;

(iv) the enjoyment must have been as of right;

(v) the right must have been enjoyed peacefully;

(vi) the enjoyment must have been for a period of 20 years and;

(vii) the enjoyment for 20 years must have been without interruption.

11. Section 15 of the Easements Act reads thus:-

"***15 Acquisition by prescription***. *-Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,*

*and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,*

*and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,*

*the right to such access and use of light or air, support or other easement shall be absolute.*

*Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.*

*Explanation I. -Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.*

*Explanation II. -Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.*

*Explanation III. -Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.*

*Explanation IV. -In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.*

*When the property over which a right is claimed under this section belongs to the [1][Government], this section shall be read as if, for the words "twenty years" the words [2]["thirty years"] were substituted."*

12. Customary easement, on the other hand, is dealt with in Section 18 of the Easement Act which reads thus:-

> "***18. Customary easements.***- *An easement may be acquired in virtue of a local custom. Such easements are called customary easements."*

13. These are rights arising out of custom but unappurtenant to a dominant tenement, but the custom must be reasonable and certain. An easement belongs to a determinate person or persons in respect of his or their land. A fluctuating body like the inhabitants of the locality cannot claim an easement. Easements are private rights belonging to particular persons while customary rights are public rights annexed to the place in general and it was for this reason that the defendants instead of setting up a simple case of easement had set up the plea of customary easement.

14. However, merely because the learned first appellate Court has failed to draw a distinction between customary rights and easement, the suit of the plaintiff cannot be

decreed as the learned first appellate Court will still have to consider whether the defendants have been able to prove their customary rights or not. Undoubtedly, this question can even be determined by this Court, but in case such course is adopted, then one valuable channel/right of appeal would be lost.

15. The substantial question of law is answered in the aforesaid terms.

16. In view of the aforesaid findings, the appeal filed by the plaintiff is accepted and the matter is remanded back to the learned first appellate Court to decide specifically the question regarding the customary easement on the basis of the material already placed on record. Since the suit was filed way back in the year 2004, it is expected that the learned first appellate Court shall decide the appeal as expeditiously as possible and in no event later than **15th May, 2019.**

17. The parties through their respective counsel(s) are directed to appear before the learned first appellate Court on **02.01.2019**. Pending application, if any, also stands disposed of.

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

Gaurav ...Petitioner
Versus
State of H.P. ...Respondent
Cr.MP(M) No. 1271 of 2018
Decided on : 17.12.2018

**Code of Criminal Procedure, 1973**- Section 439- **Indian Penal Code, 1860**- Sections 363, 376 & 506- **Protection of Children from Sexual Offences Act, 2012**- Section 4- Regular bail- Grant of- Prosecutrix and her mother during trial, resiling from statements given during investigation- Prosecutrix also feigning ignorance of incriminatory articles sent for DNA examination having been recovered at her behest- Accused in lock up for last two years- No likelihood of his escape- Conditional bail granted. (Paras 2 & 3)

For the petitioner : Mr. Sanjeev Bhushan, Sr. Advocate
with Ms. Abhilasha Kaundal, Advocate.
For the respondent : Mr. Hemant Vaid Addl. A.G. with Mr. Y.S. Thakur, Dy. A.G.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge (oral)**

The instant petition has been instituted by the bail petitioner, under, Section 439 Cr.P.C, for, his being released from judicial custody, wherein he is extantly lodged for his allegedly committing offence(s) punishable under Sections 363, 373, 506 of the Indian Penal Code, and, Section 4 of the Protection of Children From Sexual Offences Act (POCSO), in respect whereof, FIR No. 295 of 2016 of 23.12.2016, is lodged, at Police Station Solan, District Solan, Himachal Pradesh.

2. The learned Additional Advocate General, has, apprised this Court that, both, the prosecutrix, and, her mother hence resiling, from, their respectively recorded previous statements. However, he submits that the prosecutrix, may not, be construed to resile from her previous statement, recorded in writing, before the Magistrate concerned (i) even, when, she testified qua her making, the, afore previous statement, at the behest of the police, without, her further stating that she was compelled, by the Investigating Officer, to render the afore statement, before the learned Magistrate concerned. However, the afore submission made before this Court, by the learned Additional Advocate General, is not accepted, (ii) given the prosecutrixs' testification qua hers making the afore statement under Section 164, before the learned Magistrate concerned, at the behest of the police, rather hence holding/tinges, of, it being prima facie construable, to be a tutored statement. Furthermore, when the prosecutrix was confronted, with, the affirmative report, made by the FSL concerned, upon the relevant items, sent thereat for examination, she has feigned ignorance qua collection thereof occurring at her instance, thereupon the incriminatory effect of any affirmative DNA report, made by the FSL concerned, upon, the relevant items, is visibly effaced.

3. The bail-applicant/accused is suffering judicial incarceration, for, two years, hence bearing in mind the aforesaid factum, this Court deems it fit and appropriate, (i) importantly, when the Investigating Officer has reported that the bail-applicant, has throughout associated, hence, in the relevant investigation, to, hence afford, the facility of bail in favour of the bail applicant/petitioner. Moreso, when at this stage, no evidence has been adduced by the prosecution, demonstrating, that in the event of bail being granted to the bail applicant/petitioner, there being every likelihood of his fleeing from justice or tampering with prosecution evidence, Accordingly, the indulgence of bail, is, granted to the bail applicant/petitioner, on, the following conditions:-

i) That he shall furnish personal bond, comprised in a sum of Rs. 2,00,000/- with two sureties in the like amount, to the satisfaction of the learned trial Court.

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

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

iv) That he shall not leave India without the previous permission of the Court;

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

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

4. In view of above, petition stands disposed of. 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 SURYA KANT, C.J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.**

Kuldeep Dogra ....Petitioner
Versus
State of H.P. and others ...Respondents.

CWP No. : 4416 of 2012
Decided on: 17.12.2018.

**Constitution of India, 1950** -Article 226- Public Interest Litigation- Maintainability- Writ petitioner challenging appointment of lady as Craft Teacher on ground of her being overage on date of appointment- Held, in matter pertaining to appointment in Government service on a basic level post, writ petition in purported public interest, not maintainable-Private respondent found having requisite qualification as prescribed by Rules at time of appointment- Relaxation in age given to her as per Government policy- She also having retired after attaining age of superannuation- Petition dismissed. (Para 5)

For the petitioner Petitioner in person.
For the respondents Mr. Ashok Sharma, Advocate General with M/s. Ranjan Sharma, Adarsh Sharma and Ritta Goswami, Additional Advocate Generals for respondent/State.
Mrs. Aruna Chauhan, Advocate for respondent No. 4.
M/s Jyotirmay Bhatt and Anubhuti Sharma, Advocates for respondents No. 5 and 6.

The following judgment of the Court was delivered:

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**Surya Kant, Chief Justice** *(Oral)*

This petition has been filed purportedly in public interest challenging the question of appointment of respondent No. 5 as a Craft Teacher and obviously, seeking a writ of quo- warranto. The plea taken is that though respondent No. 5 was possessing requisite academic qualification, as provided in the Statutory Rules, on the date of her appointment, nevertheless, her appointment amounts to fraud on public exchequer as she was over age at that time.

2. Leaned Additional Advocate General states that the name of respondent No. 5 was registered with the Employment Exchange and as per the State Government Policy which is applied uniformly, the said respondent was entitled to age relaxation to the extent of period, for which her name remained registered with the Employment Exchange.

3. Record demonstrates that seven posts of Craft Teachers alongwith various other posts were advertised vide advertisement No. 2/99, dated 05.03.1999. The age limit prescribed in the advertisement was between 18 to 38 years. Respondent No. 5 also applied for the post of Craft Teacher. Her age as per her application was 40 years, 7 months and 22 days. The specific stand of the respondent No. 4 in its reply in para 4 on merit is as under:-

> *"It is also submitted as per rules notified by the Commissioner-cum-Secretary (Education) to the Govt. of H.P. vide notification No. Shiksha-II-ka(4)-2/80 dated 20.04.1986, the maximum age limit for direct recruitment in case of*

*certain persons of the teaching services in the Education Department, H.P. is not applicable namely:-*

*The maximum age limits prescribed in any Recruitment & Promotion Rules of the Education Deptt. shall not be applicable in the following cases if the candidate before attaining the maximum age limit prescribed for the service.*

*(a) is registered in any Employment Exchange set up under the Employment Exchange (compulsory Notification of vacancies-Act-1959) or*

*(b) is engaged as adhoc or Volunteer teacher by the State Government.*

*Keeping in view the above rules, the candidature of respondent No. 5 was considered which were actually not inserted in the advertisement dated 05.03.1999." [emphasis applied]*

4. The petitioner fairly concedes that respondent No. 5 was appointed as Craft Teacher on 19th October, 2000, whereas the instant writ petition has been filed in the year 2012. On a further query, the petitioner informs that respondent No. 5 has already retired from service on attaining the age of superannuation.

5. Having heard the petitioner appearing in person at a considerable length, at this stage and juncture, we are satisfied that the instant writ petition in purported public interest is not maintainable in a matter pertaining to appointment in government service and that too on a basic level post like the Craft Teacher. Secondly, the fact that 5th respondent was possessing the requisite qualification as prescribed under the Rules at the time of her appointment would completely dissuade this Court from issuing a writ of *quo-warranto*. Thirdly, the grant of age relaxation by the competent Authority is in terms of the State Government Policy for the reason that the name of respondent No. 5 was registered in the Employment Exchange and thus the age relaxation given to her for the period for which her name remained registered with the Employment Exchange, was justified. Fourthly, assuming that there was some irregularity or illegality at the time of appointment of 5th respondent, this petition at this juncture deserves to be dismissed, for the said respondent has already retired from service on attaining the age of superannuation. We have serious doubts on the maintainability of this petition and the same is accordingly dismissed. Pending miscellaneous application also stand dismissed.

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

Kanshi Ram ...Appellant/Plaintiff

Versus

Radhi Devi (deleted) Sh.Jiwnu and others. ...Respondents/Defendants.

R.S.A. No. 317 of 2005
Reserved on: 06.12.2018
Decided on : 17.12,2018.

**Specific Relief Act, 1963**- Section 15- Agreement to Sell- Specific performance- Grant of - Defendant agreeing to sell land granted to him as Nautor in breach of conditions of grant- Plaintiff filing suit for specific performance- Suit dismissed by trial Court and appeal against decree by District Judge- Regular Second Appeal- Held, agreement to sell executed by grantee with plaintiff purporting to transfer his right in such land being in breach of Nautor

Policy, is void and unenforceable- Agreement against public policy cannot be specifically enforced- Regular second appeal dismissed. (Paras 11 & 12)

**Indian Contract Act, 1872** - Section 23- Agreement to sell- Refund of earnest amount- Contract opposed to public policy- Breach thereof- Consequences- Held, agreement to sell being contrary to public policy since cannot be specifically enforced, it cannot be indirectly made executable by ordering refund of earnest amount or damages. (Paras 15 & 16)

***Cases referred:***

Chet Ram and others vs. Sawanu Ram and others, AIR 1985 HP 97

| | |
|---|---|
| For the Appellant | Mr. Neeraj Gupta, Advocate. |
| For the Respondents | Respondent No.1 deleted.<br>Respondents No.2 and 3 exparte.<br>Mr.K.D.Sood, Senior Advocate, with<br>Mr. Rajnish K. Lal, Advocate, for respondent No.4. |

The following judgment of the Court was delivered:

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**Tarlok Singh Chauhan, Judge**

The appellant is the plaintiff, who after having lost before both the learned Courts below, has filed the instant appeal.

The parties shall be referred to as the 'plaintiff' and the 'defendants'.

2. The plaintiff filed a suit for specific performance of contract

and in alternative for damages of Rs.36,000/- against the defendants on the allegation that the disputed land measuring 5-1 bighas comprising of Khata Khatauni No. 39/47, Khasra No. 353/324/192 situated in Chak Sarog, Paragna Parali, Tehsil Theog, District Shimla was owned by one Sehju, who was huaband of St. Radhi Devi defendant No.1. On 11.6.1987, Sehju agreed to sell the disputed land to the plaintiff for a consideration of Rs.8000/-, out of which Rs.6500/- were paid by the plaintiff to Sehju at the time of execution of the agreement to sell. It was further averred that the disputed land was allotted to Sehju by the Government of Himachal Pradesh by way of Nautor in the year 1975 and as per the terms of Nautor, Sehju was not authorised to transfer this land before the expiry of 15 years from the date of grant. For this reason, the sale deed in favour of the plaintiff was not executed on 11.6.1987 and it was agreed between the parties that Sehju shall receive the balance amount of Rs.1500/- at the time of the execution of the sale deed which was to be executed within a period of six months after the completion of the period of 15 years from the date of grant or at the time when Sehju was to notify the date of executing the sale deed to the plaintiff. However, Sehju died before executing the sale deed and the disputed land then devolved upon defendant No.1. As per the case of the plaintiff, defendant No.1 also agreed to execute the sale deed in favour of the plaintiff. However, this was not done and in fact defendant No.1 illegally and unauthorisedly executed a gift deed in favou of Shanti Devi, defendant No.3 on 3.5.1997 whereby a part of the disputed land was gifted by defendant No.1 in favour of Shanti Devi. The plaintiff came to know about this fact after he obtained a copy of jamabandi from the Pawari. It was lastly averred that the plaintiff was always ready and willing and is still ready and willing to pay the balance sale price, but it was defendant No.1 who failed to execute the sale deed. Hence the suit for specific performance in respect of agreement dated 11.6.1987 against the defendants. In the alternative, the defendants be

made to pay a sum of Rs.36,000/- to him as damages on account of failure of defendant No.1 to execute the sale deed in his favour.

3. The suit was contested by the defendants by filing written statement wherein it was admitted that the disputed land was allotted to Sehju under special Nautor Scheme to landless persons in the year 1975. However, it was denied that Sehju had entered into any agreement with the plaintiff or that he had agreed to sell the disputed land in favour of the plaintiff for a consideration of Rs.8000/-. It was also claimed that Sehju was not competent to sell the land because the same was granted to him by way of Nautor. It was further averred that the agreement dated 11.6.1987 even if executed was void, illegal and inoperative and, therefore, the plaintiff was not entitled to the relief of specific performance. It was further averred that the gift deed in respect of a part of the disputed land executed by defendant No.1 in favour of defendant No.3 was lawful and valid and it was further claimed that the possession of this land had already been given to defendant No.3. Thus, the defendants prayed for dismissal of the suit.

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

1. *Whether the plaintiff is entitled for the specific performance of the contract as alleged? OPP*
2. *Whether the plaintiff is entitled for damages? OPP*
3. *Whether the suit is within limitation? OPP*
4. *Whether the gift-deed of the part of the suit land in favour of the defendant No.2 is wrong and illegal? OPP*
5. *Whether the suit is not maintainable? OPD*
6. *Relief.*

5. After recording the evidence and evaluating the same, the learned trial Court dismissed the suit and the appeal filed against the same was also dismissed by the learned first Appellate Court vide its judgment and decree dated 28.3.2005.

6. Aggrieved by the judgments and decrees so passed by the learned Courts below, the plaintiff has filed the instant appeal which came to be admitted on 4.7.2005 on the following substantial questions of law:

1. *Whether the judgment and decrees of both the Courts below are a result of complete misleading and misconstruing of the pleadings and the documentary evidence, especially Ext.P-1 and Ext.P-2?*
2. *When the document Ext.P-1 was held to be illegal, void and against public policy were both the courts below not under an obligation to grant appropriate relief to the plaintiff-appellant for the damages sustained by him under the said agreement to sell and the benefit derived by the predecessor-in-interest of respondent No.1, in view of the applicability of Section 65 of the Indian Contract Act. Are not the findings of both the Courts below vitiated when the entire suit of the plaintiff-appellant has been dismissed?*
3. *When the plaintiff-appellant had specifically assailed the execution of the Gift Deed in favour of defendant No.3 by defendant No.1 and issue No.4 was framed by the learned trial Court, was it not mandatory to return specific findings by both the Courts below as to whether the Gift Deed was valid or not, especially when the defendants had*

*themselves pleaded that the said Gift Deed had themselves pleaded that the said Gift Deed had themselves pleaded that the said Gift Deed was executed without the delivery of possession?*

4. *When the plaintiff-appellant was put in possession of suit land, on the basis of agreement to sell, Ext.P-1, could the relief of injunction still be declined when only Ext.P-1 has been held to be illegal, void etc. by the two Courts without returning a specific finding regarding possession?*

7. However, before answering the substantial questions of law, it needs to be noticed that during the pendency of the appeal, defendant No.1 transferred the suit land in favour of one Om Parkash on 20.10.2010 vide registration No. 462 of 2010, Book No. 1 reference No. 831/2010 vide sale deed registered in the office of Sub Registrar, Theog, District Shimla, H.P. Accordingly, said Om Parkash was ordered to be arrayeed as respondent No.4 in this appeal.

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

**SUBSTANTIAL QUESTIONS OF LAW NO.1, 2 & 4:**

8. At the outset, it needs to be noticed that certain issues were conclusively decided against the defendants and they have not filed any appeal or cross-objections against the same. Even though, the defendants have denied the execution of the agreement dated 11.6.1987 by late Sh. Sehju, however, the same was held to have been duly established and proved on record as is evident from paras 11 to 13 of the judgment passed by learned first appellate Court. Therefore, in such circumstances, only the question that remains to be answered is qua the agreement of sale Ex.P-1 whether the same is a lawful agreement capable of specific performance or that the agreement is illegal and void being against the public policy.

9. Noticeably, both the learned Courts below held the agreement to be illegal, void and against public policy after placing reliance upon the Division Bench judgment of this Court in ***Chet Ram and others vs. Sawanu Ram and others AIR 1985 Himachal Pradesh 97.*** The facts therein were that the plaintiff had filed a suit for permanent prohibitory and mandatory injunction qua the land in dispute on the allegation that the same had been granted to defendant No.1 as Nautor, which was objected to by the plaintiff. A compromise in writing was effected between the parties on 15.12.1954, according to which the parties came in possession of the disputed land in equal shares, each party having 1/9th share. Defendant No.1 therein agreed to get a mutation sanctioned in plaintiff's favour. The plaintiffs were put in possession of the land and they did not doubt the bonafides of defendant No.1. The plaintiffs alleged that after 12.7.1964, defendant No.1 started interfering with the plaintiffs' possession, compelling them to file the suit. The defendants did not admit the plaintiffs' claim and contested the suit. They denied the execution of the agreement/compromise and further alleged that the same was void and unenforceable. Learned trial Court decreed the suit, against which the defendants filed the appeal, which was accepted by the first Appellate Court and held that the agreement dated 15.12.1954 was simply a paper transaction and was never acted upon. It was further held that the agreement was against the spirit of the nautor patta. Aggrieved, the plaintiffs filed an appeal being RSA No. 24 of 1968 before this Court. Learned Single Judge of this Court vide judgment and decree dated 16.4.1971 dismissed the appeal with costs and held that the disputed land was leased out to defendant No.1 by the Government and, therefore, defendant No.1 could not confer any rights upon the plaintiffs by any compromise. This judgment and decree was assailed before learned Division Bench of this Court in LPA No. 22

of 1971 wherein it was argued by the plaintiffs that the agreement dated 15.12.1954 was valid and binding and defendant No.1 had handed over the possession of the land to the plaintiffs. He had also contended that defendant No.1 was competent to do so and therefore, the findings rendered by the first Appellate Court and learned Single Judge of this Court were not based upon proper appreciation of law and facts. Even though he conceded that the Himachal Pradesh Nautor Rules, 1954 had the force of law in view of the decision of this Court in Som Krishan vs. State, AIR 1979 Himachal Pradesh 35.

10. It was in this factual background that learned Division Bench of this Court while dismissing the appeal held that the object of granting Nautor was to implement a policy of the Government to help certain persons who are either landless or have very little holdings and who need land for cultivation for the purposes of their 'subsistence'. Since defendant No.1 got the land as Nautor for himself for his subsistence, therefore, he was bound by the conditions of the Patta and the Nautor Rules. The purpose of granting Nautor to various persons under the Nautor Rules was a matter of policy of the Government, whereby it wanted to help certain poor and landless persons by giving them land for their subsistence. This grant was personal to the allottee and, therefore, could not be transferred in favour of the other eight persons therein as this would amount to circumventing the policy of the Government. Therefore, this action of defendant No.1 by entering into an agreement was against the public policy.

11. Here it shall be apposite to refer to the relevant observations as contained in paragraphs 12 to 17 of the judgment which read thus:

> *"12. Thus according to the Nautor Rules and the conditions of the patta (Ex. D-l) the disputed land was granted to defendant 1 for 'subsistence' and he was to make it fit for cultivation within two years. In case defendant 1 failed to break up and terrace the land within two years, the grant was liable to resumption and defendant I could not claim compensation even if certain improvements had been effected by him. A combined reading of the various Nautor Rules and the conditions of the patta (Ex. D-l) clearly indicate that the object to such grant is to implement a policy of the Government to help certain persons who are either landless or have very little holdings and who need land for cultivation for the purposes of their 'subsistence'.*
>
> ***13. Defendant 1 got the land subject to the conditions incorporated in the patta (Ex.D-1) and under the Nautor Rules. The Government while granting, the nautor to defendant 1 must have kept in view the fact that defendant 1 required the land for his subsistence and it could be granted in his favour under the Nautor Rules. Now, even if the agreement dt. 15-12-1954 (Ex. PW 4/A) is admitted to be proved, still such an agreement is 'forbidden by law' and is not enforceable under Section 23, Contract Act. By this agreement defendant 1 had agreed to divide the disputed land in 9 equal shares thus keeping only one share for himself. For the remaining 8/9th share he agreed to relinquish his rights and accept the other 8 persons as owners. Defendant 1 after having got the land as 'nautor' for himself for subsistence purposes was bound by the conditions of the patta (Ex. D-l) as well as the Nautor Rules. He had no authority or right to transfer his ownership rights to third person on payment of any amount. Further, the land was given to defendant 1 for cultivation purposes only. By the agreement (Ex. PW 4/A) defendant 1 agreed that the 8/9th portion of the land would remain in the ownership of the other persons as it was their grazing***

***ground. 1 n other words, this land could not be utilized for cultivation purposes and was to remain a grazing ground, that is, uncultivated land. Such an agreement is clearly forbidden by law and will defeat the very object of the grant of land in favour of defendant 1. Hence the plaintiffs cannot seek the enforcement of this agreement (Ex.PW 4/A). The purpose of granting nautor to various persons under the Nautor Rules is a matter of policy of the Government. The Government wanted to help certain poor and landless persons by giving them land for their subsistence.***

***14. In AIR 1934 Mad 811 (Ganesh Naicken v. Arumugha Naicken) it was held that where a grant was in the nature of a gift by the Government with a specific provision that the property shall not be alienated without the consent of the Tehsildar, it was intended to be personal to the grantee. Any contract which has the effect of circumventing this policy of the Government would be opposed to public policy.***

***15. In the present case too, the Government granted nautor to defendant 1 with certain specific conditions. Under the conditions of the patta (Ex. EM) and the Nautor Rules, defendant 1 was supposed to break up the land and make it fit for cultivation so that he could utilise the same for his subsistence. Defendant 1 was under an obligation to allow the Government to resume this grant without any compensation even if he had made certain improvements on the same, if he failed to break up and terrace this land within two years from the date of the grant. Thus it was also a persona! grant to defendant 1. By transferring his rights of grant in favour of other 8 persons defendant 1 has in fact circumvented the policy of the Government and this action of defendant 1 is, therefore, against the public policy.***

***16. In view of the above discussion, the agreement dt. 15-12-1954 (Ex.PW 4/A) is unenforceable and the plaintiffs cannot be granted any relief on the basis of this agreement. We also do not find any reasons to disagree with the various reasonings given by the learned single Judge in his judgment D/-16-4-1971.***

***17. As a result of the above discussion, the present appeal is dismissed."***

12. It is, more than settled that the Division Bench decision is binding on Single Judge and judicial comity demands that binding decision to which the attention has been drawn should neither be ignored nor overlooked. The decision of the Division Bench in ***Chet Ram's*** case (supra) is binding on this Court and, therefore, on the basis of the aforesaid exposition of law, it can conveniently be held that sale made by the grantee in violation of the conditions with regard to the utilisation of the land granted as Nautor before the expiry of the period I.e.15 years is against the public policy and, therefore, the agreement executed by grantee with the plaintiff transferring his rights were void and unenforceable. The facts of the present case are akin to those in Som Krishan's case and, therefore, fully applicable to the facts of the present case.

13. That being the factual position, obviously, therefore, the agreement executed between Sehju and the plaintiff which even though proved on record being void is unenforceable as the same is against the public policy.

14. Section 23 of the Indian Contract Act, reads as under:

> ***"23.*** *- The consideration or object of an agreement is lawful, unless – it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."*

15. It is more than settled that where a contract is illegal being contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it. Therefore, the Court cannot direct the refund of money paid as part consideration. Thus, where a contract is entered into for making purchases prohibited by statute, no party can invoke the aid of a court to have such a contract carried into effect, as law will not tolerate any party to violate any moral or legal duties.

16. If money is advanced for a purchase which is either opposed to morals or law, in furtherance of an illegal transaction, such advance is not recoverable. No relief can be given when a case is based on illegality. Therefore, once the document Ex.P-1 was held to be illegal, void and against the public policy, the Courts below were not under obligation to grant appropriate relief or rather any relief to the plaintiff/appellant.

17. Thus, on the basis of the aforesaid discussion, it can conveniently be held that the judgments and decrees passed by learned Courts below are based on correct reading and construction of pleadings and the documentary evidence available on record. Accordingly, substantial questions of law No.1, 2 and 4 are answered against the appellant/plaintiff.

**SUBSTANTIAL QUESTION OF LAW NO.3:**

18. As this Court has already held that transaction entered into between Sehju and plaintiff to be void and against the public policy, therefore, the plaintiff had no locus standi to assail the gift deed made by defendant No.1 in favour of defendant No.3. Accordingly, substantial question of law No. 3 is decided against the appellant/plaintiff.

19. Once the agreement is against the public policy and void, therefore, the Court were not come in the aid of the plaintiff to protect his so called possession under void and unenforceable agreement.

20. In view of the aforesaid discussion, I find no merit in this appeal and the same is accordingly dismissed, so also the pending application(s) if any.

**CMP NO. 449 OF 2011:**

21. The appellant/plaintiff has filed this application for initiating contempt proceedings against respondent No.1 Radhi Devi on the ground that the appellant alongwith the appeal had filed application under Order 39 Rule 1 & 2 CPC which was registered as CMP No. 556 of 2005. This court while admitting the appeal on 4.7.2005 had passed an interim order in this application thereby restraining the respondents from selling, transferring, alienating or encumbering the suit land in any manner till further orders.

22. The respondents were put to notice of the appeal as well as the application. Only respondent No.1 contested the application by filing reply. However, this Court vide its

order dated 10.1.2006 made the interim order dated 4.7.2005 absolute during the pendency of the appeal.

23. The respondent No.1 in utter disregard to the aforesaid orders transferred the suit land during the pendency of the appeal in favour of one Om Parkash S/o Sh. Mouji Ram.

24. Since respondent No.1 Radhi Devi against whom alone this application is directed has already died issueless on 22.5.2014 and her name has already been ordered to be deleted from the array of the respondents, therefore, this application seeking initiation of contempt proceedings against respondent No.1 has been rendered infructuous with efflux of time and is ordered to be dismissed as such.

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

State of H.P. and another ...Petitioner.
Versus
Satish Kumar ...Respondent.

Arbitration Case No.55 of 2017
Date of Decision : December 17, 2018

**Arbitration and Conciliation Act, 1996-** Section 34- Objections to award- Sustainability- State Government's settlement Policy providing for payment of market rate on price index mentioned in bid documents for delayed execution of work by contractor during extended period- Parties arriving at settlement and arbitrator passing award in favour of contractor on basis of calculations filed by Department- State challenging award by filing objections- Held, extended period in given cases was from 1.5.2008 till 31.12.2008- Contractor entitled for price escalation regarding work executed during this period on price index mentioned in bid documents- Award of Arbitrator granting escalation for this period not wrong- Objections dismissed- Award upheld (Paras 10 to 13 )

For the Petitioner : Mr. Shiv Pal Manhans, Additional Advocate General, and Mr. R.P. Singh & Mr. R.R. Rahi, Deputy Advocates General.
For the Respondent : Mr. Sumit Raj Sharma, Advocate.

The following judgment of the Court was delivered:

**Vivek Singh Thakur, Judge**

The present petition has been filed by the State of Himachal Pradesh (hereinafter referred to as appellant-department), under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), against the award dated 29.9.2016, passed by Arbitrator-cum-Superintending Engineer, Arbitration Circle, Himachal Pradesh Public Works Department (HPPWD), Solan, whereby in respect of Claim No.2 of respondent-claimant, claiming market rates for execution of work, after expiry of the period of contract/award, an amount of Rs.16,69,928/- has been awarded, alongwith interest

claimed in Claim No.6 at the rate of 8% per annum from the date one year after submission of the final bill by the respondent-claimant to the date of award, and simple interest at the rate of 18% per annum for the period three months beyond the date of award to the actual date of realization.

2. It is undisputed that the Arbitrator has passed the award after amicable settlement of the dispute, during the pendency of arbitration proceedings before him, under the instructions issued by the Government and as per that settlement, the respondent-claimant had abandoned/ withdrawn his all other claims and had agreed for market rate for the execution of work during the extended period, in terms of the instructions issued by the Government for the said purpose.

3. For completion of record, it is relevant to record that the Engineer-in-Chief, HPPWD, vide letter No. PW-29-CTR-29-637/2015-13913-18, dated 31.12.2015 (Annexure A-2), had submitted a proposal to the Government, through the Additional Chief Secretary (PW) to the Government of Himachal Pradesh, Shimla, for determining settlement of prolongation claims, with respect to Pradhan Mantri Gram Sadak Yojna (PMGSY), of the contracts, as provided in other contracts under Clause 10CC (Price Escalation). The crux of the proposal made by the Department was as under:

(I) That in those cases where contractor(s) was deprived hindrance free site and it lead to delay in execution, for determination of price variation date of bid opening will be the base for price analysis index formula.

(II) That period for which such variation will be payable shall reckon after expiry of stipulated period and to determine this it has to be seen as for how much period the delay is on the part of department till hindrance free site was made available. Thereafter the price quarterly index payable during the execution of work period by the contractor has to be applied e.g. If out of 2 years stipulated period, the work has been completed in 4 years and out of these two years extended period of for one year the delay is on the part of department and one year the delay is on the part of contractor, then the price variation shall be available to the contractor for the period for which delay had occurred on the part of the department i.e. 1 year and for determining this price variation, the date of bid opening shall be base for the price index and the price index during the period when work has been executed shall be made the base as per clause 10 CC of Standard Bidding Document. No other formula provided under 10 cc despite non-existence of clause shall be the best available option to the department to settle such claims. However the contractor will not be entitled for price variation of stipulated period of completion as per agreement.

4. Thereafter, the matter was considered by the Government and the decision of the Government was communicated to the Engineer-in-Chief, vide letter dated 15.3.2016, whereby it was conveyed that it has been decided that price escalation be given only under the PMGSY works and only cases where the contractor has entered into litigation and approached for amicable settlement and escalation may be given as per 10 CC clause only for increase in cost of material and labour and the escalation clause for increase in cost of material and labour as provided in the bid documents for NABARD and State works be provided for PMGSY works on the same pattern.

5. In the light of the aforesaid decision of the State, amicable settlement was arrived at between the parties before the learned Arbitrator and the Department had filed calculation of market rate as considered to be payable on account of amicable settlement to the respondent-claimant. As per this calculation, the Department had calculated the claim under clause 10 CC to the tune of Rs.21,93,182/-. However, before passing the award, on re-checking in the Department, it was found that the said claim was calculated for whole period, including the stipulated completion period and the extended period, whereas the same, as per instructions dated 31.12.2015, was payable for extended period only. Therefore, the Department has re-filed the calculation of the amount to the tune of Rs.16,69,928/-.

6. The respondent-claimant had not disputed the said stand of the Department and had accepted the settlement of the dispute on the same amount and the impugned award was passed by the Arbitrator.

7. After passing of the award, a letter dated 26.9.2016 was again written to the Arbitrator by the Department that as per fresh calculation the respondent-claimant is entitled only to Rs.2,10,697/- instead of Rs.16,69,928/-. However, the said calculation was not entertained as the award had already been passed.

8. Feeling aggrieved of the aforesaid passing of the award by the Arbitrator, the State has filed the present petition.

9. It is an admitted fact on the record that the work was awarded to the respondent-claimant on 16.4.2007 and it was not completed during the stipulated period, i.e. on or before 30.4.2008, but was completed during the period extended by the appellant-department upto 31.12.2008.

10. As per formula adopted by the appellant-department of determining the price deviation for amicable settlement in disputes, like the present one, the period for which such variation will be payable shall reckon after expiry of stipulated period and for that period only for which the delay has been caused on the part of the department and no price escalation shall be permissible to the contractor where the delay is on the part of the contractor and further that for determining this price variation the date of bid opening shall be the base for price index and price index during the period when work has been executed shall be made the base as per clause 10CC of Standard Bidding Document. However, the contractor will not be entitled for price variation of stipulated period of completion as per agreement.

11. In the present case, the stipulated period had expired on 30.4.2008 and thereafter extension was granted by the department upto 31.12.2008. In view of the proposal of the department, to determine the claim of price escalation amicably, on the basis of formula adopted by the department for settlement, the plea of delay on the part of the contractor is not available to the appellant-department. Therefore, as per instructions/formula, referred supra, respondent-claimant is entitled for price escalation from 1.5.2008 to 31.12.2008 and for determining the price variation 'date of bid opening' shall be the base for the price index, meaning thereby the difference in price prevailing on the date of bid opening and the price prevailing during the period when the work had been executed will be the basis for calculating the claim of escalation in price.

12. In the present petition, appellant-department has claimed that as per the formula adopted by the State, respondent-claimant will be entitled to Rs.2,10,697/-. In the supplementary affidavit, dated 21.6.2018, filed by the petitioner-Department, this calculation has been justified by stating that the base price index is to reckon from the date

when the stipulated period of completion of work ends and not from the bid opening date and on the basis of this the appellant-department has calculated the amount payable as Rs.2,10,697/-.

13. A bare reading of the formula adopted by the State as contained in letter dated 31.12.2015 (referred to supra), it is not the base price index of the last date of stipulated period of completion of work, which is to be taken into consideration for calculation of escalation in price but it is the date of bid opening which shall be the base for the price index. Therefore, present petition has been filed by the State, based on wrong calculations and under misconceived interpretation of the formula adopted by the State for amicable settlement of the claims of contractor under PMGSY works.

14. In supplementary affidavit dated 21.6.2018, it is also stated that in this case initially price variation was determined on the basis of price index on the date of bid opening and by taking into consideration the extended period and the total claim payable on account of price escalation was worked out to Rs.16,69,928/-In view of the formula adopted by the State, I find that there is no ambiguity or mistake in the formula adopted by the appellant-department, where the amount payable to respondent-claimant has been determined at Rs.16,69,928/-.

15. In view of the above discussion, present petition is dismissed alongwith pending applications filed by the State, if any, but except OMP No.274 of 2017 filed by the respondent-claimant for release of the amount in his favour.

16. Petition stands disposed of.

**OMP No.274/2017**

17. This application is also disposed of with liberty to the respondent-claimant to file afresh for release of the amount.

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

Prem Raj .....Petitioner
Versus
State of H.P. .....Respondent

Cr.MP(M) No. 1611 of 2018
Order reserved on 6th December, 2018
Decided on :18th December, 2018

**Code of Criminal Procedure, 1973**- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985** (Act)- Section 20-Regular bail- Grant of- Held, principles that bail is a general rule and person should not be put in jail during trial, are not attracted in cases where there is reverse onus or statutory presumption with regard to commission of offence provided by Statute- Many other cases, including one under Act, pending against accused- Bail denied though recovered substance falling in intermediate category- Application dismissed. (Paras 4 to 6)

For the petitioner Mr. N.S. Chandel, Advocate.

For the respondent Mr. Shiv Pal Manhans Additional Advocate General with Mr.R.P.Singh and Mr.R.R.Rahi, Deputy Advocate Generals.
HC Sanjay No. 87 P.S. Nankhari, District Shimla.

The following judgment of the Court was delivered:

**Justice Vivek Singh Thakur, Judge.**

Petitioner has preferred this petition under Section 439 of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') for grant of regular bail in case FIR No. 42 of 2018 dated 3.8.2018 registered at P.S. Nankhari, District Shimla, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act.

2 For enlarging the petitioner on bail, it has been canvassed that petitioner has been implicated falsely in the present case and further that even if the case of prosecution is believed in toto, alleged recovery of 107 grams of charas is not only lesser than commercial quantity but nearer to small quantity as provided under the Act and therefore, rigors of Section 37 of NDPS Act are not attracted in the present case and therefore, in view of right to personal liberty of petitioner, he deserves to be released on bail.

3. It is true that bail is general rule and putting a person in jail or in prison during the trial is an exception and presumption of innocence is fundamental postulate of criminal jurisprudence. But these principles are not applicable as such, in cases where there is reverse onus and/or statutory presumption with regard to commission of offence and therefore, such cases are to be dealt with differently keeping in view the statutory presumption and reverse onus provided under the statute. Being a basic natural right, liberty is a priceless treasure for a human being. Depriving of liberty to a person has enormous impact on his mind as well as body. But at the same time, accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society and society expects responsibility and accountability from its members and it desires that the citizens should obey the law, respecting it as a cherished social norm and attempt of an individual to create a concavity in the stems of social stream is impermissible and in such a case, the Court has a duty towards the society.

4. For consideration of a bail application, detailed examination of evidence and elaborate documentation of merits of case are to be avoided as consideration of details of the evidence is not a relevant consideration and where mere prima facie involvement of the case is apparent in a case harming the societal interest like present in nature, accused may not be permitted to be enlarged on bail for protecting his individual interest keeping in view his right to liberty.

5. Perusal of status report, filed by the State, indicates that since 2008 till date, besides present case, as many as four criminal cases were registered against the petitioner. In FIR No. 70 of 2008 dated 17.5.2008 P.S. Rampur he was tried under Section 61 of the Excise Act, though he was acquitted in this case. However another criminal case arising out of FIR No. 129 of 2009 registered under Section 61 (1) (14) of the Excise Act in P.S. Rampur is still pending consideration in the Court. Further in a case arising out of FIR No. 67 of 2010 registered in P.S. Rampur under Section 302 IPC, petitioner stands acquitted but in another case in FIR No. 202 of 2012 registered under Section 20 of the NDPS Act in P.S. Rampur he stands convicted vide judgment dated 5.1.2018 wherein he was sentenced to pay Rs.12,000/- as fine.

6. It is true that for quantity of charas recovered from the petitioner, rigors of Section 37 IPC are not applicable in the present case, however, general principles, require to be considered at the time of granting the bail as also envisaged in Cr.P.C., are to be definitely taken into consideration. Antecedents of the petitioner are also relevant factors. Present petitioner is previous convict in a case under Section 20 of the NDPS Act. No doubt, previous conviction cannot be a sole base for denying the bail to the petitioner, however, other circumstances are also not favourable to him as not only his bail application, preferred before learned Special Judge-cum-District and Sessions Judge Kinnaur at Rampur, stands rejected on 4.9.2018, but bail application preferred in this Court was also dismissed on 8.10.2018 and copies of these orders have also been placed on record so as to discuss the reason for dismissal of petitioner's earlier bail application and there is no material placed on record showing the circumstances considered at that time and change therein after that. Case is pending consideration before learned Special Judge and fixed for 21.12.2018 for checking of copy of challan and other documents supplied to the petitioner.

7. In view of above, considering the cumulative effect of entire circumstances, without entering upon the merits of the evidence and keeping in view the principles laid down by the Apex court and other factors like nature of offence and its impact on society, petitioner is not entitled for bail at this stage. Hence the petition is dismissed.

8. Any observation made herein above shall not be taken as an expression of opinion on the merits of case and shall be construed to have been made for limited purpose of deciding this application and the trial Court shall decide the matter uninfluenced, by any observation made herein above.

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

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

Cr.MP(M) No. 1423 of 2018
Order reserved on 21st December, 2018
Decided on : 26th December, 2018

**Code of Criminal Procedure, 1973**- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Sections 21, 35, 37 & 54- Bail- Grant of- Recovery of contraband from room- Accused seeking bail on ground that contraband was not in his actual possession- And his involvement in case not forthcoming- Held, provisions of Act put reverse onus on accused by raising certain presumptions against him and said provisions cannot be ignored - In such cases, parameters for considering bail are different- House from where recovery effected taken on rent by wife of accused- Other accused his close relatives- Applicant cannot take plea that room was not in his possession- Accused involved in another case under Act- Principle of parity also not applicable- Application dismissed. (Paras 9 to 14)

For the petitioner Mr. N.S. Chandel, Advocate with Mr. Vinod Kumar Gupta, Advocate.

For the respondent — Mr. Shiv Pal Manhans Additional Advocate General with Mr.R.R.Rahi, Deputy Advocate General.
HC Satyanam Walia No. 184 IO P.S. Dharamshala, District Kangra H.P.

The following judgment of the Court was delivered:

**Justice Vivek Singh Thakur, Judge.**

Petitioner has preferred this petition under Section 439 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') for grant of regular bail in case FIR No. 169 of 2018 dated 6.9.2018 registered at P.S. Dharamshala, District Kangra, under Section 21 of the Narcotic Drugs and Psychotropic Substances Act.

2. Status report stands filed and record of the investigation has also been produced.

3. Petitioner is a co-accused in a case of recovery of 29.99 grams of herion (chitta/diacetyl morphine) from room taken on rent by accused persons in house of one Rajiv Puri, known as Gulmohar Residency situated at Gurdwara road, Dharamshala.

4. As per prosecution story, the said room was rented by its owner Rajiv Puri on 3.9.2018 to one Ruby (co-accused), who is wife of Ajay Kumar (present petitioner/accused) on monthly rent of Rs. 11,000/- per month. According to him, the room was taken on rent by Ruby introducing her as wife of Ajay Kumar whereas Aman, Amit and Babita, other co-accused, were introduced by her as her relatives, who were stated to be engaged in a business/work of shuttering.

5. On 6.9.2018 on the basis of secret information received, room rented to these persons was raided and 29.99 grams herion was recovered from a bag.

6. Co-accused Ruby and Babita respectively are wife and sister of petitioner, whereas Amit is nephew of petitioner. Co-accused Aman is a friend of these persons who are relatives of each other.

7 For enlarging the petitioner on bail, it has been canvassed that even if the prosecution case is admitted to be true as it is, there is no firm and reliable evidence on record to connect the petitioner with recovered contraband and there is nothing on record to show that the petitioner was in actual possession of recovered contraband.

8 It is further argued that commercial quantity for herion is 250 grams, whereas contraband alleged to have been recovered is far less than the commercial quantity. Further that general rule is grant of bail and not jail and presumption of innocence being a fundamental postulate of criminal jurisprudence is in favour of petitioner particularly keeping in view the fact that there is no positive evidence on record to link the bag with petitioner, from which contraband is alleged to have been recovered. It is further pointed out that co-accused Babita, Ruby and Amit have already been released on bail by learned Special Judge, Kangra, whereas bail application of the petitioner despite having been similar situated to the said co-accused has been dismissed by the Special Judge Kangra at Dharamshala vide judgment dated 24.10.2018. Therefore, bail on the ground of parity has also been pleaded.

9. While considering the presumption of innocence in favour of the accused till prove guilty, the statutory provisions of Sections 35, 37 and 54 of NDPS Act are also to be

taken into consideration which provide certain presumptions against the accused by putting a reverse onus upon him to disprove that presumption and it is for the fact, which cannot be ignored, that drug addiction is increasing especially in youth day to day and persons involved in the drugs supply business are not only spoiling the life of one person, but are responsible for causing irreparable loss to the family of victim as well as to the nation and society at large and it is well settled that in such cases, the yardstick for considering the bail application is a little bit different.

10. Plea of the petitioner, that he was not found in conscious possession of recovered contraband, is to be considered on merits by the trial Court. However, at this stage, on the basis of evidence on record, it is apparent that co-accused Ruby is wife of present petitioner, co-accused Babita is his sister. The house was taken on rent by Ruby wife of Ajay Kumar and other occupants of room were close relatives of Ruby and Ajay Kumar, whereas Aman Verma is friend of Ajay Kumar. Therefore, Ajay Kumar is also a tenant in Gulmohar Residency and all of the occupants are closely related to each other and have taken one room for residing. Therefore, ex-facie it cannot be said that Ajay Kumar was not having the knowledge of herion (chitta) in his bag.

11. Learned counsel for the petitioner has also relied upon Cr.MP(M) No. 151 of 2017 whereby the accused alleged to have been found in possession of 900 grams of charas was released on bail by the Coordinate Bench of this Court. The case of said judgment is not similar to one as in that case the bail was declined by learned Special Judge on the ground that petitioner was permanent resident of Punjab and there was every chance of petitioner for extending and threatening the witnesses and Coordinate Bench of this Court, in considering the entire facts of the case, has found that apprehension of learned Special Judge was not sustainable, whereas in present case petitioner is already involved in another case under NDPS Act and there are two similar cases against co-accused Aman who had been residing together with family and relatives of present petitioner. During his enlargement on bail in the previous case, he has repeated the commission of offence.

12. Petition for bail of petitioner, as claimed by the petitioner, has not been rejected by learned Special Judge only on the ground that another case under NDPS Act has been registered against him. But also for impact of the offence alleged to have been committed by the petitioner/accused coupled with his previous involvement in similar offence. Plea of the petitioner that he has been discriminated on the ground that other co-accused have been released on bail is not sustainable as the case of the present petitioner is different from the case of other co-accused as they were first offenders, whereas present petitioner has repeated the commission of offence after his bail in case No 310 of 2016 dated 27.12.2016, which was also under Section 20 of NDPS Act.

13. Plea raised by the petitioner that he was not found in conscious possession of contraband, is to be considered by the trial Court during trial.

14. At this stage,bail of petitioner has rightly been dismissed by Special Judge-I in the facts and circumstances of the case, as not only the petitioner has been found to be involved in case FIR No. 310 of 2016 registered under Section 20 of NDPS Act, but co-accused Aman has also been found to be accused in FIR Nos. 152 of 2016 and 29 of 2018 registered under Section 21 of NDPS Act. It is informed that next date of hearing in present case is fixed on 27.12.2018 and recording of evidence has also not started yet.

15. In view of above, considering the cumulative effect of entire circumstances, without entering upon the merits of the evidence and keeping in view nature and gravity of offence and its impact on the society and the fact that petitioner is already involved in

similar case in P.S. Indora, petitioner is not entitled for bail at this stage. Hence the petition is dismissed. Needless to say that petitioner will have the right to file successive bail application before the appropriate Court at the appropriate stage, if advised so based upon circumstances.

16. Any observation made herein above shall not be taken as an expression of opinion on the merits of case and shall be construed to have been made for limited purpose of deciding this application and the trial Court shall decide the matter uninfluenced, by any observation made herein above.

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**BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.**

Maja Personal Care ....Appellant
Versus
Commissioner of Central Excise, Chandigarh. ....Respondent

CEA No. 1 of 2018
Date of decision: 21.12.2018

**Central Excise Act, 1944-** Section 35-G- Appeal against order of Customs Excise and Service Tax Appellate Tribunal (Tribunal) before High Court- Maintainability- Held, no appeal against order of Tribunal lies before High Court even under Section 35-G of Act unless it involves substantial question of law- Pure question of fact cannot be treated as substantial question of law. (Para 10)

**Central Excise Act, 1944-** Section 35 - G- Appeal- Substantial question of law- What is?- Held, substantial question of law would mean having substance, essential, real, of sound worth, important or considerable- Whether party fairly disclosed facts or suppressed or gave selective information, are questions of fact and per se do not give rise to substantial question of law- Dispute inter se parties whether appellant filed requisite declaration for claiming tax exemption on 13.04.2005 or 13.05.2005, is pure question of fact – And appeal involving question of fact not maintainable- Appeal dismissed. (Paras 16 & 17)

***Cases referred:***

Boodireddy Chandraiah& others versus Arigela Laxmi& another (2007) 8 SCC 155]
Collector of Customs versus Presto Industries (2001) 3 SCC 6
Commissioner of Customs (Import), Mumbai versus Dilip Kumar and Company & others (2018) 9 SCC 1]
Commissioner of Central Excise, Chandigarh versus Punjab Laminates (P) Ltd. (2006) 7 SCC 431
Larsen and Toubro Ltd. Versus Commissioner of Central Excise, Pune II (2007) 9 SCC 617
Navin Chemicals Mfg.& Trading Co. Ltd versus Collector of Customs, reported in 1993 (68) E.L.T. 3 (S.C.)

For the Appellant : M/s Rupesh Kumar, Jitin Sehgal and Vipul Sharda, Advocates.
For the respondent: Mr. Rajiv Jiwan, Advocate.

The following judgment of the Court was delivered:

**Surya Kant, Chief Justice** *(Oral)*

This Central Excise Appeal is directed against the Order dated 25.04.2017, passed by the Customs, Excise & Service Tax Appellate Tribunal (in short 'the Tribunal') in Appeal No. E/2577/2007, as also the Order dated 10.08.2017, whereby the appellant's Review Application against the above mentioned order has been dismissed.

2. The facts as revealed from the order dated 25th April, 2017passed by the Tribunal,are that with a view to avail exemption from payment of Central Excise under the Notification No. 50/03-CE, dated 10.06.2003 as a new Manufacturing Unit set up after 07.01.2003, the assessee in its Declaration filed on 25th November, 2004 had mentioned the goods falling under 'Sub-Head 3004', namely, 'beauty or make-up preparations and preparations for the care of skin', which are non-specific. The Adjudicating Authority declined the benefit of exemption under the aforesaid Notification, but on appeal, the Commissioner (Appeals) held that it was a case of eligibility for exemption under the Notification dated 10.06.2003of the goods manufactured and removed from the factory. The Commissioner (Appeals), however, declined exemption on 'After-Shave Lotion' which fell under 'Sub-Head 3307'.

3. Aggrieved by the order of Commissioner (Appeals) granting relief in part, both sides went in appeal before the Tribunal, which vide its order dated 25.04.2007 held that in its Declaration filed on 25.11.2004, the assessee had given description(s) of goods specified under 'Sub-Head3004'which were to be manufactured by the assessee and thus, the Commissioner (Appeals) rightly allowed the exemption, for those goods were not mentioned in the 'Negative List' of the Notification.

4. As regard to the appellant's claim to declare that they are also manufacturing exempted goods like 'Creams' under heading 3304.10.00, 'After-Shave Lotion' under Heading 3307.10.90, 'Paste' under heading 3306.10.20, 'Shaving Cream' under Heading 3307.10.10 and 'Kali Mehandi' under Heading 3305.10.90, the Tribunal found as a matter of fact that neither any Declaration was received from the assessee in the Office of Assistant Commissioner, Shimla in respect theretonor any evidence of receiving such Declaration was produced. The Tribunal further observed that even on the date of hearing, the assessee failed to lead any evidence to substantiate the plea of filing of such Declaration on '13.05.2005'. In such fact situation, when the assessee had not filed the Declaration before the first clearance of the specified goods, the Tribunal held that the assessee was not entitled to claim the benefit of exemption under Notification dated 10.06.2003 on these additional goods. Both the appeals were thus dismissed.

5. The Appellant thereafter filed Review Application pointing out,*inter-alia,* that there was an error apparent onthe record as the Tribunal had proceeded on the premise that the appellant filed its 2ndDeclaration on '13.05.2005', whereas the said Declaration was filed on '13.04.2005' and there was enough proof comprising original postal receipt to prove the filing of such Declaration.

6. The Tribunal nonetheless was not convinced with the aforesaid factual plea and dismissed the appellant's Review Application observing as follows:-

> *"4. On perusal of the records, we find that the declaration is undated which has been reflected at page 23 and at page 24, there is postal*

*receipt which is dated 13.04.2005. In the appeal papers, the contention of the applicant is that they have filed declaration on 13.05.2005. Admittedly, no declaration has been filed on 13.05.2005. In that circumstance, there is no mistake apparent on the face of record in the order passed by this Tribunal on 25.04.2017. Therefore, we do not find any merit in the application for rectification of mistake. Accordingly, the same is dismissed."*

7. The Tribunal's original order as well as the one passed in revision, are now under challenge by the assessee through this Appeal under Section 35-G of the Central Excise Act, 1944.

8. It may be noticed at the outset that according to Mr. Rajiv Jiwan, learned Counsel for the Revenue,the instant appeal is not maintainable. He submits that the issue sought to be raised by the assessee pertains to the 'determination of the rate of duty on excise' and therefore, in view of the exception carved out under Sub Section (i) of Section 35-G read with Section 35-L (i) (b) of the Act, such an appeal is maintainable only before the Hon'ble Supreme Court.

9. Both sides have relied upon various decisions to substantiate their respective pleas re: maintainability of this appeal, especially the judgment of the Apex Court in ***Navin Chemicals Mfg.& Trading Co. Ltd versus Collector of Customs,*** reported in **1993 (68) E.L.T. 3 (S.C.).**

10. Having given thoughtful consideration to the rival submissions made against or for the maintainability of the appeal before High Court, we do not deem it necessary to dwell upon the issue as to whether the instant appeal falls within the four corners of Section 35-G or it shall lie to the Hon'ble Supreme Court under Section 35-L of the Act. We say so for the reason that no appeal can be entertained even by the High Court under Section 35-G of the Act, unless it involves a substantial question of law.

11. What is thus needed to be determined firstly is - whether the instant appeal raises a substantial question of law for adjudication by this Court?

12. Learned Counsel for the appellant very strenuously urges that while deciding the Review Application the Tribunal fell into a grave error in assuming that the 2nd Declaration was filed by the appellant on '13.05.2005'or that it was not available on the record. The said Declaration was actually filed on '13.04.2005 and not on '13.05.2005' and this omission has led to denial of justice to the assessee which in itself constitutesa 'substantial question of law'. He contends that in the Grounds of Appeal taken before the Tribunal, it was repeatedly recited that the 2nd Declaration was filed on '13.04.2005' vide Postal Receipt No. 0439, original whereof was also produced but the Tribunal has mechanically dismissed the Review Application on an erroneous premise that the 2nd Declaration was claimed to be dated'13.05.2005' but no such Declaration was available in record of the Assistant Commissioner, Central Excise. Learned Counsel urges that overlooking material evidence which has sweeping effect on the merits of the case, especially when it stood proved with the aid of Postal Receipt issued in the course of official business and thus carries presumption of truth, also satisfies all ingredients of a substantial question of law for the purpose of maintainability of this appeal.

13. We are not, however, impressed by these submissions. We say so for the reason that whether the appellant filed the 2nd Declaration on '13.04.2005' or on '13.05.2005', is purely a question of fact. There is no gainsaying that an Exemption Notification ought to be construed strictly and the burden of proving its applicability lies on

the assessee so as to establish that its case falls within the parameters of the exemption clause [please see : *(i)**Collector of Customs** versus **Presto Industries (2001) 3 SCC 6*** and*(ii) **Commissioner of Customs (Import), Mumbai** versus **Dilip Kumar and Company & others (2018) 9 SCC 1***]. Whosoever therefore seeks the benefit of exemption must always prove its admissibility. The appellant was obliged to establish that it had actually applied for the benefit of exemption under the Notification dated 10.06.2003 through 2nd Declaration filed on 13.04.2005or that such a Declaration was available in the officeof Assistant Commissioner, Central Excise. The appellant has miserably failed to discharge such onus.

14. Aplain reading of the Grounds of Appeal reveals that even the appellant was not sure about the actual date of filing of alleged 2nd Declaration, as the date of filing such Declaration claimed is'13.04.2005'whereas in the later part comprising 'Grounds of Appeal', it is stated to be dated '13.05.2005'. The Postal Receipt may be relevant to assume that a letter was sent on 13.04.2005, but it falls short to prove the contents of the letter. The appellant has thus failed to discharge the initial onus cast on it.

15. There is yet another reason for us to draw adverse inference re: filing of 2nd Declaration on'13.04.2005'.The appellant's own case is that the first Declaration dated 25.11.2004 was filed in advance well before actual commencement of the production of items falling under 'Sub-Head 3004'. It is also the assessee's own case that on getting licence from the Drug Inspector, it started manufacturing all the products together somewhere in February, 2005.If that were the truth, what prevented the appellant from claiming the benefit of exemption in advance on 25.11.2004qua other products as well. We cannot persuade ourselves to accept as to why the appellant applied for such benefit in respect of one product only when it intended or claimed to have started simultaneous production of 5-6 items in respect whereof the subsequent Declaration was statedlyfiled on '13.04.2005'.

16. Be that as it may, such like disputes are essentially questions of fact and cannot be treated as substantial question of law for the purpose of maintainability of this appeal. It is well settled that "substantial question of law" would mean—of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with---technical, of no substance or consequence, or academic merely [See: ***Boodireddy Chandraiah& others** versus **Arigela Laxmi& another (2007) 8 SCC 155***].

17. In any view of the matter, whether a party fairly disclosed the facts or suppressed or gave selective information, too are surely questions of fact and *per se* does not give rise to substantial question of law **[***Ref:(i)**Commissioner of Central Excise, Chandigarh** versus **Punjab Laminates (P) Ltd. (2006) 7 SCC 431;(ii)**Larsen and Toubro Ltd.** Versus **Commissioner of Central Excise, Pune II (2007) 9 SCC 617***].**

18. The appeal is accordingly dismissed alongwith pending application(s), if any.

**********

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

Shri Inder Singh & others .....Petitioners/Plaintiffs.

Versus

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

CMPMO No. 409 of 2017.
Reserved on : 29th November, 2018.
Date of Decision: 17th December, 2018.

**Code of Civil Procedure, 1908**- Order XXXIX Rules 1 and 2- Temporary injunction- Grant- Held, grant or decline of temporary injunction necessarily depends upon existence of prima-facie case- Existence thereof to be inferred by referring to pleadings and material on record- Copies of jamabandies shows land as 'Shamlat deh' in possession of owners- Plaintiffs thus having prima facie an arguable case- Parameters of balance of convenience and irreparable also stand in their favour- Petition allowed- Orders of lower Courts set aside- Parties directed to maintain status quo qua nature and possession of suit land during pendency of suit. (Para 4, 10 & 11)

***Cases referred:***
Chuhniya Devi Vs. Jindu Ram, 1991(1) Sim. L.C., 223
Gurbachan Singha and another Vs. Gram Pancyayat and others, (2000)10 SCC 594

For the Petitioners: Mr. K.D. Sood, Sr. Advocate with
Mr. Rajneesh K. Lal, Advocate.
For the Respondents : Mr. Hemant Vaid and Mr. Desh Raj Thakur,
Additional Advocate Generals with
Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The plaintiffs instituted a suit for declaration for setting aside the revenue entries recorded, vis-a-vis, the suit khasra number(s), (i) wherethrough, in substitution, of the earlier therewith consistent entries borne therein, reflecting the suit property, as Shamlat Hasab Rasab Khewat, and, theirs being shown in the column of possession, as, Mukbuja Malkan, (ii) rather the State of Himachal Pradesh, under, a mutation recorded in the year 1975, bearing No.353, stand reflected, as "Mustarka Sarkar Daulat Mandaar Va Jamindaran Shamlat Deh Hasab Rasab Khewat", (iii) and, thereafter consistent therewith entries are recorded in the revenue records, and, in respect whereof also rendition, of, a declaratory decree, for, theirs being set aside is also claimed.

2. A perusal of the plaint, reveals, qua specific averments appertaining, vis-a-vis, the afore espousal, hence, being averred in paragraph No.5 of the plaint, para whereof stands extracted hereinafter:-

> "5. That the revenue entries in the column of ownership of the jamabandi continued to be shown as "Mustarka Sarkar Daulat Mandaar Vs Jamindaran Shamlat Deh Hasab Rasab Khewat" in the revenue records. The mutation No.353 dated 26.9.1975 has been sanctioned for Mauza Pain Kuffar whereby land comprised in Khata No.69, Khatauni NO. 115 to 133, i.e. Khasra Kitta 71, the land which is earlier recorded as Shamlat deh hasab rasad khewat has been mutated in favour of Stat eof H.P. and there is reference of some order passed by Collector, Sub Division Rajgarh, Numbered as 1460/SDOC/R/75 dated 23.8.1975 in the said mutation. The said order and the mutation both have been

> passed behind the back of the plaintiffs or their predecessor-in-interest or the estate right holders. Even vide the order passed on the mutation the suit land has not been mutated in favour of State of HP, however, on the last page the suit land has been detailed and in the new entry the name of Zimdaran Shamlat deh hasab rasad khewat has been deleted, however, in the column of possession entry of makbuza Khud va Muktalif has been shown, even this mutation does not create any right, title or interest in favour of the defendant State of HP, the same and subsequent revenue tries in pursuance thereof are wrong, illegal, null and void. However, in the jamabandi for the year 1977-78 certain other numbers were included along with the other above mentioned three khasra numebrs i.e. Khasra No. 641 min, 642 min, and 643 min and in an unauthorized and illegal manner some cutting has been made in the column of ownership in the jamabandi especially without any order or mutation etc., as such the cutting, the land comprised in the above mentioned 3 khasra numbers are hereinafter are mentioned as "the land in question". The land in question which is part and parcel of the suit was subsequently in the jamabandi for the year 1977-78 has been shown to be owned by State of HP, the name of estate right holders has been deleted without any notice to the estate right holders, without adopting any legal process in an arbitrary, unilateral, unjust and unfair manner. The deletion of the names of estate right holders or the khewatdars which has been carried out behind their back or without their relinquishment of their rights, title and interest is not only wrong and illegal but further does not affect the rights, title and interest of the estate right holders qua the land in question."

Defendants No.1 and 2 in their written statement, instituted to the plaint, in apt corresponding paragraph No.5, of their written statement, as, furnished to the afore paragraph, of the plaint, belied the afore averment, by hence, rearing therein, the hereinafter ad verbatim extracted contention:-

> "5. That the content of para-5 of the plaint are admitted to the extent that the column of ownership of jamabandi shown as a Mushtarka Sarkar Dolatmadar was Jamidaran Shamlat deh Hasab Rasab Khewat, it is also admitted that mutation o.353 dated 26.09.1975 sanctioned for mauza Pain Kuffar in favour of Govt. of HP vide order No. 1460/SDOC/R/75 passed by Collector, Sub Division Rajgarh. It is wrong and denied that said order was passed behind the back of plaintiff all their predecessor in interest all the state right holder. It is submitted that the order passed by the Collector Sub Division, Rajgarh was in knowledge of the plaintiffs and their predecessor as the land was allotted in Khasra No.641 and 642/2 to the people of the are who were landless through different mutation which is very much clear from the revenue record. It is wrong and denied that State of H.P. has no right, title and interest in the land in question."

3. During the pendency of the suit, before the learned trial Court, an application cast, under the provisions of Order 39, Rules 1 and 2, of, the CPC, was, preferred by the plaintiffs/applicants/petitioners herein, before it, (i) wherein, they sought relief of ad interim injunction, being pronounced vis-a-vis them, and, qua the suit land. Relief upon the aforesaid application, was declined, vis-a-vis, them, by the learned trial

Court, (ii) and, the aggrieved plaintiffs, hence, preferred therefrom an appeal, before the learned District Judge, Sirmaur District at Nahan, (iii) and, the latter Court also proceeded, to render an order, bearing concurrence therewith. Now the plaintiffs/ petitioners herein being aggrieved therefrom, hence, institute the instant petition before this Court.

4. Without testing the validity of the aforesaid espousal, reared by the contesting litigants, before this Court, (i) the prime principle(s), governing the declining and affording, of, the relief of ad interim injunction to the plaintiffs, comprised in the factum, of, their existing a prima facie case, in their favour is required, to be, from, traversing through, the material, in consonance therewith, existing on record, hence prima facie proven to hence beget apt satiation. In making the afore endeavour, a, perusal of jamabandi appertaining to the year 1949, is, important, (ii) wherein, in column of ownership, a, reflection occurs qua the suit land being described therein, to bear the classification of "Shamlat Hasab Rasab Khewat", and, in the column of possession, the, plaintiffs, stand described as "Makbuja Malkan". In adjudging the effect, of, the aforesaid reflections, borne in the jamabandi, vis-a-vis, the suit land, appertaining to the year 1949, it is also deemed important to bear in the mind, the, apt statutory provisions applicable thereto.

5. Consequently, before alluding to the factual matrix, prevailing in the extant suit, it is of utmost importance, to bear in mind, the apposite provisions borne, in Section 4, of the Punjab Village Common Lands (Regulation) Act, 1961, provisions whereof stand extracted hereinafter:-

> 4. Vesting of rights in Panchayats and non-proprietors. - (1) Notwithstanding anything to the contrary contained in any other law for the time being in force or in any agreement, instrument, custom or usage or any decree or order of any court or other authority, all rights, title and interests whatever in the land:-
>
> > (a) which is included in the shamilat deh of any village and which has not vested in a panchayat under the shamilat law shall, at the commencement of this Act, vest in a panchayat constituted for, such,village, and, where no such panchayat, has been constituted for such village; vest in the panchayat on such date, as a panchayat having jurisdiction over that village is constituted;
> >
> > (b) which is situated within or outside the abadi deh of a village and which is under the house owned by a non-proprietor, shall on the commencement of the shamilat law, be deemed to have been vested in such non-proprietor.
>
> (2) Any land which is vested in a panchayat under the shamilat law shall be deemed to have been vested in the panchayat under this Act.
>
> (3) Nothing contained in clause (a) of sub-section (1)and in sub-section (2) shall affect or sholl' be deemed ever to hove
>
> affected the-
>
> > (I) existing rights, title or interest of persons who though not entered as occupancy tenants in the revenue records are accorded a similar status by custom or otherwise, such as Dholidars, Bhondedars, Butimars, Bosikhuopahus, Saunjidars, Muqararidars;
> >
> > (ii) rights of persons in cultivating possession of shamilat deh for more than twelve years without payment of rent or by payment of

> charges not exceeding the land revenue and cesses payable thereon;
>
> (iii) rights of a mortagee to whom such land is mortgaged with possession before, the 26th January, 1950."

(a) wherein in sub section 3 (ii) thereof, a specific mandate is engrafted, whereby, stand pointedly excluded, the diktat, hence, of, the preceding thereto provisions, rather, containing an explicit mandate, vis-a-vis, the apt vestment(s) of all rights qua lands reflected, as Shamilat Deh, in the revenue records apposite thereto, (i) besides thereunder apt preservation(s) of all rights, is, bestowed upon persons, in cultivating possession, of Shamilat Deh, for more than twelve years, without payment of rent or by payments of charges, not exceeding, the land revenue and cesses payable thereon, (ii) or in other words, the aforesaid mandate borne in clause (ii) of sub section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, 1961, (iii) rather excludes, the operation, of, the preceding thereto provisions, occurring, in Section 4 of the aforesaid Act, wherein rather shamlat land, is, ordained to stand vested, in the Panchayat deh, (iv) also apart therefrom, provisions analogous, to the aforesaid provisions, are, also borne in clause (d) of Section 3, of The Himachal Pradesh Village Common Lands Vesting and Utilization (Amendment) Act, No.20 of 2001, provisions whereof stand extracted hereinafter:-

> "(d) land records as "Shamlat tika Hasab Raad Malguzari" or by any such other name in the ownership column of jamabandi and assessed to land revenue and has been continuously recorded in cultivating possession of co-sharers so recorded before 26th January, 1950 to the extent of their shares therein"

(v) wherein a specific mandate, is engrafted, qua vis-a-vis all land(s) recorded, as "Shamlat Tika Hasab Rasad Malguzari" or "by any such other" name in the ownership column, of jamabandi, and, assessed to land revenue, and, continuously recorded in cultivating possession, of the cosharers, (vi) and, with afore reflection, of, possession whereof, rather evidently existing, in the apt records, prepared prior to 26th January, 1950, (vii) thereupon, rather the mandate of preceding thereto provisions, contrarily, ordaining its/their vestment in the "panchayat deh", being hence specifically excluded besides excepted.

6. Both the aforesaid statutory provisions, for hence purveying the apt strength, to the espousal of the counsel, for the petitioner, (i) that, with theirs excluding, the mandate, and, operation, of the substantive provisions, borne respectively, in sub-section 3(ii) of Section 4, of the Punjab Village Common Lands (Regulation) Act, and, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting and Utilization (amendment) Act, No.20 of 2001, (ii) AND, whereunder, rather stand statutory excluded, hence, the prior thereto, rather explicit statutory contemplation(s), hence ordaining the vestment of shamlat land, in, the panchayat concerned, (iii) does, obviously, and, necessarily require an allusion to the evidence/material, bearing prima facie absolute tandem, with, the afore-referred apt exclusionary provisions, as, contained in the afore stated statutory provisions. The apt revenue record, is comprised, in, copies of jamabandis, as, appertaining to the suit land, and, they respectively appertain to the years 1949, 1952-53, 1956-57, 1960-61 (iv) wherein, in the column, of ownership, reflections occur, vis-a-vis, the suit land, being described, as Shamlat deh Hasab Rasab Khewat, and, in possessory column thereof, reflections occur, qua the suit land being possessed, by "Makbuja Malkan", hence the apt co-sharer therein, holding, the apposite rights, in proportion of their/his shares, hence making user thereof. The afore referred, entries borne in jamabandis, as, appertaining to the years 1949, 1952-53, 1956-57, 1960-61, are not contested nor evidence, is adduced, (v) for ripping apart, the presumption of truth, carried by them, consequently, it

is to be concluded, qua the afore referred, displays occurring therein, hence, prima facie rather enjoying conclusivity, (vi) whereupon, it is to be concluded, of, with the suit land holding hence the apposite description, of "Shamlat tika hasab rasad Malguzari", hence, render it, to, fall within the ambit of coinage "or any such other name", as, is hereat borne, thereupon, the exclusionary mandate borne, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting, and, Utilization (amendment) Act, No.20 of 2001, against its vestment, in the "panchayat deh" concerned, concomitantly making its evident/ prima facie surfacing, (vii) and, also the apt therewith exclusionary benefits thereof, hence, prima facie ensuing, vis-a-vis, the petitioners/plaintiffs. Moreover, the afore-referred reflections, borne in jamabandis, as, appertaining to the years 1949, 1952-53, 1956-57, 1960-61, are lent vigorous succor, by mutation bearing No.353, wherein a clear display is embodied, of despite, the suit land being reflected as, "Shamlat deh Hasab Rasab Khewat", (viii) yet, evidently, despite, the afore classification donned by the suit land, it, stood untenably vested in, the government/panchayat. Nowat, the reflections, in the apposite order, hence, attesting mutation, of, vestment, of the suit land, in the State concerned, (ix) suit land whereof, rather carries the classification of "Shamlat deh Hasab Rasab Khewat", reiteratedly renders the aforesaid factum, as, clearly borne, in the order attesting the relevant mutation, to, hence thereupon rather acquire conclusivity, (x) thereupon, the evident mantle, donned by the suit land, vis-a-vis, it being "Shamlat deh Hasab Rasab Khewat", is both obviously, and, openly, prima facie acquiesced by the respondents/State, also, hence the factum probandum, of the suit land, earlier depicted, in the jamabandis appertaining to the years 1949, 1952-53, 1956-57, 1960-61, to bear the character, of "Shamlat deh Hasab Rasab Khewat", rather also prima facie acquires corroborative vigour, as also, conclusivity. The order or mutation No.353, in pursuance whereof, also jamabandis, were, prepared subsequent thereto, hence, also carry reflections in compatibility thereof, and, in pursuance whereof, the vestment of the suit land, occurred, in the State, despite, reiteratedly it evidently, bearing, the statutory exclusionary classification, of "Shamlat deh Hasab Rasab Khewat", (xi) rather is neither at par, nor is construable to be any piece, of a valid legislation, whereunder, rather would occur, any apposite valid supplantation or amendment, vis-a-vis, the mandate of clause (ii) to sub section (3) of Section 4, of the Punjab Village Common Lands (Regulation) Act. In aftermath, with the provisions, borne in clause (ii), to sub section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, remaining hence unsubstituted, through, a valid amendment, rather carried, by the legislative assembly concerned, (xii) thereupon, with a candid diktat borne therein, especially, vis-a-vis, preservations of rights, of persons, in cultivating possession, of "shamlat land, rather, for more than 12 years, without payment of rent or by payment of charges nor exceeding the land revenue, and, cesses payable thereon", (xiii) in category whereof, both the suit land, and, the petitioners/plaintiffs, prima facie rather fall, given emphatically, with the afore jamabandis, appertaining to the suit land, for reasons aforesaid, bearing out the factum, (xiv) of, the predecessors-in-interest, of, the petitioners/plaintiffs, holding continuous cultivating possession, of shamlat land, since 1949 upto 1975, whereat mutation No.353 stood attested, (xv) thereupon, with the suit land, prima facie falling, within the ambit, of, the apposite exclusionary mandate, borne in clause (ii) to sub section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, vis-a-vis, the preceding thereto mandate(s), (xvi) wherein, contrarily, stand rather excepted, the lands evidently falling, within, the domain of clause (ii) to sub-section (3) of Section 4, of, the Punjab Village Common Lands (Regulation) Act, (xvii) and, bearing the classification of Shamlat deh, against from their vestment, in the Panchayat, (xviii) and, sequelly, hence, the lack of valid supplantation thereof, through, a valid legislative amendment, rather rendered, the apposite exclusionary mandate, borne in clause (ii) to sub Section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, to, both hold

prima facie clout and sway, (xix) whereas, mutation bearing No.353, obviously does not, prima facie either override or benumb the operation or clout, and, the command, of the apposite exclusionary statutory provisions, vis-a-vis, the preceding thereto provisions, borne in Section 4, of the Punjab Village Common Lands (Regulation) Act, (xx) hence renders any meteing, of, reverence thereto, to not per se clothe it with any sanctity.

7. Be that as it may, the learned counsel appearing. for the respondents places reliance, upon, a judgment of the Hon'ble Apex Court, rendered, in a case titled as ***Gurbachan Singha and another vs. Gram Pancyayat and others***, reported in ***(2000)10 SCC 594***, the relevant paragraphs whereof are extracted hereinafter:-

> "1. This litigation has had a chequered history; the dispute confining to jurisdiction. The High Court has taken the view that the civil suit did not lie and that an application under Section 11 of the Punjab Village Common Lands (Regulation) Act, 1961 will lie before the Collector of the district. In our view, the High Court was right in coming to that view especially when a question of title has been raised and Section 13 of the said Act puts a bar to the civil court determining that question. We, therefore, dispose of this appeal in letting the appellants approach the Court of the Collector under Section 11 of the said Act.
>
> 2. Under interim orders of this Court dated 27-11-1990 the appellants were required to deposit a sum of Rs 100 p.m. regularly. In terms of that order, the said sum was required to be depositedan the District Court. The sum thus collected be handed over to the respondent Gram Panchayat. This order would not, however, preclude the appellants from obtaining interim orders from the Collector when proceeding under Section 11 of the Act. In this manner, the appeal stands disposed of. No costs.

Wherein, Section 13, of the Punjab Village Common Lands (Regulation) Act, alike Section 10, of the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974, foists a statutory bar, against, the civil Court, exercising jurisdiction, over any matter, arising, from the question of title, (i) and, when in absolute alikeness or affinity therewith, provisions also occur in Section 10 of the Himachal Pradesh Village Common Lands Vesting and Utilization Act, (ii) AND when in respect whereof, the Hon'ble Apex Court, in the apt paragraphs extracted hereinabove, had, concluded of the civil courts, holding no jurisdiction, vis-a-vis, any matter falling with the domain, of the aforesaid Act, (iii) hence, no pronouncement, in the affirmative being meted, vis-a-vis, the instant lis. However, the reliance, as placed by the learned counsel appearing, for the respondents, upon, the aforesaid statutory bar, created in the apposite provisions, occurring in both, the Himachal Pradesh Village Common Lands Vesting, and, Utilization Act, and, in the Punjab Village Common Lands (Regulation) Act, for hence rendering, not maintainable, the extant suit, before the civil court concerned, (iv) is clearly a sequel, of his misreading, the entire statutory provisions, as, borne in both the afore referred statutes, (v) also arises from his being unmindful vis-a-vis (vi) the evident description, of the suit land, in the apt record, as "Shamlat deh Hasab Rasab Khewat, whereon, the apt exclusionary statutory provisions, as, referred hereiabove, are prima facie firmly concluded, to hence stand attracted, (vii) and, as a corollary thereof, the vestment of the suit land in the State, is, prima facie concluded to stand stained, with, vices of apt statutory infractions. The sequel of the learned counsel appearing, for the respondents, hence remaining unmindful, vis-a-vis, the afore referred conclusions, is obviously qua hence, the apt hereafter ensual, rather arising, (viii) qua with all revenue records, specifically mutation No.353, being manifestly prepared in derogation,

of, the apt exclusionary statutory provisions, and, in sheer derogation, of, apposite therewith classification hence donned, by the suit land, (ix) thereupon with the apt mutation No.353 being invalidly recorded, (x) besides, its begetting open infraction, of, the mandate of the apt exclusionary provisions, borne in clause (ii) to sub-section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, and, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting and Utilization (Amendment) Act, 20 of 2001, (xi) thereupon, unless the apt excepting relief(s), as, created in the afore referred statutes, is accepted, and, is applied hereat, (xii) thereupon, alone the solemn holistic purpose, of the apt exclusionary mandate, would be preserved, (xiii) concomitantly, for keeping alive the apt excepting mandate, thereupon, the apt statutory bar, rather hence cannot be construed, to be creating any obstruction. Contrarily, rather, the ill besides insagacious sequel, would ensue, of even invalidly made orders, anchored upon a clear lack of adherence, to the revenue records, bearing absolute incongruity, with the mandate of the apt exclusionary clauses, to the relevant inclusionary or vesting provisions, respectively, borne in clause (ii) to sub-section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, and, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting, and, Utilization (Amendment) Act, 20 of 2001, rather, being hence untenably validated. Corollary thereof, is that the bar, of jurisdiction, is applicable, vis-a-vis, only validly made orders, by the revenue officers, and, it being not be applicable, vis-a-vis, any invalidly made orders or orders made in blatant transgression, of, the apt excepting statutory provisions. Moreover, the judgment whereon, the learned counsel, appearing for the respondents, has, placed reliance, makes a clear display, of the Hon'ble Apex Court, affirming the view taken, by the Hon'ble High Court, (i) that, the remedy available, to the aggrieved litigant, being to cast, an application under Section 11 of the Act, before the revenue officer concerned, and, not by his canvassing, his grievance, through, his instituting, a civil suit suit. Consequently, with Section 11 of the Punjab Village Common Lands (Regulation) Act, hence, appertaining to an interdiction, against, any preemption, against, sale of land, in shamlat deh, (ii) whereas, contrarily, hereat, there is open, gross and blatant transgression, of, the apt statutory hence excepting exclusionary mandate, vis-a-vis, the mandate, of, apt vesting provisions, (iii) thereupon, no remedy other than, for setting aside, the apposite order or for setting aside, all concurring therewith entries, as, carried in the revenue record, through, the institution of the civil suit, rather comprising, the, only remedy available, vis-a-vis, the aggrieved, and, also vis-a-vis the petitioners/plaintiffs herein.

8. In coming to the aforesaid conclusion this Court derives strength from a judgment of tis Court rendered in case titled as ***Chuhniya Devi vs. Jindu Ram***, reported in ***1991(1) Sim. L.C., 223,*** wherein this Court, while answering the issue, with respect to the effect of the statutory bar, existing in Section 115 of the H.P. Tenancy and Land Reforms Act, (i) had, though rendered an answer qua the afore bar, rendering rather disempowered the civil Courts, to, exercise jurisdiction, vis-a-vis, all the orders rendered by a Revenue Officer, while, exercising hence powers vested in them under Section 104 of the H.P. Tenancy and Land Reforms Act, (ii) rather had also proceeded to carve therein, hence, exceptions thereto, inasmuch as (iii) orders being rendered in blatant transgression of the fundamental judicial procedure; (iv) provisions of the Act had not been complied with. Even though, the afore judicial verdict, is, rendered with respect to the statutory bar, existing in H.P. Tenancy and Land Reforms Act, yet, analogous thereto provisions , do also exist in the extant Act, (v) thereupon, the trite principles, in exception therewith, as referred above, are, also applicable hereat, besides when for all reasons aforestated, there is apparent blatant transgression, by the revenue authorities (a) of the fundamental judicial procedure while attesting mutation, (b) whereunder, the proprietary rights conferred upon the State, vis-a-vis, the afore statutory provisions, (c) thereupon, the learned District Judge concerned, has prima facie erred in concluding, that, the suit is barred by statutory mandate, encapsulated

in Section 10 of the H.P. Village Common Lands (Vesting and Utilization) Act, hence, thereafter, hence, has proceeded to decline the relief, to the plaintiffs.

9. Consequently, the result of the afore discussion is that triplicate principles governing the affording or declining, of, apposite relief, comprised in, (a) prima facie good arguable case being established by the plaintiffs; (b) balance of convenience being loaded vis-a-vis the plaintiffs and (c) irreparable loss or injury being, causable to the plaintiffs, in case, ad interim injunction is not granted, hence visibly begetting the apt satiation qua the plaintiffs.

10. The aforesaid discussion, unfolds, that both the learned courts below, in making, hence disaffirmative concurrent pronouncement(s) vis-a-vis the plaintiffs/petitioners herein, have omitted to revere apposite material, thereupon, both the learned Courts below have mis-appraised, and, ousted from consideration, the, relevant material.

11. For the foregoing reasons, the instant petition is allowed and orders impugned before this Court are set aside. In sequel, the parties are directed to maintain status quo qua nature and possession with respect to the suit land, till, the final disposal of the main suit, by the learned trial Court. The parties are directed to appear, before, the learned trial Court, on 26th December, 2018. However, it is made clear that the observations made hereinabove shall have no bearings on the merits of the case. No order as to costs. All pending applications also stand disposed of. Records, if received, be sent back forthwith.

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

Sonia Jiswal & others .....Applicants.

Versus

Om Prakash & others. .....Respondents.

CMP(M) No. 702 of 2013
Decided on : 4.1.2018

**Code of Civil Procedure, 1908 –** Order XXXII Rule 4 – Representation by Guardian ad-litem – Challenge thereto – In suit filed by plaintiff for declaration and rendition of accounts, minor defendants duly represented by their predecessor - Trial Court dismissing suit - RFA by plaintiff – Minor defendants filing application and contending that their interest was not properly watched before trial court by court guardian - On facts, no concrete evidence indicating any prejudice having been caused to them on account of act and conduct of guardian ad-litem - Suit was in fact dismissed in favour of defendants - Applicants would get opportunity to rebut contentions of plaintiffs in RFA- Application dismissed. (Paras 1 to 3)

For the applicants: Mr. N.K. Thakur, Sr. Advocate with Mr. Ramesh Sharma, Advocate.

For the respondents: Mr. Dheeraj K. Vashishat, Advocate, for respondent No.1.
Mr. Neeraj Gupta, Advocate, for respondent No.2.
one for other respondents.

The following judgment of the Court was delivered:

**Sureshwar Thakur, J (oral)**

One Om Prakash, instituted a suit bearing Civil Suit No. 67-S/1 of 95/93, seeking therein rendition, of, a declaratory decree besides rendition of a decree, for, rendition of accounts. The learned trial Court, on, the relevant issue, appertaining to the parties at contest, constituting a joint hindu family AND the suit property besides' the business belonging to the joint hindu family, hence returned dis-affirmative findings thereon. The learned trial Judge also on the issue, relating, to the valid execution, of, testamentary disposition, of, one Shakuntka Devi, disposition whereof stood propounded by defendant No.1, returned affirmative findings thereon. The plaintiff, one Om Prakash, being aggrieved, by the adversial findings returned vis-à-vis him, upon issues No. 1, 9 and 10, hence, instituted RFA No. 365 of 2000 before this Court, wherein the applicants' herein also are arrayed as party(s). Consequently, with the predecessors-in-interests of applicants' herein, standing arrayed as party(s) in Civil Suit No. 67-S/1 of 95/93 besides with the applicants' herein, being also arrayed as parties in RFA No. 365 of 2000, (i) thereupon when the aforesaid, would during, the course of hearing of RFA No. 365 of 2000, hence hold the apposite opportunity(s) to contest the submissions made by the counsel representing Sh. Om Prakash, whereby he makes an effort for reversing the findings, returned by the learned trial Court, upon issues No. 1, 9 and 10, (ii) thereupon, when this Court declines relief, on, the instant application vis-à-vis the applicants', no, apparent prejudice would hence be entailed upon them.

2. Be that as it may, in the aforesaid backdrop, when apparently, no prejudice would be encumbered, upon, the applicants' in CMP(M) No. 702 of 2013, (i) thereupon with the grounds meted in the application, cast under the provisions of Section 5 of the Limitation Act, (ii) grounds whereof stand anviled, upon, the applicants' interest in litigation being not diligently protected by their court guardian, rather cannot at this stage, be held construable to be a tangible ground(s), apparently *when no concrete evidence exists, for, , sustaining them.* Moreso, given all the aforestated reasons, besides now at, also given theirs being arrayed as party(s) in RFA No. 365 of 2000, hence with theirs holding an opportunity, to, validate the affirmative findings returned by the learned trial Judge, upon the apposite issues No. 1, 9 and 10 vis-à-vis their respective predecessors-in-interests, also constrains this Court, to, dismiss the application.

3. In sequel, there is no merit in the instant application and the same is accordingly dismissed. However, it is clarified that, upon, hearing, of, RFA No. 365 of 2000, the applicants' in the instant application shall be given the fullest opportunity to protect their interests in litigation.

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

Jyotsana .....Petitioner.

Versus

State of H.P. & Ors. .....Respondents.

Cr.MP(M) No.1763 of 2015
Reserved on : 21.12.2017.
Date of Decision: 5th January, 2018.

**Code of Criminal Procedure, 1973-** Section 173- Closure Report- Acceptance – Justiciability- De facto Complainant dying before filing of closure report before Magistrate- Magistrate accepting closure report after issuing notice to widow of de facto complainant, who didn't appear despite service – Minor daughter of de facto complainant approaching High Court and contending that no opportunity of heard was given to her before acceptance of closure report – And she was prejudiced by action of Magistrate- On facts, petition found having been filed through mother – notice was duly issued to her mother by Magistrate before acceptance of closure report- held, on these facts it cannot be said that mother of petitioner didn't watch her interest in proceedings before Magistrate- Petition dismissed.( Paras 4 & 5)

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| For the Petitioner: | Mr. Divya Raj Singh, Advocate. |
| For Respondents 1 & 10 : | Mr. Vivek Singh Attri, Addl. A.G. |
| For Respondents No. 2 to 9: | Mr. Ajay Sharma, Advocate with Mr. Kishore Pundeer, Advocate. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The learned trial Magistrate, under, the impugned orders, had accepted the proposals made by the Investigating Officer concerned, in his report furnished before him under the provisions of Section 173 of the Cr.P.C., proposal whereof, appertained to closure of investigation(s) with respect to the FIR concerned.

2. Since, the petitioner, through, her mother-cum-natural guardian, has belatedly concerted, to beget reversal of the impugned order, hence, she has cast the instant application, under, the provisions of Section 5 of the Limitation Act, whereby, she endeavours to seek condonation, of a delay of 198 days, as has occurred, in filing the criminal revision petition before this Court.

3. The application was contested by the respondents, by filing detailed reply(ies) thereto. The Investigating Officer in his apposite closure report instituted before the learned trial Magistrate concerned, had therein made ad nauseam, allusions to the factum of (a) the deceased complainant admitting, his handing over papers bearing his signature(s) to one Gulbir Singh Chaudhary, (b) his admitting of his opening a joint account inter se him and one Gulbir Singh Chaudhary, (c) thereupon, he recorded conclusions, of purported withdrawals of sums of money, from, the authorised joint account(s) by one Gulbir Singh Chaudhary, the authorised co-operator thereof, hence, not attracting any criminal liability(ies) vis-a-vis him, (d) any misuser of signatured paper(s) of deceased complainant, by Gulbir Singh Chaudhary, not being amenable to cogent proof, given the deceased complainant, not being alive, at the stage contemporaneous, to the Investigating Officer concerned, instituting a report, under, Section 173 of the Cr.P.C., before the learned trial Magistrate concerned, with proposal(s) therein, for closure of investigations.

4. Even if, reasons) in affirmation thereto meted by the learned Magistrate, are, may be prima facie infirm, yet the learned Magistrate concerned, (i) had, also alluded to an application moved before him by the petitioner, through, her natural guardian one Smt. Sangeeta Devi, in the latter's purportedly safeguarding(s), of, the interest, of, her minor daughter, one Jayotsana, (ii) whose interest(s), nowat, also she is pursuing being her mother-cum-natural guardian, (iii) AND imperatively had rejected all the purported apposite

objections reared thereat by Mrs. Sangeeta Devi. Consequently, even if, one Sangeeta Devi was aggrieved, therefrom, she was enjoined, to, with utmost promptitude, motion this Court, for concerting reversal of the impugned order. However, she omitted to do so. Moreover, in the application at hand, she has purveyed an untenable reason, (iv) of hers, forming an opinion that the only appropriate remedy available to her, for contesting, the impugned order, was through, the mechanism of hers instituting a civil suit. The aforesaid purported reason, which debarred or precluded, the applicant to promptly move this Court, for assailing the impugned orders, is per se ridden with an aura of falsity nor hence it is acceptable. Contrarily, when she has also made a disclosure in the application at hand, of her mother, through whom, she has moved the instant revision petition also being careful and diligent in watching her interests, (v) whereas, rather a contrary thereto averment(s), of her mother being not diligent or watchful in protecting her interest in litigation, rather constituted an appropriate averment, for, her application being allowed, (vi) thereupon, with her mother-cum-natural guardian, inordinately, procrastinating in agitating the impugned orders, constrains this Court, to, conclude that delay as has occurred, in the institution of the criminal revision petition, before this Court, for assailing the impugned order, has not been satisfactorily explained, rather it is both intentional and deliberate.

5. For the foregoing reasons, there is no merit in the instant petition and it is dismissed accordingly. Records be sent back forthwith.

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

Lala Ludarmal Dharamshala Trust .....Petitioner.

Versus

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

CMPMO No. 349 of 2017.
Reserved on : 21.12.2017.
Date of Decision: 5th January, 2018.

**Himachal Pradesh Land Revenue Act, 1954 -** Section 163 – **Limitation Act, 1963** - Articles 64 & 65 - Adverse possession – Whether person is entitled to seek declaration of having become owner by way of adverse possession ? - Held, adverse possession can be used only as shield - Person is not entitled to seek declaration of having become owner of land by way of adverse possession. *Gurdwara Sahib Versus Gram Panchayat Sirthala and another (2014) 1 SCC 669* relied upon. (Para 3 )

**Himachal Pradesh Land Revenue Act, 1954 -** Section 163 - Encroachment over government land - Claim of adverse possession - Essential requirements - Held, person seeking declaration before AC-I Grade of having become owner of government land by adverse possession, is required to file regular suit and pay requisite court fee. (Para 3 )

***Cases referred:***

Gurdwara Sahib Vs. Gram Panchayat Sirthala and another, (2014) 1 SCC 669

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, Judge.**

The instant petition is directed against the orders, respectively, borne in Annexure P-1 and in Annexure P-2. Annexure P-1 embodies a mandate pronounced, upon, the petitioner herein, (I) to institute a plaint before the Revenue Officer concerned, embodying therein averments bearing out its claim, of its, becoming owner, of, the suit property by adverse possession. Annexure P-1, was, appealed before the Collector Sub-division, Kandaghat. The latter under Annexure P-2, dismissed the appeal, on the short ground, (ii) of with a specific mandate occurring, in, sub-section (5) of Section 163 of the Himachal Pradesh Land Revenue Act, 1954, (hereinafter referred to as the Act), provisions whereof stands extracted hereinafter:-

> "(5) An appeal from the decree of the Revenue Officer made under sub-section (4) shall lie to the District Judge as if that decree were a decree of Subordinate Judge in an original suit."

against appeals being reared vis-a-vis orders rendered by Revenue Officer(s) concerned upon the latter exercising powers, of, Civil Court, rather in consonance, with, sub section (4) of Section 163 of the Act, theirs being, preferable only before the learned District Judge concerned. Even, if the aforesaid order is per se infirm, given (i) no decree being rendered under Annexure P-2, yet with its tacitly affirming, the orders borne in Annexure P-1, thereupon, it acquires, for, reasons assigned hereafter, an intrinsic aura of validity(ies).

2. Be that as it may, before determining the validities, of, the aforesaid orders, it is imperative to cull out the relevant germane facts thereto. Annexure P-3, comprises a show cause notice, issued by the competent officer upon the petitioner herein. Recitals occurring therein, make, a display of the petitioner herein, encroaching upon government land. The aforesaid statutory notice was replied by the petitioner herein AND therein it made echoing(s) of the noticee/petitioner herein, holding, since 1946, with an *animus possedendi*, evident possession of the suit property, (i) thereupon, with the apposite statutorily mandated period, of, limitation, expiring upto the initiation of proceedings under Section 163 of the Act, (ii) thereupon the noticee/petitioner herein perfecting its title as owner vis-a-vis the suit property. The afore referred reply meted by the noticee vis-a-vis the statutory notice issued, within, the ambit of Section 163 of the Act, by the Revenue Officer concerned, upon noticee/petitioner herein, (iii) makes a vivid display, of, the noticee hence asserting acquisition of title, by adverse possession vis-a-vis the suit property. Consequently, with the aforesaid assertions, made by the noticee/petitioner herein, hence falling,within the domain, of, sub section (3) of Section 163 of the Act, the further mandate(s) embodied therein, of, hence a Revenue Officer, not, below the rank of Assistant Collector 1st Grade, being enjoined, to determine the aforesaid assertions, as if he were Civil Court, (iv) hence necessarily was also rendered workable vis-a-vis the noticee/petitioner herein, besides were compliable by the Revenue Officer concerned. The pointed onslaught mounted upon the impugned orders, by the learned counsel for the noticee/petitioner herein, is (a) of the insistences, made, by the Revenue Officer concerned, upon, the noticee/petitioner herein, for, its furnishing a plaint, encompassing therein, pleadings apposite, to assertion(s) of title by way of adverse possession, by it, vis-a-vis the suit land, rather begetting visible detraction(s) vis-a-vis the mandate, of, both sub-section (3) and of sub-section (4) to Section 163 of the Act; (b) conspicuously hence beneficial working(s), of, the mandate(s) of the aforesaid provisions of law, thereupon, being rendered both nugatory besides redundant. However, for the reasons to be assigned hereinafter, the initial espousal, made, by the counsel for the noticee/petitioner herein, of, untenable insistences, being

made by the Revenue Officer concerned, upon, the noticee, to, furnish an apposite plaint, embodying therein pleadings apposite to acquisition of title, by it, vis-a-vis te suit property, conspicuously, by adverse possession, IS rendered diminished of its vigour (i) by the Hon'ble Apex Court in a judgment reported in **(2014)1 SCC 669,** rendered in a case title as **Gurdwara Sahib versus Gram Panchayat Sirthala and another**, the relevant paragraphs No. 8 & 9 whereof stand extracted hereinafter:-

> "8. There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence.
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> 9. However, we also find from the reading of the judgment of the High Court that the High Court has refused the injunction observing that the appellant was not entitled to the same as it is the Gram Panchayat which is the owner of the property in dispute and as the appellant is in possession without any right, it has no right to seek injunction against the Gram Panchayat. This finding is totally perverse and, in fact, unnecessary. In the first instance, there was no occasion or reason for the appellant's counsel to seek this prayer in the Second Appeal. As pointed out above, the relief of injunction had already been granted by the Civil Court and this portion of the decree had not been challenged by the respondents. Decree to this extent in favour of the appellant had attained finality. The First Appellate Court also specifically recorded this fact and observed that by not challenging the judgment and decree passed by the learned Civil Judge, the respondents accepted that the appellant was in adverse possession of the land since 13.4.1952. We, thus, clarify that observations of the High Court that the appellant is not entitled to injunction, were unnecessary and beyond the scope of the appeal." (p..673)

making, a clear categorical mandate therein, of, the espousals of adverse possession, by the plaintiff, being grossly impermissible also therein an explicit mandate, is borne of the apposite Article of the Limitation Act, purveying the aforesaid empowerment(s) to the plaintiff, standing hence blunted besides becoming naturally redundant, besides unworkable emphatically vis-a-vis the plaintiff. Consequently, with the noticee/petitioner herein, striking at the insistences, made upon it, by the Revenue Officer concerned, for, furnishing an apposite plaint, containing therein pleas apposite, to its, acquiring title by adverse possession vis-a-vis the suit land, (ii) it is, obviously making a blatant open concert, to, benumb the efficacy of the verdict, of the Hon'ble Apex Court, wherein, rearing(s) of the aforesaid pleas, by the plaintiff in the affirmative, has been firmly denounced. It also appears that the noticee/petitioner herein, has, attempted to resist the aforesaid insistences, made upon it, by the Revenue Officer concerned, for, enabling it to rear the aforesaid plea in its written statement, (iii) obviously it intends to injunct the Revenue Officer concerned, to, institute a plaint for rearing therein, relief(s), for, rendition of a decree for possession, of the suit property.

3. The aforesaid contrivances are grossly untenable, the reason being (i) of the Revenue Officer concerned, upon, his issuing besides ensuring service, of, statutory notice anvilled upon Section 163 of the Act, upon the noticee/petitioner herein, being not, thereafter either insisted upon, not it can be injuncted, to, hence institute a plaint, claiming therein rendition of a decree for declaration AND rendition, of a decree for possession of the suit land, (ii) given thereupon, rather with sub-section (4) of Section 163 of the Act, making

a clear express mandate, of, upon a Revenue Officer concerned, trying question(s) of title, his, drawing proceedings in a manner alike the ones drawn by a Civil Court, upon the latter's trying a Civil Suit, besides his converting itself to a Civil Court, (iii) imperatively, he is enjoined to regulate, the trial of the suit, in the manner contemplated in the Code of Civil Procedure, (iv) thereupon, if the Revenue Officer concerned, who issues a statutory notice, within the ambit of Section 63 of the Act, thereafter, insists, upon, the authority(ies) initiating apposite proceedings, under the Act, to furnish a plaint, it, would entail obviously the consequence(s) of the plaint, being enjoined to also bear court fees ad valorem vis-a-vis the market value of the suit property concerned, with a concomitant unbefitting ill consequence of (v) statutory notice losing its vigour, besides its being effaced, whereas, therefrom, the statutorily contemplated proceedings commence rather, upon, the noticee purveying reply(ies) thereto when rear, a plea of adverse possessing, is enjoined to in consonance therewith form an apposite plaint, rendering it not akin, to, a plaint. (vi) The entire exchequer being drained of money(s), merely, for affixing on the apposite plaint, court fees ad valorem vis-a-vis the values of the suit property. In aftermath, the aforesaid ill consequences are to be obviated. Moreover, if the aforesaid plea, is, enjoined to be workable vis-a-vis the petitioner herein/noticee, (i) thereupon, it would beget infraction, of, the specific bar, encapsulated in the verdict rendered by the Hon'ble Apex Court, against, rearing(s) in the affirmative, of, pleas of adverse possession, for, thereupon the claimant, in the affirmative, hence, canvassing his acquiring title vis-a-vis the suit land concerned, (ii) corollary whereof, is, of, unless reverence in the absolute rigour, is, meted therewith, thereupon, it may beget infraction of the mandate of the Hon'ble Apex Court rendered in Gurdwara Sahib's case (supra). Consequently, also the argument of the learned counsel appearing, for the noticee/petitioner herein, that, unless its plea, is accepted, thereupon, the mandate of sub-section (3) of Section 163 of the Act would be rendered redundant, is also, of, no avail to him, (iii) given the Hon'ble Apex Court in an alike situation rendering redundant workability(ies), of, the apposite Article of the Limitation Act, whereupon, leverage is purveyed to the plaintiff concerned, to rear pleas in the affirmative, pleas whereof appertaining to acquisition of title by adverse possession. Consequently, even if negativing, the plea of noticee/petitioner herein renders redundant the mandate of subsection (3) of Section 163 of the Act, thereupon, rather all the aforesaid ill consequences would be obviated.

4. For the foregoing reasons, the instant petition is dismissed and the impugned orders are maintained and affirmed. No order as to costs. All pending applications also stand disposed of.

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

Smt. Nalini ....Petitioner.

Versus

Gulbir Chaudhary & others ....Respondents.

Cr.MMO No. 29 of 2010
Reserved on : 26.12.2017
Date of Decision: 5th January, 2018.

**Indian Penal Code, 1860 -** Sections 193, 471 and 120-B - Forgery and use of forged document before court - Summoning order – Challenge thereto - In civil suit party producing

two documents, one photocopy and another certified copy, containing different versions though with respect to same transaction – Civil court accepting version of custodian of records and declining to conduct enquiry - However, Judicial Magistrate taking cognizance of offences and summoning accused - Additional Sessions Judge (Fast Track) setting aside summoning order - Petition against - Held, document was not used for getting benefits since suit was withdrawn - Complaint for alleged offences was premature- Petition dismissed. (Paras 6 & 7)

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| For the Petitioner: | Mr. Rajnish Maniktala, Advocate. |
| For Respondent No.2: | Mr. Ajay Sharma, Advocate. |
| For Respondents No.3 & 4: | Mr. Dushyant Dadwal, Advocate. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant petition stands preferred by the aggrieved complainant, against, the pronouncement recorded on 5.9.2009, by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, upon, Cr. Appeal No. 14-P/X/08, whereby, he set aside the orders recorded by the learned Judicial Magistrate 1st Class, Palampur, upon, Cr. Complaint No. 142-II-2005, whereby, the latter had found prima facie case against the respondents/accused for theirs committing offences punishable under Section 193, 471 and 120-B of the IPC AND had also directed for transmission, of, the criminal complaint, to, the Court of the learned Chief Judicial Magistrate concerned.

2. The foundation of the complaint instituted by the complainant/petitioner herein, against, the respondents herein/accused, (i) is comprised in a copy of agreement, Annexure P-5, certified copy whereof, bears, mark C-10, (ii) being the one appended initially along with Civil Suit No. 123/2002, whereas, subsequent thereto, another agreement comprised in Ex. C-8, being produced before this Court and before the learned trial Court concerned, (iii) wherein, clause (7) hitherto not existing in Annexure P-5, rather found occurrence therein. Consequently, it is contended that, thereupon, the respondents/accused were intending to draw untenable leverage therefrom.

3. The learned counsel appearing for the petitioner herein has contended with vigour that with respondents herein/accused, in their reply furnished, to the show cause notice, making communications of theirs relying upon Ex. C-8, thereupon, it is per se evident therefrom, (i) of, theirs acquiescing, of theirs, surreptitiously introducing it, on the file of civil suit No. 123 of 2002, pending before the learned trial Court concerned, (ii) AND more so, after theirs removing the initially therewith appended agreement, as, borne in Annexure P-5, from, the file of the aforesaid civil suit. Consequently he contends that with the verdict impugned before this Court palpably not taking into account the aforesaid factum, thereupon, its warranting interference by this Court.

4. Before proceeding to deal with the vigour of the aforesaid arguments addressed before this Court by the learned counsel appearing for the petitioner herein, the imperative factum enjoined, to be, borne in mind, (i) is, of Civil Suit No.123 of 2002, instituted by the petitioner herein, as plaintiff against one Yashoda Devi, being dismissed on 28.08.2008, by the learned Civil Judge (Senior Division) concerned, (ii) besides, of, in the aforesaid suit, an application preferred by the respondent herein, application whereof, was, cast under the provisions of Order 1, Rule 10 of the CPC, being also dismissed. (iii) AND apparently, of,the purportedly forged agreement borne in Ex. C-8, rather being appended

with the aforesaid application. The apposite complaint was lodged, during, the pendency of Civil Suit No.123 of 2002. It appears, from, a perusal of the record, of, the trial judge seeking explanation(s) from the official concerned, holding legal custody, of, the record, AND on the official concerned meteing an explanation thereto, (iv) the learned trial Judge concerned, on 9.5.2003, accepting his explanation and permitting the placing(s) on record, the photo copy of the original agreement initially appended with Civil Suit No. 123 of 2002, agreement whereof is marked as Annexure C-10. Conspicuously, with the explanation, meted by the official concerned, who held the legal custody of the relevant records, hence, coming to be accepted by the learned trial judge concerned also when subsequent to 5.9.2003, the photo copy of the initially appended agreement with civil suit No.123 of 2002, also being permitted to be placed on record, besides when mark C-10, is evidently not demonstrated, to be not the photo copy of the original thereof, (iv) rather when the certified copy thereof, was supplied, to the complainant/petitioner herein AND preeminently reiteratedly also when a copy thereof, after its location by its custodian, was, hence permitted to be taken on record by the trial Judge concerned, hence, when thereupon it is acquiesced to be an undisputed copy thereof (v) thereupon, when it has not been shown, that, merely on account, of, non existence or non tenderings or lack of proof, of, the photo copy, from the original, of, the initially appended agreement, with Civil Suit No.123 of 2002, hence sequelling, dismissal, of the aforesaid suit, (vi) thereupon, it cannot be concluded that in its purported misplacing, purportedly at the instance of the respondents/accused any purported wrongful loss or gain hence occurred vis-a-vis the litigant concerned.

5. Be that as it may, as aforestated, even the Civil Suit, filed before this Court by the litigant concerned, rather came to be dismissed as withdrawn. In the aforesaid civil suit, also the purportedly forged agreement, as also, purportedly introduced, upon, the file of Civil Suit No.123 of 2002 instituted before the learned trial Court concerned, is therein, too, contended to be relied upon. However, in the face of (a) accused/respondents' application cast under the provisions of Order 1, Rule 10 of the CPC, before, the learned trial Court concerned, during, the pendency of Civil Suit No.123 of 2002, wherewith the purportedly forged agreement was appended, rather hence coming to be dismissed; (b) besides the apposite civil suit instituted by the litigants concerned before this Court also coming to be dismissed, as withdrawn, sequel(s) thereof, is that hence no benefit came to thereupon accrue vis-a-vis the accused/respondents herein.

6. Apart from the above, the effect(s) of the aforesaid purported acquiescences, emanating, from the responses, afore referred, meted, by the accused/respondents herein vis-a-vis the show cause notice, issued vis-a-vis them, (i) does not at all carry forward any inference of theirs surreptitiously, for securing any benefits, theirs introducing it, emphatically, even in the file of Civil Suit No.123 of 2002, (ii) rather the effect of the aforesaid inference is squarely countervailed, by, the factum of the subsequent agreement being evidently not borne on the file of Civil Suit No.123 of 2002, (iii) rather it being borne, on, file of a Civil Suit, whereto stood assigned, a number other than the number assigned vis-a-vis the Civil suit, under, litigation inter se the parties at contest hereat. Consequently, bearing in mind all the aforesaid trite factum, it is difficult to make any conclusion (iv) that upon anvil of the subsequent purportedly forged agreement, the respondents intending, to make, any capitalization either in Civil Suit instituted before this Court, civil suit whereof came to be dismissed as withdrawn or theirs intending, to make any capitalization therefrom, in Civil Suit No.123 of 2002 instituted, before, the learned trial Court concerned, civil suit whereof also came to be dismissed. The simple reason, for making the aforesaid inference is anvilled upon (v) that apart from, the subsequent agreement containing clause (7), whereas, clause whereof, not, existing in the earlier agreement, initially appended with Civil Suit No.123 of 2002, there, occurring no recitals in the complaint, of, its not carrying

the signatures of any signatory thereto nor hence it came to be proven to be carrying the unauthentic signatures, of any, of the executants thereof, (vi) thereupon, per se, upon, the mere factum of clause (7) existing therein, clause whereof was amiss in the earlier agreement, no conclusion can prima facie be drawn of its granting, any strength, to, the espousal of the respondents herein, (vii) significantly, when only upon cogent proof, of, its unauthenticity(ies), on all fronts, an adversarial conclusion was drawable vis-a-vis the respondents herein. In aftermath, the disputed agreement dehors the aforesaid proof(s), is obviously inchoate AND premature.

7. For the foregoing reasons, there is no merit in the instant petition and it is dismissed accordingly. In sequel, the order impugned hereat, is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Raj Kumar & another .....Appellants/Plaintiffs.

Versus

Sh. Jassa and another .....Respondents/defendants.

RSA No. 509 of 2005.
Reserved on : 20.12.2017.
Decided on: 5th January, 2018.

**Specific Relief Act, 1963-** Section 5 - Suit for possession on strength of title – Entitlement - Plaintiff filing suit for possession alleged to be in unauthorized possession of defendants - Defendants claiming long possession and stating to have become owner by way of adverse possession – Trial Court decreeing suit - First Appellate Court dismissing appeal of defendants – RSA – Defendants relying upon electricity bills of superstructure to prove their adverse possession - However, period starting from date of filing application for installation of electricity meter by defendants falling short of statutory period of 12 years on date of suit - Held, on facts, defendants failed to prove their adverse possession over suit land - RSA dismissed - Judgments and decrees of lower courts upheld. ( Para 9 )

**Limitation Act, 1963 -** Section 3 & Article 65 – Limitation - Computation thereof - Held, Limitation starts running from day plaintiff feels aggrieved of acts of defendants – Principles of conscious, awakened waivers and abandonment(s) have due applicability in computing period of limitation. (Para 9)

For the Appellants: Mr. R.K. Gautam, Senior Advocate with Ms. Megha Kapoor Gautam, Advocate.

For the Respondents: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The plaintiffs/appellants herein instituted a suit for possession against the defendants. The plaintiffs' suit was dismissed by the learned trial Court. Being aggrieved therefrom, the plaintiffs' instituted an appeal before the learned First Appellate Court, thereupon, the latter Court pronounced a verdict in affirmation to the verdict pronounced by

the learned trial Court. Consequently, the plaintiffs' being aggrieved therefrom, now, concert to assail it before this Court, by instituting therefrom, the instant appeal before this Court.

2. The original plaintiff's case was that he owned and possessed the land comprised in Khewat No.513 min, Khatauni No. 862, measuring 3, Kanal 2 Marla, situated in revenue Village Dharampur, District and Tehsil Una, H.P. About a year anterior to institution of the suit aforesaid, the defendant encroached upon a portion of the suit land, measuring 2 kanal which denoted by letters ABCDE in the site plan. On the aforesaid land, the defendants raised a superstructure which is denoted by letters FGHIJ and shaded in red ink in the site plan. The plaintiffs requested the defendants to deliver the vacant possession of the suit land, but they refused to oblige. Hence this suit.

3. The defendant contested the suit of the plaintiff and filed written statement, wherein, their defence was of denial of the plaintiff's allegations qua the suit land being encroached by them about a year prior to the institution o of the suit. According to the defendants, they have been in possession of the suit land for the past more than 35 years and the revenue entries showing the plaintiffs to be the owners thereof are wrong. Claiming to have constructed a cattle shed over a portion of the suit land about 30 years and a pucca Kotha and a chhaper over the remaining portion about 15-16 years ago, the defendants averred that besides these structures, they installed a Belna (sugarcane cusher) on the suit land, and that in case the plaintiffs were proved to be the owners of the suit land, they have become owners thereof by way of adverse possession.

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

1. Whether the defendants have become owners of the suit site shown by letters ABCDE by way of adverse possession, as alleged? OPD.
2. Whether the plaintiff is estopped by his act and conduct to file this suit? OPD.
3. Whether the suit is not properly valued, as alleged? OPD.
4. 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 herein before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/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. This Court, admitted the appeal instituted by the plaintiffs/appellants, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the estoppel can operate against law and whether a real owner can be estopped from claiming the possession of his property from a stranger having no legal title over the property?

b) Whether the judgments and decrees passed by the courts below are perverse to the evidence on record?

**Substantial questions of Law No.1 and 2.**

7. Uncontrovertedly, the plaintiffs are recorded owners in possession of the suit property. The defendants, resisted the plaintiffs' suit by rearing a plea of theirs becoming owners of the suit land, by way of adverse possession. However, the aforesaid plea, reared, by the defendants vis-a-vis the plaintiffs' suit, for possession, was negatived by the learned trial Court. The defendants did not agitate the dis-affirmative findings rendered by the learned trial Court, upon, the issue appertaining to theirs purportedly becoming owners, of the suit land, by way of adverse possession, thereupon, the pronouncement recorded, upon, the apposite issue No.1 by the learned trial court acquires conclusivity, hence, the defendants are estopped to rear the aforesaid plea, before this Court.

8. Both the learned Courts below, had meted deference, to the factum of the defendants, (i) to the knowledge of the plaintiffs erecting a pucca Kotha and a chhapar 16-17 years, prior to the institution of the suit. The reason for both the learned Courts below imputing credence, to the aforesaid espousal, of the defendants, hence, emanated, from, theirs placing reliance upon Ex.DW4/A, exhibit whereof comprises an application, made, by one Jaswant Singh vis-a-vis the State Electricity Board, for installation of an electricity connection in the suit property. Apparently sanction thereto, was meted, in the year 1980, by the State Electricity Board, meteings whereof are borne by the defendant Jaswant Singh, as reflected by Ex. D-1 to D-7, defraying electricity charges, to the electricity board, for his consuming electricity, for the purpose applied for. The aforesaid inference would suffer negation, in case, evidence, is adduced by the plaintiff, (i) that the sanction meted by the electricity board vis-a-vis the application made by Jaswant Singh, not, appertaining to the structure raised by the defendants, upon, the suit khasra number, (ii) upon firm evidence being adduced, of, the electricity bills not appertaining to the suit premises, besides evidence being adduced, of, no electricity meter being installed for the purpose applied for, by one Jaswant Singh. However, the aforesaid evidence is grossly amiss, (iii) thereupon, on anvil of Ex.DW4/A, it is to be concluded, (iv) of, hence the year 1980, being the apt reckonable period, for, computing the commencement(s), of, the apt period(s) of limitation, (v) for the plaintiff, to, within 12 years therefrom, period whereof, is the mandated period, under, the apposite Section 65, of the Limitation Act, hence institute a suit for possession, (vi) thereupon, the plaintiffs' suit for recovery of possession, being instituted within 12 years, elapsing from 1980, renders it to fall within limitation. Even if, no issue appertaining to limitation, stood struck, by the learned trial Court, yet on an incisive reading of issue No.2, which stands extracted hereinafter:

> "2. Whether the plaintiff is estopped by his act and conduct to file this suit?OPD."

does bear out an inference, (vii) of, its including also the therein the issue of limitation, especially when, unless, the interdicting embargo of estoppel reared against the plaintiffs, by the defendants, has also been cogently proven, especially, for ousting, the plaintiffs, from, seeking rendition, of a decree of possession, tenable ouster(s) whereof, also obviously encompass an entwined therewith plea, of, the plaintiffs' suit being barred by limitation, "besides" reiteratedly pleas of estoppel AND, of, acquiescence(s) acquire validity only upon the period of limitation prescribed, for instituting a suit, for possession, hence evidently expiring, whereas, hereat it has not evidently expired. (viii) Imperatively, the effect, of, estoppels' arising from conscious waiver and abandonment(s), of, known rights by the aggrieved, take their fullest effect, only upon the mandated apposite period of limitation, hence, standing evidently elasped. Consequently, omissions, if any, of the learned trial Court, to strike any direct issue appertaining, to the plaintiffs' suit, being barred by limitation, is, not a gross infirmity, nor non striking thereof vitiates, the trial of the suit, (ix) importantly, when for reasons aforestated, the afore extracted apposite issue No.2, takes

within its ambit, also, for the reasons aforestated, the issue appertaining to the plaintiff's suit being barred by limitation. Moreover, when thereupon no apparent prejudice has been demonstrably visited upon the defendants, rather with theirs during the trial of the suit, being evidently aware of its non striking, thereupon, they are estopped to espouse before this Court, that, non striking(s) thereof, hence, prejudicing their right(s).

9. Be that as it may, the counsel for the defendants has contended with much force before this Court that the concurrent findings, rendered upon issue No.2, warranting vindication by this Court, given, the apparent fact, of the suit property neither adjoining nor abutting, the properties of the defendants, rather it being located at some distance therefrom, hence, (a)with the defendants openly and to the knowledge of the plaintiffs' raising construction thereon; (b) AND with theirs construction, as evident, from Ex.DW4/A, being raised in the year 1980; (c) thereupon, the inevitable inference accruable therefrom, is of the plaintiffs', consciously abandoning besides waiving their claims vis-a-vis the suit land and also theirs hence standing estopped, to rear the suit against them, for seeking rendition of a decree for possession. However, the aforesaid plea is not acceptable to this Court, given this Court concluding that, all conscious, awakened waivers and abandonment(s), of, plaintiffs' claim qua the suit kahsra numbers, yet not eroding their rights, to seek reclamation of its possession, unless, the plaintiffs' suit was instituted beyond the prescribed period, of, limitation. Contrarily, with this court concluding, of, the plaintiffs' suit, being, within limitation, thereupon, all the awakened abandonment(s) and waiver(s) of claim(s), by the plaintiffs vis-a-vis the suit khasra numbers, would work, no benefits vis-a-vis the defendants, for theirs barring the plaintiffs, the recorded true owners of the suit khasra number, to seek a decree for possession of the suit khasra number..

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court being not based upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned Courts below excluding germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the appellants/plaintiffs and against the defendants/respondents

11. In view of the above discussion, the instant appeal is allowed and the concurrent judgments and decree rendered by both the learned Courts below are set aside. In sequel the suit of the plaintiff is decreed AND the defendants are directed to handover vacant possession of the suit land measuring 2 kanals and as depicted in site plan Ex.P-1 being part of land measuring 3 kanals , 2 marlas, bearing Khewat No.513 min, Khatauni No.862 min, Khasra No.1747, situated in village Dharampur and District Una, H.P. 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.**

Sanjay Saini .....Appellant/Plaintiff.

Versus

State of H.P. .....Respondent/defendant.

RSA No. 199 OF 2005.
Reserved on : 22.12.2017.
Decided on : 5th January , 2018.

**Himachal Pradesh Tenancy & Land Reforms Act, 1972 (Act) -** Sections 104 - Conferment of proprietary rights - When cannot be availed - In previous suit, trial court holding defendant (present plaintiff) as 'non-occupancy' tenant over disputed land - In appeal, Additional District Judge modifying decree and holding defendant (present plaintiff) as lessee in possession under lease deed - Judgment attaining finality – Collector passing order for resumption of land in terms of lease deed - Plaintiff filing suit challenging order of Collector and claiming to have become owner of land under provisions of Act – Trial court dismissing suit - Decree upheld by first appellate court – RSA - Held, decree of Additional District Judge categorically held plaintiff as lessee under lease deed - Terms of lease empowering State to resume land leased to plaintiff – Plaintiff being evicted in accordance with law from disputed land – RSA dismissed. (Paras 7-9)

For the Appellant: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

For the Respondent: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal stands directed against the concurrently recorded verdicts, of, both the learned Courts below, whereby, they dismissed the suit of the plaintiff, wherein, he claimed rendition, of, a decree to the effect that the order, of, 25.3.1997 rendered by the District Collector, Bilaspur, H.P., whereunder, he directed, for, resumption, of possession of suit land measuring 2532.02 sq. meters, being hence declared to be illegal, void, contrary to the judgment and decree pronounced by the learned Additional District Judge Bilaspur, upon Civil Appeal No. 171-B/13 of 1986/85. Being aggrieved therefrom, the plaintiff/appellant herein concerts to assail, it, by preferring an appeal before this Court.

2. Briefly stated the facts of the case are that, the original plaintiff Sh. Mangat Ram, now represented by appellant, filed a suit for declaration, possession and mandatory injunction as against the defendant. It is averred that he filed a civil suit which was decided on 29.1.1985 by the learned Sub Judge, Bilaspur and the plaintiff was held to be tenant of the suit land. In appeal, the learned Additional District Judge, Bialspur, modified the judgment and decree to the extent that the plaintiff was held to be tenant in possession, but it was held that he cannot become owner in view of the provisions of Section 104 of the H.P. Tenancy and Land Reforms Act. It was further alleged that the defendant can not interfere in peaceful possession of the plaintiff except by the process of law. It was alleged that the defendant issued notice to the plaintiff for resumption of the land and the plaintiff filed the reply also. The Collector vide his order dated 25.3.1997 ordered to resume the possession of the suit land and further issued warrant of possession. It was alleged that the said order is malafide and the plaintiff cannot evicted under the law. Hence the suit filed by the plaintiff.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections inter alia maintainability, res judicata, cause of action and that the plaintiff had not alleged the complete facts in regard to an execution of application filed earlier in regard to the suit land. On merit, it was pleaded that the plaintiff was dispossessed on 29.3.1997 from the suit land in accordance with law and he is not entitled to any relief claimed.

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

1. Whether the order dated 25.3.1997 passed by the District Collector, Bilaspur, is wrong, illegal, null and void, as alleged? OPP
2. Whether the plaintiff is entitled to the relief of possession of the suit land, as alleged? If so, in what manner? OPP.
3. Whether the suit is not maintainable in the present form? OPD.
4. Whether the suit is barred under Section 11 of the C.P.C.? OPD
5. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD.
6. Whether the plaintiff has been evicted from the suit land on 29.3.1997 in accordance with law? If so, its effect? OPD.
7. Whether this Court has no jurisdiction to decide the case, as alleged? OPD.
8. Whether the suit is bad for non-service of notice U/S 80 CPC, on the defendant, as alleged? OPD.
9. Whether the suit land has been improved by the defendant after dispossessing the plaintiff from it, as alleged? If so, its effect? OPD.
10. 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, 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 30.05.2005, 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 proceedings for termination of the tenancy was to be regulated under the provisions of H.P. Tenancy and Land Reforms Act, because the learned Additional District Judge had held the plaintiff late Mangat Ram to be tenant over the land in suit, as per judgment dated 3.5.89?

**Substantial question of Law No.1.**

7. In sequel to a conclusive binding verdict recorded by the learned Additional District Judge, Bilaspur, upon, Civil Appeal No. 171-B/13 of 1986/85, verdict whereof borne in Ex. P-3, wherein, (i) the learned Additional District Judge concerned, made, a declaration qua the deceased plaintiff's possession, upon, the suit khasra numbers being in the capacity of a lessee, under, a lease deed executed inter se the deceased plaintiff vis-a-vis the defendant, (ii) also he in the operative part, of, Ex.P-3, injuncted the defendant/state of Himachal Pradesh, from, interfering in the possession of the plaintiff upon the suit land except by adoption of due process(es) of law, (iii) hence, thereupon, the District Collector concerned, in consonance with the apposite instrument of lease deed executed inter se the deceased plaintiff, with, the defendant/State of Himachal Pradesh, instrument of lease whereof is borne in D-2, tritely upon anvil of clause (f) thereof, provisions whereof stand

extracted hereinafter, wherein, contemplations are held, of, the lessee on being served with one month's notice, his being entailed with an obligation, to vacate the leased property, hence, under EX.D-3, issued one month's notice upon the lessee. Clause (f) of the lease deed, comprised in Ex. D-2, is reproduced as under:-

> "(f) The lessee shall vacate the leased premises on one month's notice requiring him to do so at any time and within that period he (lessee) will have to remove his materials or structures from the land failing which he shall be liable to ejectment without any claim for any compensation."

As apparent, from, an endorsement occurring, on the second page of Ex. D-3, it was evidently served upon the lessee, AND thereafter, the authority concerned, ordered for issuance of warrants of possession vis-a-vis the suit land. In consequence(s) to valid execution, of apposite warrants, of possession, hence, possession of, the suit land was taken, from the lessee. The extant suit, of, the plaintiff, rears, a plea for setting aside the contractual notice borne in Ex. D-3 also embodies therein relief, for, setting aside the orders recorded by the Collector concerned, orders whereof are borne in Ex., D-1.

8. Be that as it may, the learned counsel appearing for the appellant has contended with vigour, (i) that the mandate, of, the learned Additional District Judge concerned, pronounced in Civil Appeal No. 171-B/13 of 1986/85, verdict whereof, is, comprised in Ex. P-3, voices a categorical declaration, of, the lessee being construed to be a "gair maurusi" upon the suit land, under, the defendant/State, (ii) whereafter, he contends that resumption(s) or reclamation(s) of, possession of the suit property, enjoined reverence being meted vis-a-vis the apposite provisions borne in the Himachal Pradesh Tenancy and Land Reforms Act, 1972, rather than, an inapt invocation by the Collector concerned, of the afore extracted clause, borne in the instrument of lease executed vis-a-vis the suit land inter se the lessee/deceased plaintiff and the defendant/State. However, reading(s) of the operative paragraph No.11, of, the verdict pronounced by the learned Additional District Judge, Bilaspur in Civil Appeal No. 171-B/13 of 1986/85, verdict whereof borne in Ex.P-3, paragraph No.11 whereof stand extracted hereinafter:-

> "11. In view of the foregoing discussion, I conclude that the plaintiff is in possession of the suit land as a tenant under the defendant, the State of H.P. However, it is held further that the plaintiff has not become owner of the disputed land under the provisions of H.P. Tenancy and Land Reforms Act, 1972. Consequently, the appeal is partly accepted and the judgment and decree dated 29.1.1985 passed by Shri R.K. Verma, Sub Judge, Bilaspur are modified. It is declared that the plaintiff is in possession of the disputed land as tenant under the lease dated 1.2.1965 under the defendant, the State of H.P. The defendant, the state of H.P. is restrained from interfering with the possession of the plaintiff over the disputed land except under the due process of law. Parties shall bear their own costs. The judgment and decree under appeal shall stand modified accordingly. Decree sheet be prepared accordingly."

contrarily makes a display, of, the learned Additional District Judge, Bilaspur, making, a clear echoing therein of the plaintiff not being vested with the statutory proprietary rights vis-a-vis the suit land, especially upon purported working(s), of the apposite statutory provisions vis-a-vis him, provisions whereof are embodied in the Himachal Pradesh Tenancy and Land Reforms Act, 1972. Contrarily, a vivid declaration, is, made therein of the plaintiff's possession vis-a-vis analogous suit khasra number(s) therein vis-a-vis the suit khasra numbers herein, (i) being, in the capacity of a tenant, importantly, under an

instrument of lease, of, 1.2.1965, executed vis-a-vis the suit land inter se him and the State of H.P. (ii) Furthermore, when in Ex.P-3 it is also ordained, of, the defendant/State being restrained, from, interfering in the plaintiff's possession vis-a-vis the suit land, except by its adopting due process of law, (iii) thereupon, the learned Collector concerned by invoking the aforesaid apposite clause (f), borne, in the apposite instrument of lease embodied in Ex.D-2, also hence his in consonance therewith, evidently issuing, one month's notice upon the lessee, notice whereof also stood evidently served upon the latter, as borne by an endorsement existing on the second page of Ex. D-3, (iv) thereupon, the subsequent thereto resumption, of, possession, of, the suit land, by the defendant/State of H.P., under validly executed warrants of possession, from, the lessee, cannot be, construed to be suffering from any illegality. Even if, there was any illegality, in the Collector concerned, relying upon clause (f) of Ex. D-2, thereupon, it was open for the lessee, to, adduce evidence in respect thereof, (v) especially qua the aforestated apposite clause being untenable, besides being arbitrarily invoked by the Collector concerned. However, the aforesaid evidence remains unadduced. Contrarily, the only ground reared in the plaint, for, reversing the verdict recorded by the Collector concerned, verdict whereof is borne in Ex. D-1, (vi) is of Ex. D-2, rather vesting right(s) in the lessee, for, his ejectment from the suit land, occurring only in consonance, with, the provisions borne in the H.P. Tenancy and Land Reforms Act, (vii) espousal whereof, for all the reasons recorded hereianbove, are extremely frail, thereupon, with the Collector concerned, pronouncing apposite valid orders, orders whereof is borne in Ex.D-1, hence, subsequent thereto resumption of possession, of the suit land, by the defendant/State, under validly executed warrants, of, possession, from, the lessee/plaintiff, is imbued with formidable legal tenacity.

9. 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, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court did not exclude germane and apposite material from consideration. Consequently, the substantial question of law No.1 is answered in favour of the defendant/respondent and against the plaintiff/appellant.

10. 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.**

Sohan Singh .....Appellant/defendant.

Versus

Shri Thisu (deleted) & Smt. Kamla .....Respondents/Plaintiffs.

RSA No. 317 of 2006.
Reserved on : 29.12.2017.
Decided on: 5th January, 2018.

**Code of Civil Procedure, 1908** - Order XXII Rule 4 - Representative of deceased party – Whether entitled for the benefits accruing under Decree?- Trial court holding 'K' as daughter of 'R' entitling her to succeed to his estate - Further holding Will set up 'SS' not duly proved - In appeal, Additional District Judge holding 'K' as not daughter of 'R' and finding 'T',

brother of 'R' having succeeded to estate of 'R' – Finding of ADJ not challenged by 'K'- RSA - During pendency of RSA, 'T' dying and ordered to be deleted from array of parties on ground that his estate duly represented by 'K', co-respondent - Held, 'K' entitled to succeed to suit land after death of 'T'.(Para 8)

For the Appellant: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the Respondents: Nemo.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The plaintiffs' suit, constituted before the learned trial Court, was, decreed by the learned trial Judge. The learned Trial Judge pronounced findings adverse vis-a-vis defendant, one, Sohan Singh, vis-a-vis the testamentary disposition of deceased testator Ranu, testamentary disposition whereof is borne in Ex.DW5/A, qua it being not proven to be validly and duly executed also the learned trial Court recorded a firm conclusion qua co-plaintiff Kamla Devi being born from the loins of deceased Ranu, from the latter's marriage with one Kanchu. The defendant being aggrieved therefrom instituted an appeal before the learned First Appellate Court. The latter Court affirmed the disaffirmative findings recorded by the learned trial Judge, upon, the issue, appertaining to the valid and due execution of the testamentary disposition executed by deceased testator Ranu, testamentary disposition whereof, is, comprised in Ex.PW5/B, whereas, it reversed findings recorded by the learned trial Court qua co-plaintiff being born, from, the loins of lions of deceased Ranu, from his marriage with one Kanchu. The learned First Appellate Court in the operative part of the judgment concluded that co-plaintiff Tishu being the brother of deceased Ranu, hence, his being to the exclusion of defendant Sohan Singh, thereupon, entitled to, on opening of succession vis-a-vis the deceased's estate, hence succeed it. 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 plaintiffs have filed the suit for declaration and permanent injunction with the averments that plaintiff No.1 is brother and plaintiff No.2 is daughter of Sh. Ranu Ram. Plaintiff No.1 along with said Sh. Ranu is recorded owners in possession of the land comprised in Khata No.28, Khatauni No.39, Khasra Nos. 639 and 649, measuring 8-13 bighas situate in Mouza Tiari, Tehsil, Chopal, District Shimla. Sh. Ranu Ram has died 27 years back and plaintiff No.2 was minor at that time. The defendant taking undue advantage of the illiteracy of plaintiff No.1 and minority of plaintiff No.2 prepared a forged and false Will of 23.05.1980 in the absence and without the consent of Ranu Ram and presented the same before the revenue authorities in years 1982/1984 for incorporation of the revenue entries in his favour, which was rejected on 11.11.1987 by the A.C. 1st Grade on the ground that the same be got registered under **Section 40/41 of Indian Registration Act.** Plaintiff No.2 had also raised objections through her brother that the "Will" was forged. The defendant slept over his right and after a gap of about nine years initiated proceedings under Section 40-41 and got the 'Will' registered, falsely in the absence of the plaintiff and that the same is forged, wrong, incorrect and contrary to the facts and liable to be set aside. The defendant along with one Murat Singh instead of perusing the "Will" preferred an application for correction of revenue entries under Section 37 of the H.P. Land Revenue Act before the A.C. 2nd Grade, Chopal on 22.03.1993, with regard to the suit land. The defendant in the proceedings admitted the status of the plaintiff No.1 as legal representative of Sh. Ranu Ram. Mutation No.471 of

14.06.1996, on the basis of "Will" is wrong, illegal and incorrect. The defendant was threatening to dispossess the plaintiff from the suit land. So, the plaintiffs have filed the instant suit.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections qua, maintainability, estoppel, limitation and non joinder of necessary parties. ON merits, the defendant has averred that the suit land is owned and possessed by the defendant to the extent of ½ share and the remaining suit land is in possession of Sh. Murat Singh. The entries in favour of plaintiffs are contrary. Sh. Ranu Ram executed a valid Will during his life time in sound state of mind to the knowledge of the plaintiff No.1 and the general public. The Will was probated by the defendant in accordance with the provisions of Indian Registration Act and mutation No. 471 dated 14.06.1996 was validly attested. The order of the Assistant Collector 2nd Grade was legal. Sh. Ranu along with plaintiff No.1 had left the village. Sh. Murat Singh and also filed a suit against the plaintiff in respect of half share in the suit land.

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

1. Whether the 'Will' dated 23.5.1980 executed by the deceased Ranu in favour of defendant is forged as alleged?OPP.
2. Whether the mutation No.471 dated 14.6.1996 is wrong and incorrect, if so, its effect?OPP.
3. Whether the plaintiff No.2 is a daughter of deceased Ranu as alleged?OPP.
4. Whether the plaintiff is entitled for permanent injunction?OPP.
5. Whether the suit is within time?OPP.
6. Whether in the alternative the plaintiffs are entitled for decree of possession? OPP.
7. Whether the deceased Ranu executed the 'WILL' legal and valid will dated 23.5.1980 in favour of defendant, as alleged? OPD.
8. Whether the plaintiffs are estopped to file the suit on account of their acts of omission and commission?OPD.
9. Whether the suit is maintainable in the present form?OPD.
10. Whether the suit is bad for non joinder of necessary parties?OPD.
11. Whether the suit has not been valued properly for the purpose of Court fee?OPD.
12. Relief.

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

6. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal before this Court 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 26.11.2007, 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:-

> 1. Whether the learned Sub Judge below having held that respondent No.1 Smt. Kamla was only legal heir of late Sh. Ranu, therefore, in the absence of any appeal, on behalf of respondent No.1, Sh. Thisu, such findings cannot be reversed in appeal, as filed by the defendant, by the learned Addl. District Judge, whereby he has held that respondent No.2 was not daughter of Sh. Ranu and therefore, he had exclusively succeeded deceased Sh. Ranu?
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> 2. Whether the findings of the trial court holding respondent No.2 as daughter of Sh. Ranu and for this reason that she is owner in possession of this land, are without legal and valid basis and in the appeal Learned Addl. District Judge below reversed those findings in the absence of any valid reason whereby respondent NO.1 has been held to be owner in possession of suit land?
>
> 3. Whether respondents have failed to lead evidence in support of their claim to be in possession of the suit land and on the contrary appellant have pleaded and proved on record that he is in possession of the suit land, therefore, decree of injunction could be passed against him and findings by both the Courts below on the point of ownership and possession of the suit land are self contradictory erroneous and illegal?

**Substantial questions of Law No.1 to 3.**

7. None of the substantial question of law formulated hereinabove appertain to the invalidity of the pronouncements concurrently recorded by both the learned Courts below vis-a-vis the testamentary disposition of deceased Ranu, borne in Ex. DW5/A, being not proven to be validly and duly executed, pronouncements whereof are founded, upon, want of emergence, of, evidence in satiation of apposite thereto statutory principles, enshrined in Section 63 of the Indian Succession Act. Consequently, the findings recorded by both the learned Courts below vis-a-vis Ex.DW5/A being not cogently proven to be validly and duly executed, hence, acquired binding and conclusive effect.

8. Be that as it may, with RSA No. 361 of 2007, constituted before this Court by one Kamla Devi, a co-plaintiff along with Thisu in the apposite Civil Suit, standing dismissed for want of prosecution, thereupon, the findings adversarial vis-a-vis co-plaintiff Kamla Devi recorded by the learned First Appellate Court vis-a-vis hers being, not, begotten from the loins, of, one Ranu, from the latter's marriage with one Kanchu, also acquire(s) conclusivity and binding effect. (i) Nowat, it being proven of the defendant Sohan Singh holding, no, relationship with the deceased rather with proof emanating of co-plaintiff Thisu being the brother of deceased Ranu. (ii) Besides, upon, co-plaintiff Tishu's demise occurring, during, the pendency of the instant RSA before this Court, his name being ordered to be deleted by this Court, (iii) under, orders recorded on 30.09.2016, hence, for rendering a befitting verdict, enjoin(s) an imperative allusion thereto. (iv) Readings, of the, apposite orders, unveils of the reason prevailing with this Court, for, ordering for deletion of the name of deceased Thisu, from, the array of respondents, in the extant appeal, being rested upon, the estate of deceased Thisu, being represented by surviving respondent No.2, one, Kamla, (v) hence, the benefits of the decree rendered vis-a-vis deceased respondent No.1 Thisu, obviously ought to accrue vis-a-vis respondent No.2, given the latter on the former's demise hence representing his estate. As aforestated, with both the learned Courts below, making, a firm binding pronouncement qua invalidity, of, execution of Ex.DW5/A by deceased Ranu vis-a-vis the defendant, (vi) therefrom with defendant Sohan Singh, naturally holding no locus standi vis-a-vis the estate of deceased Ranu, besides obviously vis-a-vis the suit

property, rather the estate, of, co-respondent No.1, since deleted from the array of respondents, being for the reasons aforestated, now represented by respondent No.2, consequently, the benefits of the decree ought to accrue vis-a-vis respondent No.2 Kamla Devi. (vii) Dehors the infirmity, if any, in the findings returned by the learned First Appellate Court, upon, the issue appertaining to Kamla not being born, from the loins of Ranu, from the latter's marriage with Kanchu.

9. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court ahas not excluded germane and apposite material from consideration. All the substantial questions of law are answered in favour of the respondent(s) and against the appellant.

10. In view of the above discussion, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgment and decree rendered by the learned First Appellate Court in Civil Appeal No.150-S/13 of 2000 is affirmed and maintained. 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.**

M/S Himachal Co-operative Non Agriculture Thrift and Credits Society Limited
.....Paintiff/non-applicant.

Versus

Shri Raj Kumar Mittal and another ....Defendants/applicants.

OMP No. 174 of 2018 in
CS No. 23 of 2018
Reserved on: 2.11.2018
Decided on : 20.11.2018

**Code of Civil Procedure, 1908 -** Order XXXVII Rule 3(5) – Summary suit - Leave to defend – Grant of - Plaintiff society filing recovery suit on basis of cheque issued by defendant - Criminal proceedings qua dishonour of aforesaid cheque also pending before Judicial Magistrate - Defendant seeking leave to defend on ground that cheque was given towards security and writings on it are forged – Held - Court may grant unconditional leave to defend suit when defendant is able to establish that he has good triable defence – In appropriate cases, Court may grant leave to defend subject to defendant making payment in Court or otherwise securing plaintiff's claim – However, where defence put forth by defendant is illusory or moonshine then by granting leave to defendant, statutory holistic purpose of Order XXXVII Rule 3(5) would rather be defeated – On facts, defendant not found having taken plea of 'security cheque' or of 'forgery' before criminal court – Application for leave to defend declined. (Paras 20 to 23).

***Cases referred:***

State Bank of Hyderabad Vs Rabo Bank, (2015) 10 SCC 521

Sunil Enterprises and anr Vs SBI Commercial & International Bank Ltd., (1998) 5 SCC 354

For the plaintiff/non-applicant: Mr. B.C Negi, Sr. Advocate with Mr. N.K Bhalla and Mr. Dalip K Sharma, Advocates.
For the defendants/applicants: Mr. P.S Goverdhan, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, J**

This order will dispose of an application, cast under the provisions of Order 37 Rule 3 (5) of the Code of Civil Procedure, as, moved before this Court, by the defendants/applicants (hereinafter referred to as the "defendants"), wherethrough, they seek hence leave to defend the summary suit, instituted by the plaintiff/non-applicant (hereinafter referred to as the "plaintiff").

2. The plaintiff has instituted the instant suit, cast under the provisions of Order XXXVII, of the Code of Civil Procedure, seeking there-through, the, recovery of suit amount. An averment is embodied in the plaint, qua the plaintiff being a duly registered co-operative Society, registration whereof, is, entered at Sr. No. 687, in the apt records, maintained by the Registering Authority concerned. The plaint has been instituted by the duly authorized representative of the society. The suit has been drawn, on, anvil of cheque bearing No. 644324 of 6.7.2016, drawn on State Bank of India, Solan, embodying therein a sum of Rs. 45,50,000/-, cheque whereof, upon, its presentation before the Bank concerned, was refused to be honoured, on account of " Drawer sign not as per mandate". Photocopy of the Cheque is appended with the plaint as Annexure P-3. In sequel thereto, the apt statutory notice was served, upon, the defendants. Notice whereof, is, borne in Annexure P-5, and, upon the defendants not meteing compliance thereto, a complaint embodied, in Annexure P-6, was, instituted before the Court of Judicial Magistrate, Ist Class, (II), Solan. Clause (a) of Paragraph 5 of the plaint, details the amount(s) taken as loan, by the defendants, from the plaintiff.

3. Succinctly, the dishonored cheque borne in Annexure P-3, is, espoused to be carrying hence sum(s) of money arising, towards a legally enforceable debt. The plaintiff, through the instant plaint, cast under the afore provisions, has, upon Annexure P-7, Annexure whereof comprises a notice issued by the defendants, hence, reared a vehement contention, before this Court, (i) that the recitals borne therein, being, readable as admission(s) of the defendants, vis-a-vis, issuance, of, the afore dishonored negotiable instrument, borne in Annexure P-3, being towards a legally enforceable debt, hence, a verdict rather summarily decreeing the plaintiff's suit being pronounced, upon, the plaintiff.

4. When notice was served, upon the, defendants, the instant application, cast under the provisions, of, Order 37 Rule 3(5) of the Code of Civil Procedure, stood instituted before this Court, by the defendants, wherethrough, they seek leave of the Court, to, defend the suit, and, obviously espousals' contrary to the ones embodied in the plaint, stand reared therein. In paragraph 2 of the afore OMP, a contention is reared qua some borrowings, being made by the defendants, from the plaintiff society, and, the entire borrowings being liquidated, by the defendants, and, also disclosures rather holding concurrence, with, the afore averment, hence, also occur in the apt statement, of, account prepared up to 31.3.2016. A further averment is borne therein qua liquidation of the loan amount being made, either, through RTGs or through cheques, hence, per se, the defendants contest, that, the apt liquidation not occurring through cash payments. A denial is borne in afore OMP qua the amount embodied in the cheque aforesaid, being, not realizable, from, the defendants, hence, the suit being not maintainable, for, its being hence summarily decreed.

5. A contention, vis-a-vis, the suit being not maintainable, within, the ambit, of, Section 72 of the Himachal Pradesh Co-operative Societies Act, 1968, is, also reared, conspicuously qua the condition set-forth therein, remaining un-complied with, by, the plaintiff. Further more, the afore dishonored cheque, is, contended by the defendants to be a part of a series of blank security cheques, issued, by the defendants, to, the plaintiff before March, 2016. Moreover, it is also contended, that, the issuance thereof being under pressure standing exerted, upon, one Raj Kumar Mittal, by one Chander Pal, Secretary of the Society. Also the details occurring on the back side of the cheque, are, averred to be made by the plaintiff, as such, the cheque is alleged to be forged. A cheque in addition, from one amongst, the series of blank cheques, and, carrying a sum of Rs. 9 lacs, stands contended to be presented for encashment by M/S A.R Associates, of which one Raj Kumar, is, stated to be a partner. Moreover, the defendants also aver, in, the afore OMP, qua forbidance being made upon one Chander Pal , from, making misuse of certain blank cheques, A notice is stated to be issued on 10.6.2016, whereunder, a request for returning, the, security cheques, was made. However, it is further averred that the plaintiff failed to do so, rather, he has instituted the instant summary suit.

6. The plaintiff meted reply to the application, and, contended that given the averments, made, in the summary suit, and, with the afore rendered admission, of, the defendants, rather renders the suit amount, to be an undisputed claim, and, with the extant summary suit being backed, by an apparent statutorily holistic purpose, and, also with the instant suit, hence satiating, all thereof apt statutory ingredients,(i) thereupon the espoused leave being granted to the defendants, would rather render the afore holistic statutory purpose hence being defeated.

7. In opposition to the statement of account, appended with the application, the, plaintiff has appended with its apt reply, hence Annexure R-1, annexure whereof, comprises the statement of account appertaining, to, the period from 1.4.2015 to 31.3.2017, wherethrough, rather ,the, disclosures borne in the prior thereto statement of account, ending up to 31.3.2016, hence stand negativated.

8. The defendants while meteing rejoinder to the reply furnished by the plaintiff, contended, that Annexure R-1 appended with the reply to the afore OMP, is, bereft of any vigor, and, is a false document.

9. Before proceeding to determine, the, validity of the aforesaid submissions addressed before this Court, by the learned counsel for the parties, it is deemed incumbent, to bear in mind the expostulations of law, as are enjoined to be applied thereon, for hence making a conclusion, qua, the espoused leave being accordable or refusable. The trite expostulations of law, are, embodied in a judgment rendered by the Hon'ble Apex Court in Case titled as **Sunil Enterprises and another versus SBI Commercial & International Bank Ltd., reported in (1998)5 SCC 354,** whereunder the Hon'ble Apex Court, has set forth the hereinafter extracted expostulations of law:-

> "4(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured."

10. The afore expostulation of law are further elaborated and reiterated, in a judgment rendered, by the Hon'ble Apex Court in case titled as **State Bank of Hyderabad versus Rabo Bank, reported in (2015) 10 SCC 521,** relevant paragraphs 15 to 17 whereof are extracted hereinafter:-

"15. As regards the entitlement of a defendant to the grant of leave to defend, the law is well settled long back in the year 1949 in **Sm. Kiranmoyee Dassi Vs. Dr. J. Chatterjee, AIR 1949 Cal 479,** in the form of the following propositions:

If the defendant satisfies the Court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign the judgment and the defendant is entitled to unconditional leave to defend.

If the defendant raised a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately made it clear that he has a defence, yet, shows such a stage of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff`s claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.

16. It is also noticed that the law as enunciated above, has been followed by the Courts in several cases **[See also : Santosh Kumar Vs. Bhai Mool Singh, AIR 1958 SC 321, Milkhiram (India) (P) Ltd. Vs. Chamanlal Bros, AIR 1965 SC 1698, Mechelec Engineers & Manufacturers Vs. Basic Equipment Corpn., (1976) 4 SCC 687 and Sunil Enterprises & Anr. Vs. SBI Commercial & International Bank Ltd. (1998) 5 SCC 354].**

17. An analysis of the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, the plaintiff is entitled to leave to sign judgment."

11. For apt application(s), of, the inherent apt nuance, of, the afore expostulations of law, upon, the competing espousals hence reared by the plaintiff, and, for hence validating or invaliding them, rather also enjoins eruption, of, apt material personifying qua (a) an evident bonafide defence being reared by the defendants, whereupon, the defendants being enjoined to be granted, the espoused leave to defend; (b) qua the afore rearings of defence, within, the afore expostulations being not a positive good defence; (c) rather the espoused defence being both a bonafide or a reasonable defence, to the plaintiff's claim, (d), and, with imminent inference(s) being ensuable therefrom qua, upon, the defence being put to trial, there being every likelihood of emergence, of evidence, thereupon an apt

inference being erectable qua the defendants hence rearing a bonafide or a reasonable defence; (e) upon the defence being illusory or sham or practically moonshine, thereupon, the plaintiff being enjoined, to seek leave to sign the judgment, and, the defendants being dis-entitled to seek leave to defend.

12. Further more, even if the afore expostulations of law, stand satisfied by the plaintiff, and, when hence the plaintiff is enjoined to be granted, leave to sign the judgment yet, the Court may proceed to protect the plaintiff, by allowing the defence, to proceed, yet subject, to, as a measure, of, mere clemency being bestowed, upon, the defence, comprised in the directions being made, upon, the defendants, to, give an adequate security, vis-a-vis, the suit amount. Within the ambit of the afore expostulated parameters of law, this Court proceeds to determine the factum, qua, the admission, if any, of the defendants, as embodied in the notice issued by the defendants, rather hence, boosting a firm conclusion, that, the amount borne in the dishonored cheque, being an undisputed amount, (i) hence for obviating the suit being put to a procrastinated trial, upon, the apt leave being meted to the defendants, (ii) thereupon this Court rather would proceeding to grant leave, to the plaintiff to sign the judgment, (iii) also, it is enjoined to make discernments, from, the afore rendered material qua whether the defendants rather satiating the afore parameters, whereafter, this Court may proceed to grant the espoused leave to it/him/them.

13. The most pertinent documentary evidence, existing on record, whereon reliance is placed by the plaintiff-non applicant, to, contend that it carries apt admission(s), of, the defendants/applicants, is, embodied in Annexure P-7, admission whereof occurs, in, the hereinafter extracted apt paragraph, borne in paragraph 1 thereof.

> "That Shri Raj Kumar Mittal my aforesaid client being partner of first two concerns and being Director of two Private Limited Companies took loan on different dates from your society and company in order to advance business of the aforesaid concerns and companies. The said loans were taken in individual capacity and also as partner of the said concerns and companies. In order to secure repayment of loans taken on different dates Shir Chander Pal Aggarwal being officials of the Society and company used to take blank cheques signed by my said client and without filling the name of the society, company or any individual. However, whatever amount is used to be taken as loan was shown in the said cheques. My client also issued blank cheques duly signed by him in his individual capacity from his saving account which were handed over to Shri Chander Pal aforesaid. Further blank stamp papers duly signed by my client as partner of the aforesaid concerns and also in his individual capacity were obtained by your society and company and handed over to Shri Chander Pal official of the society and company."

14. However, subsequent thereto a recital occurs, in Annexure P-7, that, certain blank cheques being handed over to one Chander Pal Aggarwal, and, from one amongst the afore blank cheques, a cheque carrying a sum of Rs. 9 lacs, standing presented on 9.6.2016 by one Amit Aggarwal son of Chander Pal Aggarwal, and, hence an echoing also occurs therein that the afore misdemeanor(s) of the son of Mr. Chander Pal Aggarwal, rather rendering open an inference, that the cheque at hand, being one amongst the blank chques, and, it not carrying any undisputed realisable or decreeable amounts' of money.

15. Further more, reliance is placed, upon, notice borne in Annexure P-5, issued by the counsel for the plaintiff, and, served upon the defendants, conspicuously, prior to the institution of a complaint under Section 138 of Negotiable Instruments Act, espousals borne wherein, are, in concurrence with the recitals, borne in the complaint, and, with the

defendants not meteing any reply thereto, hence subsequent thereto exculpating echoings, as, are borne in Annexure P-7, being an afterthought, and, a sheer concoction, and, also not rendering hence effaced, the, effect of the afore sentence, occurring in paragraph 1 of Annexure P-7.

16. Nowat is to be gauged, the respective efficacy(s) of the afore submission imperatively, on, anvil of the afore apt expostulated parameters,.

17. The dishonored negotiable instrument is issued, on, 6.7.2016, and, the statement of account, appended with the the application, rather appertains to the period much prior thereto, in as much, as, qua 31.3.2016. Consequently prima-facie, the statement of account appended with the application, at hand, with disclosure occurring therein qua no loan amounts yet pending against the defendants rather is rendered insignificant. Also, any contest qua Annexure R-1, appended with the plaintiff/non-applicant's reply, conspicuously vis-a-vis, its authenticity may not be relevant. Contrarily when it constitutes an authenticated copy of the statement, of, account, and, when, it, hence holds proximity, vis-a-vis, issuance of the dishonored negotiable instrument, (i) and, when it assumes an enhanced aura of validity given, upon, a combined reading of the apt disclosures' made therein vis-a-vis cheque borne in Annexure P-3, and, with notice borne in Annexure P-5, and, also, (ii) when its' issuance occurs in contemporaneity, vis-a-vis, issuances of cheque borne in Annexures P-3 and of notice borne in P-5 (iii) thereupon unveilings rather emerging qua inter-se congruity occurring inter-se all the aforesaid Annexures.

18. Reiteratedly, in making the aforesaid conclusion, the factum of notice, comprised in Annexure P-5, remaining un-replied, by the respondent/plaintiff, thereupon the contents thereof, do acquire an aura of validity, (i) and, further more when it is issued in contemporaneity, vis-a-vis, statement of account, (ii) also, thereupon all the afore annexures acquire an alike aura of sanctity. Even though, Annexure P-7 carries therewithin, the, afore extracted apt sentence, and, with the afore Annexure standing issued, on 10.6.2016, yet the effect of the afore sentence, does rather avail an inference, that, certain borrowings, being made by the defendants, from the plaintiff, and, for liquidation thereof, the defendants issuing cheques, and, the amount borne in the cheques rather remaining un-liquidated.

19. Since the defendants hence rear a plea, that, all the liquidations hence occurring through, cheques or through RTGs mode, and, not through cash, (i) thereupon when Annexure R-1 appended with the reply, does bear proximity vis-a-vis, issuance of the dishonored negotiable instrument, (ii) thereupon, the afore sentence occurring in Annexure P-7, tantamounts to an admission qua the sums borne therein, being towards liquidation of outstanding borrowing, as, made by the defendants from the plaintiff.

20. Even otherwise the defendants prima-facie appear to raise various submissions, that, certain security cheques being issued by them to the plaintiff, and, that the figures, and, the scribings occurring therein being, not, in his/their hands. However, the defendants did not adduce any evidence qua therewith, before, the learned trial Magistrate concerned nor any disclosures stand made, in the apt testification rendered therebefore, qua the afore trite fact, hence coming under contest. The further effect thereof, is, that the espousal occurring in paragraph 2 of Annexure P-7, qua son of one Chander Pal Aggarwal, misusing a cheque for a sum of Rs. 9 lacs, comprised in his presenting it, before the Bank concerned, stands falsified, (i) besides for the reasons, that, it appertains to a period much prior to the period of issuance, of, the dishonored instruments, (ii) and, it carrying an amount lesser than the amount borne, in, the dishonored instrument, hence, also

diminishes the vigor of the espousal, of, the defendants, (iii) predominantly also given despite the witnesses' concerned, of the plaintiff, while rendering testifications, before, the learned trial Magistrate concerned, hence making echoings' qua the apt statement of account being available (iv) yet the the defendants not making adduction(s) thereof before the Court, whereas the afore adduction of statements of accounts, would facilitate the Court, in, drawing an inference qua the defendants' admission being negatived or effaced, whereupon, non-adduction thereof, gives, rather strength to the afore admission.

21. Be that as it may, for all the assigned reasons, the defendants have abysmally failed, to, establish qua theirs holding a reasonable, fair and bonafide defence, and, also grossly failed, to, at this stage ,rear a ground that if the afore defence(s) are put to trial, theirs bringing forth hence evidence, (i) whereupon, an inference may be drawable of their defence, being workable or being genuine or holding sanctity, (ii) contrarily, thereupon it is to be concluded that the apt leave being refusable or unaccordable to the defendants.

22. The defendants contest qua with the apt statutory notice contemplated in Section 72 of the Cooperative Society Act, hence remaining evidently un-issued,thereupon the suit being not maintainable. However, the aforesaid contention would gather weight, upon, the the defendants rather committing misconduct of criminal breach of trust, vis-a-vis, plaintiff's funds, and, hence his/theirs misconduct touching, upon, the management and business of the plaintiff society. However the aforesaid evidence is amiss, contrarily when the defendant is a loanee, of, undisputed sums of money, thereupon, even when the statutory notice remained un-served, prior to the institution of the instant summary suit, yet, apt leave being grantable rather to the plaintiff.

23. Further more, the aforesaid defence is illusory or moonshine, and, further if given the afore expostulated condition precedents for, hence the apt leave being granted, when remain hence unsatisfied, thereupon, the, statutory holistic purpose, would rather be defeated, upon, the suit being put to the rigors, of, a procrastinated trial.

In view of the above, the application stands disposed of.

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

M/S Himachal Co-operative Non Agriculture Thrift and Credits Society Limited
....Plaintiff/non-applicant.

Versus

Shri Raj Kumar Mittal and another ....Defendants/applicants.

OMP No. 175 of 2018 in
CS No. 22 of 2018
Reserved on: 2.11.2018
Decided on : 20.11.2018

**Code of Civil Procedure, 1908 -** Order XXXVII Rule 3(5) – Summary suit - Leave to defend – Grant of - Plaintiff society filing recovery suit on basis of cheque issued by defendant - Criminal proceedings qua dishonour of aforesaid cheque also pending before Judicial Magistrate - Defendant seeking leave to defend on ground that cheque was given towards security and writings on it are forged – Held - Court may grant unconditional leave to defend suit when defendant is able to establish that he has good triable defence – In appropriate

cases, Court may grant leave to defend subject to defendant making payment in Court or otherwise securing plaintiff's claim – However, where defence put forth by defendant is illusory or moonshine then by granting leave to defendant, statutory holistic purpose of Order XXXVII Rule 3(5) would rather be defeated – On facts, defendant not found having taken plea of 'security cheque' or of 'forgery' before criminal court – Application for leave to defend declined. (Paras 20 to 23).

***Cases referred:***

State Bank of Hyderabad versus Rabo Bank, (2015) 10 SCC 521

Sunil Enterprises and anr Vs SBI Commercial & International Bank Ltd., (1998)5 SCC 354

For the plaintiff/non-applicant: Mr. B.C Negi, Sr. Advocate with Mr. N.K Bhalla and Mr. Dalip K Sharma, Advocates.

For the defendants/applicants: Mr. P.S Goverdhan, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, J**

This order will dispose of an application, cast under the provisions of Order 37 Rule 3 (5) of the Code of Civil Procedure, as, moved before this Court, by the defendants/applicants(hereinafter referred to as the "defendants"), wherethrough, they seek hence leave to defend the summary suit, instituted by the plaintiff/non-applicant (hereinafter referred to as the "plaintiff").

2. The plaintiff has instituted the instant suit, cast under the provisions of Order XXXVII, of the Code of Civil Procedure, seeking there-through, the, recovery of suit amount. An averment is embodied in the plaint, qua the plaintiff being a duly registered co-operative Society, registration whereof, is, entered at Sr. No. 687, in the apt records, maintained by the Registering Authority concerned. The plaint has been instituted by the duly authorized representative of the society. The suit has been drawn, on, anvil of cheque bearing No. 644525 of 6.11.2016, drawn on State Bank of India, Solan, embodying therein a sum of Rs. 47,00,000/-, cheque whereof, upon, its presentation before the Bank concerned, was refused to be honoured, on account of " Drawer sign not as per mandate". Photocopy of the Cheque is appended with the plaint as Annexure P-3. In sequel thereto, the apt statutory notice was served, upon, the defendants. Notice whereof, is, borne in Annexure P-5, and, upon the defendants not meteing compliance thereto, a complaint embodied, in Annexure P-6, was, instituted before the Court of Judicial Magistrate, Ist Class, (II), Solan. Clause (a) of Paragraph 5 of the plaint, details the amount(s) taken as loan, by the defendants, from the plaintiff.

3. Succinctly, the dishonored cheque borne in Annexure P-3, is, espoused to be carrying hence sum(s) of money arising, towards a legally enforceable debt. The plaintiff, through the instant plaint, cast under the afore provisions, has, upon Annexure P-7, Annexure whereof comprises a notice issued by the defendants, hence, reared a vehement contention, before this Court, (i) that the recitals borne therein, being, readable as admission(s) of the defendants, vis-a-vis, issuance, of, the afore dishonored negotiable instrument, borne in Annexure P-3, being towards a legally enforceable debt, hence, a verdict rather summarily decreeing the plaintiff's suit being pronounced, upon, the plaintiff.

4. When notice was served, upon the, defendants, the instant application, cast under the provisions, of, Order 37 Rule 3(5) of the Code of Civil Procedure, stood instituted

before this Court, by the defendants, wherethrough, they seek leave of the Court, to, defend the suit, and, obviously espousals' contrary to the ones embodied in the plaint, stand reared therein. In paragraph 2 of the afore OMP, a contention is reared qua some borrowings, being made by the defendants, from the plaintiff society, and, the entire borrowings being liquidated, by the defendants, and, also disclosures rather holding concurrence, with, the afore averment, hence, also occur in the apt statement, of, account prepared up to 31.3.2016. A further averment is borne therein qua liquidation of the loan amount being made, either, through RTGs or through cheques, hence, per se, the defendants contest, that, the apt liquidation not occurring through cash payments. A denial is borne in afore OMP qua the amount embodied in the cheque aforesaid, being, not realizable, from, the defendants, hence, the suit being not maintainable, for, its being hence summarily decreed.

5. A contention, vis-a-vis, the suit being not maintainable, within, the ambit, of, Section 72 of the Himachal Pradesh Co-operative Societies Act, 1968, is, also reared, conspicuously qua the condition set-forth therein, remaining un-complied with, by, the plaintiff. Further more, the afore dishonored cheque, is, contended by the defendants to be a part of a series of blank security cheques, issued, by the defendants, to, the plaintiff before March, 2016. Moreover, it is also contended, that, the issuance thereof being under pressure standing exerted, upon, one Raj Kumar Mittal, by one Chander Pal, Secretary of the Society. Also the details occurring on the back side of the cheque, are, averred to be made by the plaintiff, as such, the cheque is alleged to be forged. A cheque in addition, from one amongst, the series of blank cheques, and, carrying a sum of Rs. 9 lacs, stands contended to be presented for encashment by M/S A.R Associates, of which one Raj Kumar, is, stated to be a partner. Moreover, the defendants also aver, in, the afore OMP, qua forbidance being made upon one Chander Pal , from, making misuse of certain blank cheques, A notice is stated to be issued on 10.6.2016, whereunder, a request for returning, the, security cheques, was made. However, it is further averred that the plaintiff failed to do so, rather, he has instituted the instant summary suit.

6. The plaintiff meted reply to the application, and, contended that given the averments, made, in the summary suit, and, with the afore rendered admission, of, the defendants, rather renders the suit amount, to be an undisputed claim, and, with the extant summary suit being backed, by an apparent statutorily holistic purpose, and, also with the instant suit, hence satiating, all thereof apt statutory ingredients,(i) thereupon the espoused leave being granted to the defendants, would rather render the afore holistic statutory purpose hence being defeated.

7. In opposition to the statement of account, appended with the application, the, plaintiff has appended with its apt reply, hence Annexure R-1, annexure whereof, comprises the statement of account appertaining, to, the period from 1.4.2015 to 31.3.2017, wherethrough, rather ,the, disclosures borne in the prior thereto statement of account, ending up to 31.3.2016, hence stand negativated.

8. The defendants while meteing rejoinder to the reply furnished by the plaintiff, contended, that Annexure R-1 appended with the reply to the afore OMP, is, bereft of any vigor, and, is a false document.

9. Before proceeding to determine, the, validity of the aforesaid submissions addressed before this Court, by the learned counsel for the parties, it is deemed incumbent, to bear in mind the expostulations of law, as are enjoined to be applied thereon, for hence making a conclusion, qua, the espoused leave being accordable or refusable. The trite expostulations of law, are, embodied in a judgment rendered by the Hon'ble Apex Court in Case titled as **Sunil Enterprises and another versus SBI Commercial & International**

**Bank Ltd., reported in (1998)5 SCC 354,** whereunder the Hon'ble Apex Court, has set forth the hereinafter extracted expostulations of law:-

> "4(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured."

10. The afore expostulation of law are further elaborated and reiterated, in a judgment rendered, by the Hon'ble Apex Court in case titled as **State Bank of Hyderabad versus Rabo Bank, reported in (2015) 10 SCC 521,** relevant paragraphs 15 to 17 whereof are extracted hereinafter:-

> "15. As regards the entitlement of a defendant to the grant of leave to defend, the law is well settled long back in the year 1949 in Sm. Kiranmoyee Dassi Vs. Dr. J. Chatterjee, AIR 1949 Cal 479, in the form of the following propositions:
>
> If the defendant satisfies the Court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign the judgment and the defendant is entitled to unconditional leave to defend.
>
> If the defendant raised a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
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> If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately made it clear that he has a defence, yet, shows such a stage of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.
>
> If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.
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> If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.
>
> 16. It is also noticed that the law as enunciated above, has been followed by the Courts in several cases **[See also : Santosh Kumar Vs. Bhai Mool Singh, AIR 1958 SC 321, Milkhiram (India) (P) Ltd. Vs. Chamanlal Bros, AIR 1965 SC 1698, Mechelec Engineers & Manufacturers Vs. Basic Equipment Corpn., (1976) 4 SCC 687 and Sunil Enterprises & Anr. Vs. SBI Commercial & International Bank Ltd. (1998) 5 SCC 354]**.
>
> 17. An analysis of the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is granted to defend even in

> cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, the plaintiff is entitled to leave to sign judgment."

11. For apt application(s), of, the inherent apt nuance, of, the afore expostulations of law, upon, the competing espousals hence reared by the plaintiff, and, for hence validating or invaliding them, rather also enjoins eruption, of, apt material personifying qua (a) an evident bonafide defence being reared by the defendants, whereupon, the defendants being enjoined to be granted, the espoused leave to defend; (b) qua the afore rearings of defence, within, the afore expostulations being not a positive good defence; (c) rather the espoused defence being both a bonafide or a reasonable defence, to the plaintiff's claim, (d), and, with imminent inference(s) being ensuable therefrom qua, upon, the defence being put to trial, there being every likelihood of emergence, of evidence, thereupon an apt inference being erectable qua the defendants hence rearing a bonafide or a reasonable defence; (e) upon the defence being illusory or sham or practically moonshine, thereupon, the plaintiff being enjoined, to seek leave to sign the judgment, and, the defendants being dis-entitled to seek leave to defend.

12. Further more, even if the afore expostulations of law, stand satisfied by the plaintiff, and, when hence the plaintiff is enjoined to be granted, leave to sign the judgment yet, the Court may proceed to protect the plaintiff, by allowing the defence, to proceed, yet subject, to, as a measure, of, mere clemency being bestowed, upon, the defence, comprised in the directions being made, upon, the defendants, to, give an adequate security, vis-a-vis, the suit amount. Within the ambit of the afore expostulated parameters of law, this Court proceeds to determine the factum, qua, the admission, if any, of the defendants, as embodied in the notice issued by the defendants, rather hence, boosting a firm conclusion, that, the amount borne in the dishonored cheque, being an undisputed amount, (i) hence for obviating the suit being put to a procrastinated trial, upon, the apt leave being meted to the defendants, (ii) thereupon this Court rather would proceeding to grant leave, to the plaintiff to sign the judgment, (iii) also, it is enjoined to make discernments, from, the afore rendered material qua whether the defendants rather satiating the afore parameters, whereafter, this Court may proceed to grant the espoused leave to it/him/them.

13. The most pertinent documentary evidence, existing on record, whereon reliance is placed by the plaintiff-non applicant, to, contend that it carries apt admission(s), of, the defendants/applicants, is, embodied in Annexure P-7, admission whereof occurs, in, the hereinafter extracted apt paragraph, borne in paragraph 1 thereof.

> "That Shri Raj Kumar Mittal my aforesaid client being partner of first two concerns and being Director of two Private Limited Companies took loan on different dates from your society and company in order to advance business of the aforesaid concerns and companies. The said loans were taken in individual capacity and also as partner of the said concerns and companies. In order to secure repayment of loans taken on different dates Shir Chander Pal Aggarwal being officials of the Society and company used to take blank cheques signed by my said client and without filling the name of the society, company or any individual. However, whatever amount is used to be taken as loan was shown in the said cheques. My client also issued blank cheques duly signed by him in his individual capacity from his saving account which were handed over to Shri Chander Pal aforesaid. Further blank stamp papers duly signed by my client as partner of the aforesaid concerns and also in his

individual capacity were obtained by your society and company and handed over to Shri Chander Pal official of the society and company."

14. However, subsequent thereto a recital occurs, in Annexure P-7, that, certain blank cheques being handed over to one Chander Pal Aggarwal, and, from one amongst the afore blank cheques, a cheque carrying a sum of Rs. 9 lacs, standing presented on 9.6.2016 by one Amit Aggarwal son of Chander Pal Aggarwal, and, hence an echoing also occurs therein that the afore misdemeanor(s) of the son of Mr. Chander Pal Aggarwal, rather rendering open an inference, that the cheque at hand, being one amongst the blank chques, and, it not carrying any undisputed realisable or decreeable amounts' of money.

15. Further more, reliance is placed, upon, notice borne in Annexure P-5, issued by the counsel for the plaintiff, and, served upon the defendants, conspicuously, prior to the institution of a complaint under Section 138 of Negotiable Instruments Act, espousals borne wherein, are, in concurrence with the recitals, borne in the complaint, and, with the defendants not meteing any reply thereto, hence subsequent thereto exculpating echoings, as, are borne in Annexure P-7, being an afterthought, and, a sheer concoction, and, also not rendering hence effaced, the, effect of the afore sentence, occurring in paragraph 1 of Annexure P-7.

16. Nowat is to be gauged, the respective efficacy(s) of the afore submission imperatively, on, anvil of the afore apt expostulated parameters,.

17. The dishonored negotiable instrument is issued, on, 6.11.2016, and, the statement of account, appended with the the application, rather appertains to the period much prior thereto, in as much, as, qua 31.3.2016. Consequently prima-facie, the statement of account appended with the application, at hand, with disclosure occurring therein qua no loan amounts yet pending against the defendants rather is rendered insignificant. Also, any contest qua Annexure R-1, appended with the plaintiff/non-applicant's reply, conspicuously vis-a-vis, its authenticity may not be relevant. Contrarily when it constitutes an authenticated copy of the statement, of, account, and, when, it, hence holds proximity, vis-a-vis, issuance of the dishonored negotiable instrument, (i) and, when it assumes an enhanced aura of validity given, upon, a combined reading of the apt disclosures' made therein vis-a-vis cheque borne in Annexure P-3, and, with notice borne in Annexure P-5, and, also, (ii) when its' issuance occurs in contemporaneity, vis-a-vis, issuances of cheque borne in Annexures P-3 and of notice borne in P-5 (iii) thereupon unveilings rather emerging qua inter-se congruity occurring inter-se all the aforesaid Annexures.

18. Reiteratedly, in making the aforesaid conclusion, the factum of notice, comprised in Annexure P-5, remaining un-replied, by the respondent/plaintiff, thereupon the contents thereof, do acquire an aura of validity, (i) and, further more when it is issued in contemporaneity, vis-a-vis, statement of account, (ii) also, thereupon all the afore annexures acquire an alike aura of sanctity. Even though, Annexure P-7 carries therewithin, the, afore extracted apt sentence, and, with the afore Annexure standing issued, on 10.6.2016, yet the effect of the afore sentence, does rather avail an inference, that, certain borrowings, being made by the defendants, from the plaintiff, and, for liquidation thereof, the defendants issuing cheques, and, the amount borne in the cheques rather remaining un-liquidated.

19. Since the defendants hence rear a plea, that, all the liquidations hence occurring through, cheques or through RTGs mode, and, not through cash, (i) thereupon when Annexure R-1 appended with the reply, does bear proximity vis-a-vis, issuance of the dishonored negotiable instrument, (ii) thereupon, the afore sentence occurring in Annexure

P-7, tantamounts to an admission qua the sums borne therein, being towards liquidation of outstanding borrowing, as, made by the defendants from the plaintiff.

20. Even otherwise the defendants prima-facie appear to raise various submissions, that, certain security cheques being issued by them to the plaintiff, and, that the figures, and, the scribings occurring therein being, not, in his/their hands. However, the defendants did not adduce any evidence qua therewith, before, the learned trial Magistrate concerned nor any disclosures stand made, in the apt testification rendered therebefore, qua the afore trite fact, hence coming under contest. The further effect thereof, is, that the espousal occurring in paragraph 2 of Annexure P-7, qua son of one Chander Pal Aggarwal, misusing a cheque for a sum of Rs. 9 lacs, comprised in his presenting it, before the Bank concerned, stands falsified, (i) besides for the reasons, that, it appertains to a period much prior to the period of issuance, of, the dishonored instruments, (ii) and, it carrying an amount lesser than the amount borne, in, the dishonored instrument, hence, also diminishes the vigor of the espousal, of, the defendants, (iii) predominantly also given despite the witnesses' concerned, of the plaintiff, while rendering testifications, before, the learned trial Magistrate concerned, hence making echoings' qua the apt statement of account being available (iv) yet the the defendants not making adduction(s) thereof before the Court, whereas the afore adduction of statements of accounts, would facilitate the Court, in, drawing an inference qua the defendants' admission being negatived or effaced, whereupon, non-adduction thereof, gives, rather strength to the afore admission.

21. Be that as it may, for all the assigned reasons, the defendants have abysmally failed, to, establish qua theirs holding a reasonable, fair and bonafide defence, and, also grossly failed, to, at this stage ,rear a ground that if the afore defence(s) are put to trial, theirs bringing forth hence evidence, (i) whereupon, an inference may be drawable of their defence, being workable or being genuine or holding sanctity, (ii) contrarily, thereupon it is to be concluded that the apt leave being refusable or unaccordable to the defendants.

22. The defendants contest qua with the apt statutory notice contemplated in Section 72 of the Cooperative Society Act, hence remaining evidently un-issued,thereupon the suit being not maintainable. However, the aforesaid contention would gather weight, upon, the the defendants rather committing misconduct of criminal breach of trust, vis-a-vis, plaintiff's funds, and, hence his/theirs misconduct touching, upon, the management and business of the plaintiff society. However the aforesaid evidence is amiss, contrarily when the defendant is a loanee, of, undisputed sums of money, thereupon, even when the statutory notice remained un-served, prior to the institution of the instant summary suit, yet, apt leave being grantable rather to the plaintiff.

23. Further more, the aforesaid defence is illusory or moonshine, and, further if given the afore expostulated condition precedents for, hence the apt leave being granted, when remain hence unsatisfied, thereupon, the, statutory holistic purpose, would rather be defeated, upon, the suit being put to the rigors, of, a procrastinated trial.

24. In view of the above, the application stands disposed of.

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

M/S Himachal Co-operative Non Agriculture Thrift and Credits Society Limited
.....Plaintiff/non-applicant.

Versus

Shri Raj Kumar Mittal and another ....Defendants/applicants.

OMP No.176 of 2018 in CS No.8 of 2018
Reserved on: 2.11.2018
Decided on : 20.11.2018

**Code of Civil Procedure, 1908 -** Order XXXVII Rule 3(5) – Summary suit - Leave to defend – Grant of - Plaintiff society filing recovery suit on basis of cheque issued by defendant - Criminal proceedings qua dishonour of aforesaid cheque also pending before Judicial Magistrate - Defendant seeking leave to defend on ground that cheque was given towards security and writings on it are forged – Held - Court may grant unconditional leave to defend suit when defendant is able to establish that he has good triable defence – In appropriate cases, Court may grant leave to defend subject to defendant making payment in Court or otherwise securing plaintiff's claim – However, where defence put forth by defendant is illusory or moonshine then by granting leave to defendant, statutory holistic purpose of Order XXXVII Rule 3(5) would rather be defeated – On facts, defendant not found having taken plea of 'security cheque' or of 'forgery' before criminal court – Application for leave to defend declined. (Paras 20 to 23).

***Cases referred:***
State Bank of Hyderabad versus Rabo Bank, (2015) 10 SCC 521
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For the plaintiff/non-applicant: Mr. B.C Negi, Sr. Advocate with Mr. N.K Bhalla and Mr. Dalip K Sharma, Advocates.
For the defendants/applicants: Mr. P.S Goverdhan, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, J**

This order will dispose of an application, cast under the provisions of Order 37 Rule 3 (5) of the Code of Civil Procedure, as, moved before this Court, by the defendants/applicants(hereinafter referred to as the "defendants"), wherethrough, they seek hence leave to defend the summary suit, instituted by the plaintiff/non-applicant (hereinafter referred to as the "plaintiff").

2. The plaintiff has instituted the instant suit, cast under the provisions of Order XXXVII, of the Code of Civil Procedure, seeking there-through, the, recovery of suit amount. An averment is embodied in the plaint, qua the plaintiff being a duly registered co-operative Society, registration whereof, is, entered at Sr. No. 687, in the apt records, maintained by the Registering Authority concerned. The plaint has been instituted by the duly authorized representative of the society. The suit has been drawn, on, anvil of cheque bearing No. 409125 of 6.10.2016, drawn on State Bank of India, Solan, embodying therein a sum of Rs. 45,50,000/-, cheque whereof, upon, its presentation before the Bank concerned, was refused to be honoured, on account of "Drawer sign not as per mandate". Photocopy of the Cheque is appended with the plaint as Annexure P-3. In sequel thereto, the apt statutory notice was served, upon, the defendants. Notice whereof, is, borne in Annexure P-5, and, upon the defendants not meteing compliance thereto, a complaint embodied, in Annexure P-6, was, instituted before the Court of Judicial Magistrate, Ist Class, (II), Solan. Clause (a) of Paragraph 5 of the plaint, details the amount(s) taken as loan, by the defendants, from the plaintiff.

3. Succinctly, the dishonored cheque borne in Annexure P-3, is, espoused to be carrying hence sum(s) of money arising, towards a legally enforceable debt. The plaintiff, through the instant plaint, cast under the afore provisions, has, upon Annexure P-7, Annexure whereof comprises a notice issued by the defendants, hence, reared a vehement contention, before this Court, (i) that the recitals borne therein, being, readable as admission(s) of the defendants, vis-a-vis, issuance, of, the afore dishonored negotiable instrument, borne in Annexure P-3, being towards a legally enforceable debt, hence, a verdict rather summarily decreeing the plaintiff's suit being pronounced, upon, the plaintiff.

4. When notice was served, upon the, defendants, the instant application, cast under the provisions, of, Order 37 Rule 3(5) of the Code of Civil Procedure, stood instituted before this Court, by the defendants, wherethrough, they seek leave of the Court, to, defend the suit, and, obviously espousals' contrary to the ones embodied in the plaint, stand reared therein. In paragraph 2 of the afore OMP, a contention is reared qua some borrowings, being made by the defendants, from the plaintiff society, and, the entire borrowings being liquidated, by the defendants, and, also disclosures rather holding concurrence, with, the afore averment, hence, also occur in the apt statement, of, account prepared up to 31.3.2016. A further averment is borne therein qua liquidation of the loan amount being made, either, through RTGs or through cheques, hence, per se, the defendants contest, that, the apt liquidation not occurring through cash payments. A denial is borne in afore OMP qua the amount embodied in the cheque aforesaid, being, not realizable, from, the defendants, hence, the suit being not maintainable, for, its being hence summarily decreed.

5. A contention, vis-a-vis, the suit being not maintainable, within, the ambit, of, Section 72 of the Himachal Pradesh Co-operative Societies Act, 1968, is, also reared, conspicuously qua the condition set-forth therein, remaining un-complied with, by, the plaintiff. Further more, the afore dishonored cheque, is, contended by the defendants to be a part of a series of blank security cheques, issued, by the defendants, to, the plaintiff before March, 2016. Moreover, it is also contended, that, the issuance thereof being under pressure standing exerted, upon, one Raj Kumar Mittal, by one Chander Pal, Secretary of the Society. Also the details occurring on the back side of the cheque, are, averred to be made by the plaintiff, as such, the cheque is alleged to be forged. A cheque in addition, from one amongst, the series of blank cheques, and, carrying a sum of Rs. 9 lacs, stands contended to be presented for encashment by M/S A.R Associates, of which one Raj Kumar, is, stated to be a partner. Moreover, the defendants also aver, in, the afore OMP, qua forbidance being made upon one Chander Pal , from, making misuse of certain blank cheques, A notice is stated to be issued on 10.6.2016, whereunder, a request for returning, the, security cheques, was made. However, it is further averred that the plaintiff failed to do so, rather, he has instituted the instant summary suit.

6. The plaintiff meted reply to the application, and, contended that given the averments, made, in the summary suit, and, with the afore rendered admission, of, the defendants, rather renders the suit amount, to be an undisputed claim, and, with the extant summary suit being backed, by an apparent statutorily holistic purpose, and, also with the instant suit, hence satiating, all thereof apt statutory ingredients,(i) thereupon the espoused leave being granted to the defendants, would rather render the afore holistic statutory purpose hence being defeated.

7. In opposition to the statement of account, appended with the application, the, plaintiff has appended with its apt reply, hence Annexure R-1, annexure whereof, comprises the statement of account appertaining, to, the period from 1.4.2015 to 31.3.2017, wherethrough, rather ,the, disclosures borne in the prior thereto statement of account, ending up to 31.3.2016, hence stand negativated.

8. The defendants while meteing rejoinder to the reply furnished by the plaintiff, contended, that Annexure R-1 appended with the reply to the afore OMP, is, bereft of any vigor, and, is a false document.

9. Before proceeding to determine, the, validity of the aforesaid submissions addressed before this Court, by the learned counsel for the parties, it is deemed incumbent, to bear in mind the expostulations of law, as are enjoined to be applied thereon, for hence making a conclusion, qua, the espoused leave being accordable or refusable. The trite expostulations of law, are, embodied in a judgment rendered by the Hon'ble Apex Court in Case titled as **Sunil Enterprises and another versus SBI Commercial & International Bank Ltd., reported in (1998)5 SCC 354,** whereunder the Hon'ble Apex Court, has set forth the hereinafter extracted expostulations of law:-

> "4(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured."

10. The afore expostulation of law are further elaborated and reiterated, in a judgment rendered, by the Hon'ble Apex Court in case titled as **State Bank of Hyderabad versus Rabo Bank, reported in (2015) 10 SCC 521,** relevant paragraphs 15 to 17 whereof are extracted hereinafter:-

> "15. As regards the entitlement of a defendant to the grant of leave to defend, the law is well settled long back in the year 1949 in **Sm. Kiranmoyee Dassi Vs. Dr. J. Chatterjee, AIR 1949 Cal 479,** in the form of the following propositions:
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> If the defendant satisfies the Court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign the judgment and the defendant is entitled to unconditional leave to defend.
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> If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately made it clear that he has a defence, yet, shows such a stage of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff`s claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.
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> If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.

> 16. It is also noticed that the law as enunciated above, has been followed by the Courts in several cases **[See also : Santosh Kumar Vs. Bhai Mool Singh, AIR 1958 SC 321, Milkhiram (India) (P) Ltd. Vs. Chamanlal Bros, AIR 1965 SC 1698, Mechelec Engineers & Manufacturers Vs. Basic Equipment Corpn., (1976) 4 SCC 687 and Sunil Enterprises & Anr. Vs. SBI Commercial & International Bank Ltd. (1998) 5 SCC 354].**
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> 17. An analysis of the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, the plaintiff is entitled to leave to sign judgment."

11. For apt application(s), of, the inherent apt nuance, of, the afore expostulations of law, upon, the competing espousals hence reared by the plaintiff, and, for hence validating or invaliding them, rather also enjoins eruption, of, apt material personifying qua (a) an evident bonafide defence being reared by the defendants, whereupon, the defendants being enjoined to be granted, the espoused leave to defend; (b) qua the afore rearings of defence, within, the afore expostulations being not a positive good defence; (c) rather the espoused defence being both a bonafide or a reasonable defence, to the plaintiff's claim, (d), and, with imminent inference(s) being ensuable therefrom qua, upon, the defence being put to trial, there being every likelihood of emergence, of evidence, thereupon an apt inference being erectable qua the defendants hence rearing a bonafide or a reasonable defence; (e) upon the defence being illusory or sham or practically moonshine, thereupon, the plaintiff being enjoined, to seek leave to sign the judgment, and, the defendants being dis-entitled to seek leave to defend.

12. Further more, even if the afore expostulations of law, stand satisfied by the plaintiff, and, when hence the plaintiff is enjoined to be granted, leave to sign the judgment yet, the Court may proceed to protect the plaintiff, by allowing the defence, to proceed, yet subject, to, as a measure, of, mere clemency being bestowed, upon, the defence, comprised in the directions being made, upon, the defendants, to, give an adequate security, vis-a-vis, the suit amount. Within the ambit of the afore expostulated parameters of law, this Court proceeds to determine the factum, qua, the admission, if any, of the defendants, as embodied in the notice issued by the defendants, rather hence, boosting a firm conclusion, that, the amount borne in the dishonored cheque, being an undisputed amount, (i) hence for obviating the suit being put to a procrastinated trial, upon, the apt leave being meted to the defendants, (ii) thereupon this Court rather would proceeding to grant leave, to the plaintiff to sign the judgment, (iii) also, it is enjoined to make discernments, from, the afore rendered material qua whether the defendants rather satiating the afore parameters, whereafter, this Court may proceed to grant the espoused leave to it/him/them.

13. The most pertinent documentary evidence, existing on record, whereon reliance is placed by the plaintiff-non applicant, to, contend that it carries apt admission(s), of, the defendants/applicants, is, embodied in Annexure P-7, admission whereof occurs, in, the hereinafter extracted apt paragraph, borne in paragraph 1 thereof.

> "That Shri Raj Kumar Mittal my aforesaid client being partner of first two concerns and being Director of two Private Limited Companies took loan on different dates from your society and company in order to advance business of the aforesaid concerns and companies. The said loans were taken in individual capacity and also as partner of the said concerns and companies.

> In order to secure repayment of loans taken on different dates Shir Chander Pal Aggarwal being officials of the Society and company used to take blank cheques signed by my said client and without filling the name of the society, company or any individual. However, whatever amount is used to be taken as loan was shown in the said cheques. My client also issued blank cheques duly signed by him in his individual capacity from his saving account which were handed over to Shri Chander Pal aforesaid. Further blank stamp papers duly signed by my client as partner of the aforesaid concerns and also in his individual capacity were obtained by your society and company and handed over to Shri Chander Pal official of the society and company."

14. However, subsequent thereto a recital occurs, in Annexure P-7, that, certain blank cheques being handed over to one Chander Pal Aggarwal, and, from one amongst the afore blank cheques, a cheque carrying a sum of Rs. 9 lacs, standing presented on 9.6.2016 by one Amit Aggarwal son of Chander Pal Aggarwal, and, hence an echoing also occurs therein that the afore misdemeanor(s) of the son of Mr. Chander Pal Aggarwal, rather rendering open an inference, that the cheque at hand, being one amongst the blank chques, and, it not carrying any undisputed realisable or decreeable amounts' of money.

15. Further more, reliance is placed, upon, notice borne in Annexure P-5, issued by the counsel for the plaintiff, and, served upon the defendants, conspicuously, prior to the institution of a complaint under Section 138 of Negotiable Instruments Act, espousals borne wherein, are, in concurrence with the recitals, borne in the complaint, and, with the defendants not meteing any reply thereto, hence subsequent thereto exculpating echoings, as, are borne in Annexure P-7, being an afterthought, and, a sheer concoction, and, also not rendering hence effaced, the, effect of the afore sentence, occurring in paragraph 1 of Annexure P-7.

16. Nowat is to be gauged, the respective efficacy(s) of the afore submission imperatively, on, anvil of the afore apt expostulated parameters,.

17. The dishonored negotiable instrument is issued, on, 6.10.2016, and, the statement of account, appended with the the application, rather appertains to the period much prior thereto, in as much, as, qua 31.3.2016. Consequently prima-facie, the statement of account appended with the application, at hand, with disclosure occurring therein qua no loan amounts yet pending against the defendants rather is rendered insignificant. Also, any contest qua Annexure R-1, appended with the plaintiff/non-applicant's reply, conspicuously vis-a-vis, its authenticity may not be relevant. Contrarily when it constitutes an authenticated copy of the statement, of, account, and, when, it, hence holds proximity, vis-a-vis, issuance of the dishonored negotiable instrument, (i) and, when it assumes an enhanced aura of validity given, upon, a combined reading of the apt disclosures' made therein vis-a-vis cheque borne in Annexure P-3, and, with notice borne in Annexure P-5, and, also, (ii) when its' issuance occurs in contemporaneity, vis-a-vis, issuances of cheque borne in Annexures P-3 and of notice borne in P-5 (iii) thereupon unveilings rather emerging qua inter-se congruity occurring inter-se all the aforesaid Annexures.

18. Reiteratedly, in making the aforesaid conclusion, the factum of notice, comprised in Annexure P-5, remaining un-replied, by the respondent/plaintiff, thereupon the contents thereof, do acquire an aura of validity, (i) and, further more when it is issued in contemporaneity, vis-a-vis, statement of account, (ii) also, thereupon all the afore annexures acquire an alike aura of sanctity. Even though, Annexure P-7 carries therewithin, the, afore extracted apt sentence, and, with the afore Annexure standing issued, on

10.6.2016, yet the effect of the afore sentence, does rather avail an inference, that, certain borrowings, being made by the defendants, from the plaintiff, and, for liquidation thereof, the defendants issuing cheques, and, the amount borne in the cheques rather remaining un-liquidated.

19. Since the defendants hence rear a plea, that, all the liquidations hence occurring through, cheques or through RTGs mode, and, not through cash, (i) thereupon when Annexure R-1 appended with the reply, does bear proximity vis-a-vis, issuance of the dishonored negotiable instrument, (ii) thereupon, the afore sentence occurring in Annexure P-7, tantamounts to an admission qua the sums borne therein, being towards liquidation of outstanding borrowing, as, made by the defendants from the plaintiff.

20. Even otherwise the defendants prima-facie appear to raise various submissions, that, certain security cheques being issued by them to the plaintiff, and, that the figures, and, the scribings occurring therein being, not, in his/their hands. However, the defendants did not adduce any evidence qua therewith, before, the learned trial Magistrate concerned nor any disclosures stand made, in the apt testification rendered therebefore, qua the afore trite fact, hence coming under contest. The further effect thereof, is, that the espousal occurring in paragraph 2 of Annexure P-7, qua son of one Chander Pal Aggarwal, misusing a cheque for a sum of Rs. 9 lacs, comprised in his presenting it, before the Bank concerned, stands falsified, (i) besides for the reasons, that, it appertains to a period much prior to the period of issuance, of, the dishonored instruments, (ii) and, it carrying an amount lesser than the amount borne, in, the dishonored instrument, hence, also diminishes the vigor of the espousal, of, the defendants, (iii) predominantly also given despite the witnesses' concerned, of the plaintiff, while rendering testifications, before, the learned trial Magistrate concerned, hence making echoings' qua the apt statement of account being available (iv) yet the the defendants not making adduction(s) thereof before the Court, whereas the afore adduction of statements of accounts, would facilitate the Court, in, drawing an inference qua the defendants' admission being negatived or effaced, whereupon, non-adduction thereof, gives, rather strength to the afore admission.

21. Be that as it may, for all the assigned reasons, the defendants have abysmally failed, to, establish qua theirs holding a reasonable, fair and bonafide defence, and, also grossly failed, to, at this stage ,rear a ground that if the afore defence(s) are put to trial, theirs bringing forth hence evidence, (i) whereupon, an inference may be drawable of their defence, being workable or being genuine or holding sanctity, (ii) contrarily, thereupon it is to be concluded that the apt leave being refusable or unaccordable to the defendants.

22. The defendants contest qua with the apt statutory notice contemplated in Section 72 of the Cooperative Society Act, hence remaining evidently un-issued,thereupon the suit being not maintainable. However, the aforesaid contention would gather weight, upon, the the defendants rather committing misconduct of criminal breach of trust, vis-a-vis, plaintiff's funds, and, hence his/theirs misconduct touching, upon, the management and business of the plaintiff society. However the aforesaid evidence is amiss, contrarily when the defendant is a loanee, of, undisputed sums of money, thereupon, even when the statutory notice remained un-served, prior to the institution of the instant summary suit, yet, apt leave being grantable rather to the plaintiff.

23. Further more, the aforesaid defence is illusory or moonshine, and, further if given the afore expostulated condition precedents for, hence the apt leave being granted, when remain hence unsatisfied, thereupon, the, statutory holistic purpose, would rather be defeated, upon, the suit being put to the rigors, of, a procrastinated trial.

In view of the above, the application stands disposed of.

**********

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

M/S Himachal Co-operative Non Agriculture Thrift and Credits Society Limited
.....Plaintiff/non-applicant.

Versus

Shri Raj Kumar Mittal and another ....Defendants/applicants.

OMP No. 178 of 2018 in CS No. 10 of 2018
Reserved on: 2.11.2018
Decided on : 20.11.2018

**Code of Civil Procedure, 1908 -** Order XXXVII Rule 3(5) – Summary suit - Leave to defend – Grant of - Plaintiff society filing recovery suit on basis of cheque issued by defendant - Criminal proceedings qua dishonour of aforesaid cheque also pending before Judicial Magistrate - Defendant seeking leave to defend on ground that cheque was given towards security and writings on it are forged – Held - Court may grant unconditional leave to defend suit when defendant is able to establish that he has good triable defence – In appropriate cases, Court may grant leave to defend subject to defendant making payment in Court or otherwise securing plaintiff's claim – However, where defence put forth by defendant is illusory or moonshine then by granting leave to defendant, statutory holistic purpose of Order XXXVII Rule 3(5) would rather be defeated – On facts, defendant not found having taken plea of 'security cheque' or of 'forgery' before criminal court – Application for leave to defend declined. (Paras 20 to 23).

***Cases referred:***

State Bank of Hyderabad vs. Rabo Bank, (2015) 10 SCC 521
Sunil Enterprises and anr Vs. SBI Commercial & International Bank Ltd., (1998)5 SCC 354

For the plaintiff/non-applicant: Mr. B.C Negi, Sr. Advocate with Mr. N.K Bhalla and Mr. Dalip K Sharma, Advocates.
For the defendants/applicants: Mr. P.S Goverdhan, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, J**

This order will dispose of an application, cast under the provisions of Order 37 Rule 3 (5) of the Code of Civil Procedure, as, moved before this Court, by the defendants/applicants(hereinafter referred to as the "defendants"), wherethrough, they seek hence leave to defend the summary suit, instituted by the plaintiff/non-applicant (hereinafter referred to as the "plaintiff").

2. The plaintiff has instituted the instant suit, cast under the provisions of Order XXXVII, of the Code of Civil Procedure, seeking there-through, the, recovery of suit amount. An averment is embodied in the plaint, qua the plaintiff being a duly registered co-operative Society, registration whereof, is, entered at Sr. No. 687, in the apt records,

maintained by the Registering Authority concerned. The plaint has been instituted by the duly authorized representative of the society. The suit has been drawn, on, anvil of cheque bearing No. 693291 of 21.7.2016, drawn on State Bank of India, Solan, embodying therein a sum of Rs. 44,58,750/-, cheque whereof, upon, its presentation before the Bank concerned, was refused to be honoured, on account of " Drawer sign not as per mandate". Photocopy of the Cheque is appended with the plaint as Annexure P-3. In sequel thereto, the apt statutory notice was served, upon, the defendants. Notice whereof, is, borne in Annexure P-5, and, upon the defendants not meteing compliance thereto, a complaint embodied, in Annexure P-6, was, instituted before the Court of Judicial Magistrate, Ist Class, (II), Solan. Clause (a) of Paragraph 5 of the plaint, details the amount(s) taken as loan, by the defendants, from the plaintiff.

3. Succinctly, the dishonored cheque borne in Annexure P-3, is, espoused to be carrying hence sum(s) of money arising, towards a legally enforceable debt. The plaintiff, through the instant plaint, cast under the afore provisions, has, upon Annexure P-7, Annexure whereof comprises a notice issued by the defendants, hence, reared a vehement contention, before this Court, (i) that the recitals borne therein, being, readable as admission(s) of the defendants, vis-a-vis, issuance, of, the afore dishonored negotiable instrument, borne in Annexure P-3, being towards a legally enforceable debt, hence, a verdict rather summarily decreeing the plaintiff's suit being pronounced, upon, the plaintiff.

4. When notice was served, upon the, defendants, the instant application, cast under the provisions, of, Order 37 Rule 3(5) of the Code of Civil Procedure, stood instituted before this Court, by the defendants, wherethrough, they seek leave of the Court, to, defend the suit, and, obviously espousals' contrary to the ones embodied in the plaint, stand reared therein. In paragraph 2 of the afore OMP, a contention is reared qua some borrowings, being made by the defendants, from the plaintiff society, and, the entire borrowings being liquidated, by the defendants, and, also disclosures rather holding concurrence, with, the afore averment, hence, also occur in the apt statement, of, account prepared up to 31.3.2016. A further averment is borne therein qua liquidation of the loan amount being made, either, through RTGs or through cheques, hence, per se, the defendants contest, that, the apt liquidation not occurring through cash payments. A denial is borne in afore OMP qua the amount embodied in the cheque aforesaid, being, not realizable, from, the defendants, hence, the suit being not maintainable, for, its being hence summarily decreed.

5. A contention, vis-a-vis, the suit being not maintainable, within, the ambit, of, Section 72 of the Himachal Pradesh Co-operative Societies Act, 1968, is, also reared, conspicuously qua the condition set-forth therein, remaining un-complied with, by, the plaintiff. Further more, the afore dishonored cheque, is, contended by the defendants to be a part of a series of blank security cheques, issued, by the defendants, to, the plaintiff before March, 2016. Moreover, it is also contended, that, the issuance thereof being under pressure standing exerted, upon, one Raj Kumar Mittal, by one Chander Pal, Secretary of the Society. Also the details occurring on the back side of the cheque, are, averred to be made by the plaintiff, as such, the cheque is alleged to be forged. A cheque in addition, from one amongst, the series of blank cheques, and, carrying a sum of Rs. 9 lacs, stands contended to be presented for encashment by M/S A.R Associates, of which one Raj Kumar, is, stated to be a partner. Moreover, the defendants also aver, in, the afore OMP, qua forbidance being made upon one Chander Pal , from, making misuse of certain blank cheques, A notice is stated to be issued on 10.6.2016, whereunder, a request for returning, the, security cheques, was made. However, it is further averred that the plaintiff failed to do so, rather, he has instituted the instant summary suit.

6. The plaintiff meted reply to the application, and, contended that given the averments, made, in the summary suit, and, with the afore rendered admission, of, the defendants, rather renders the suit amount, to be an undisputed claim, and, with the extant summary suit being backed, by an apparent statutorily holistic purpose, and, also with the instant suit, hence satiating, all thereof apt statutory ingredients,(i) thereupon the espoused leave being granted to the defendants, would rather render the afore holistic statutory purpose hence being defeated.

7. In opposition to the statement of account, appended with the application, the, plaintiff has appended with its apt reply, hence Annexure R-1, annexure whereof, comprises the statement of account appertaining, to, the period from 1.4.2015 to 31.3.2017, wherethrough, rather ,the, disclosures borne in the prior thereto statement of account, ending up to 31.3.2016, hence stand negativated.

8. The defendants while meteing rejoinder to the reply furnished by the plaintiff, contended, that Annexure R-1 appended with the reply to the afore OMP, is, bereft of any vigor, and, is a false document.

9. Before proceeding to determine, the, validity of the aforesaid submissions addressed before this Court, by the learned counsel for the parties, it is deemed incumbent, to bear in mind the expostulations of law, as are enjoined to be applied thereon, for hence making a conclusion, qua, the espoused leave being accordable or refusable. The trite expostulations of law, are, embodied in a judgment rendered by the Hon'ble Apex Court in Case titled as **Sunil Enterprises and another versus SBI Commercial & International Bank Ltd., reported in (1998)5 SCC 354,** whereunder the Hon'ble Apex Court, has set forth the hereinafter extracted expostulations of law:-

> "4(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured."

10. The afore expostulation of law are further elaborated and reiterated, in a judgment rendered, by the Hon'ble Apex Court in case titled as **State Bank of Hyderabad versus Rabo Bank, reported in (2015) 10 SCC 521,** relevant paragraphs 15 to 17 whereof are extracted hereinafter:-

> "15. As regards the entitlement of a defendant to the grant of leave to defend, the law is well settled long back in the year 1949 in **Sm. Kiranmoyee Dassi Vs. Dr. J. Chatterjee, AIR 1949 Cal 479,** in the form of the following propositions:
>
> If the defendant satisfies the Court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign the judgment and the defendant is entitled to unconditional leave to defend.
>
> If the defendant raised a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
>
> If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately made it clear that he has a defence, yet, shows such a stage of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff`s claim, the plaintiff is not entitled to judgment and the defendant

is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.

16. It is also noticed that the law as enunciated above, has been followed by the Courts in several cases **[See also : Santosh Kumar Vs. Bhai Mool Singh, AIR 1958 SC 321, Milkhiram (India) (P) Ltd. Vs. Chamanlal Bros, AIR 1965 SC 1698, Mechelec Engineers & Manufacturers Vs. Basic Equipment Corpn., (1976) 4 SCC 687 and Sunil Enterprises & Anr. Vs. SBI Commercial & International Bank Ltd. (1998) 5 SCC 354].**

17. An analysis of the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, the plaintiff is entitled to leave to sign judgment."

11. For apt application(s), of, the inherent apt nuance, of, the afore expostulations of law, upon, the competing espousals hence reared by the plaintiff, and, for hence validating or invaliding them, rather also enjoins eruption, of, apt material personifying qua (a) an evident bonafide defence being reared by the defendants, whereupon, the defendants being enjoined to be granted, the espoused leave to defend; (b) qua the afore rearings of defence, within, the afore expostulations being not a positive good defence; (c) rather the espoused defence being both a bonafide or a reasonable defence, to the plaintiff's claim, (d), and, with imminent inference(s) being ensuable therefrom qua, upon, the defence being put to trial, there being every likelihood of emergence, of evidence, thereupon an apt inference being erectable qua the defendants hence rearing a bonafide or a reasonable defence; (e) upon the defence being illusory or sham or practically moonshine, thereupon, the plaintiff being enjoined, to seek leave to sign the judgment, and, the defendants being dis-entitled to seek leave to defend.

12. Further more, even if the afore expostulations of law, stand satisfied by the plaintiff, and, when hence the plaintiff is enjoined to be granted, leave to sign the judgment yet, the Court may proceed to protect the plaintiff, by allowing the defence, to proceed, yet subject, to, as a measure, of, mere clemency being bestowed, upon, the defence, comprised in the directions being made, upon, the defendants, to, give an adequate security, vis-a-vis, the suit amount. Within the ambit of the afore expostulated parameters of law, this Court proceeds to determine the factum, qua, the admission, if any, of the defendants, as embodied in the notice issued by the defendants, rather hence, boosting a firm conclusion, that, the amount borne in the dishonored cheque, being an undisputed amount, (i) hence for obviating the suit being put to a procrastinated trial, upon, the apt leave being meted to the defendants, (ii) thereupon this Court rather would proceeding to grant leave, to the plaintiff

to sign the judgment, (iii) also, it is enjoined to make discernments, from, the afore rendered material qua whether the defendants rather satiating the afore parameters, whereafter, this Court may proceed to grant the espoused leave to it/him/them.

13. The most pertinent documentary evidence, existing on record, whereon reliance is placed by the plaintiff-non applicant, to, contend that it carries apt admission(s), of, the defendants/applicants, is, embodied in Annexure P-7, admission whereof occurs, in, the hereinafter extracted apt paragraph, borne in paragraph 1 thereof.

> "That Shri Raj Kumar Mittal my aforesaid client being partner of first two concerns and being Director of two Private Limited Companies took loan on different dates from your society and company in order to advance business of the aforesaid concerns and companies. The said loans were taken in individual capacity and also as partner of the said concerns and companies. In order to secure repayment of loans taken on different dates Shir Chander Pal Aggarwal being officials of the Society and company used to take blank cheques signed by my said client and without filling the name of the society, company or any individual. However, whatever amount is used to be taken as loan was shown in the said cheques. My client also issued blank cheques duly signed by him in his individual capacity from his saving account which were handed over to Shri Chander Pal aforesaid. Further blank stamp papers duly signed by my client as partner of the aforesaid concerns and also in his individual capacity were obtained by your society and company and handed over to Shri Chander Pal official of the society and company."

14. However, subsequent thereto a recital occurs, in Annexure P-7, that, certain blank cheques being handed over to one Chander Pal Aggarwal, and, from one amongst the afore blank cheques, a cheque carrying a sum of Rs. 9 lacs, standing presented on 9.6.2016 by one Amit Aggarwal son of Chander Pal Aggarwal, and, hence an echoing also occurs therein that the afore misdemeanor(s) of the son of Mr. Chander Pal Aggarwal, rather rendering open an inference, that the cheque at hand, being one amongst the blank chques, and, it not carrying any undisputed realisable or decreeable amounts' of money.

15. Further more, reliance is placed, upon, notice borne in Annexure P-5, issued by the counsel for the plaintiff, and, served upon the defendants, conspicuously, prior to the institution of a complaint under Section 138 of Negotiable Instruments Act, espousals borne wherein, are, in concurrence with the recitals, borne in the complaint, and, with the defendants not meteing any reply thereto, hence subsequent thereto exculpating echoings, as, are borne in Annexure P-7, being an afterthought, and, a sheer concoction, and, also not rendering hence effaced, the, effect of the afore sentence, occurring in paragraph 1 of Annexure P-7.

16. Nowat is to be gauged, the respective efficacy(s) of the afore submission imperatively, on, anvil of the afore apt expostulated parameters,.

17. The dishonored negotiable instrument is issued, on, 21.7.2016, and, the statement of account, appended with the the application, rather appertains to the period much prior thereto, in as much, as, qua 31.3.2016. Consequently prima-facie, the statement of account appended with the application, at hand, with disclosure occurring therein qua no loan amounts yet pending against the defendants rather is rendered insignificant. Also, any contest qua Annexure R-1, appended with the plaintiff/non-applicant's reply, conspicuously vis-a-vis, its authenticity may not be relevant. Contrarily when it constitutes an authenticated copy of the statement, of, account, and, when, it, hence holds proximity, vis-a-vis, issuance of the dishonored negotiable instrument, (i) and,

when it assumes an enhanced aura of validity given, upon, a combined reading of the apt disclosures' made therein vis-a-vis cheque borne in Annexure P-3, and, with notice borne in Annexure P-5, and, also, (ii) when its' issuance occurs in contemporaneity, vis-a-vis, issuances of cheque borne in Annexures P-3 and of notice borne in P-5 (iii) thereupon unveilings rather emerging qua inter-se congruity occurring inter-se all the aforesaid Annexures.

18. Reiteratedly, in making the aforesaid conclusion, the factum of notice, comprised in Annexure P-5, remaining un-replied, by the respondent/plaintiff, thereupon the contents thereof, do acquire an aura of validity, (i) and, further more when it is issued in contemporaneity, vis-a-vis, statement of account, (ii) also, thereupon all the afore annexures acquire an alike aura of sanctity. Even though, Annexure P-7 carries therewithin, the, afore extracted apt sentence, and, with the afore Annexure standing issued, on 10.6.2016, yet the effect of the afore sentence, does rather avail an inference, that, certain borrowings, being made by the defendants, from the plaintiff, and, for liquidation thereof, the defendants issuing cheques, and, the amount borne in the cheques rather remaining un-liquidated.

19. Since the defendants hence rear a plea, that, all the liquidations hence occurring through, cheques or through RTGs mode, and, not through cash, (i) thereupon when Annexure R-1 appended with the reply, does bear proximity vis-a-vis, issuance of the dishonored negotiable instrument, (ii) thereupon, the afore sentence occurring in Annexure P-7, tantamounts to an admission qua the sums borne therein, being towards liquidation of outstanding borrowing, as, made by the defendants from the plaintiff.

20. Even otherwise the defendants prima-facie appear to raise various submissions, that, certain security cheques being issued by them to the plaintiff, and, that the figures, and, the scribings occurring therein being, not, in his/their hands. However, the defendants did not adduce any evidence qua therewith, before, the learned trial Magistrate concerned nor any disclosures stand made, in the apt testification rendered therebefore, qua the afore trite fact, hence coming under contest. The further effect thereof, is, that the espousal occurring in paragraph 2 of Annexure P-7, qua son of one Chander Pal Aggarwal, misusing a cheque for a sum of Rs. 9 lacs, comprised in his presenting it, before the Bank concerned, stands falsified, (i) besides for the reasons, that, it appertains to a period much prior to the period of issuance, of, the dishonored instruments, (ii) and, it carrying an amount lesser than the amount borne, in, the dishonored instrument, hence, also diminishes the vigor of the espousal, of, the defendants, (iii) predominantly also given despite the witnesses' concerned, of the plaintiff, while rendering testifications, before, the learned trial Magistrate concerned, hence making echoings' qua the apt statement of account being available (iv) yet the the defendants not making adduction(s) thereof before the Court, whereas the afore adduction of statements of accounts, would facilitate the Court, in, drawing an inference qua the defendants' admission being negatived or effaced, whereupon, non-adduction thereof, gives, rather strength to the afore admission.

21. Be that as it may, for all the assigned reasons, the defendants have abysmally failed, to, establish qua theirs holding a reasonable, fair and bonafide defence, and, also grossly failed, to, at this stage ,rear a ground that if the afore defence(s) are put to trial, theirs bringing forth hence evidence, (i) whereupon, an inference may be drawable of their defence, being workable or being genuine or holding sanctity, (ii) contrarily, thereupon it is to be concluded that the apt leave being refusable or unaccordable to the defendants.

22. The defendants contest qua with the apt statutory notice contemplated in Section 72 of the Cooperative Society Act, hence remaining evidently un-issued,thereupon

the suit being not maintainable. However, the aforesaid contention would gather weight, upon, the the defendants rather committing misconduct of criminal breach of trust, vis-a-vis, plaintiff's funds, and, hence his/theirs misconduct touching, upon, the management and business of the plaintiff society. However the aforesaid evidence is amiss, contrarily when the defendant is a loanee, of, undisputed sums of money, thereupon, even when the statutory notice remained un-served, prior to the institution of the instant summary suit, yet, apt leave being grantable rather to the plaintiff.

23. Further more, the aforesaid defence is illusory or moonshine, and, further if given the afore expostulated condition precedents for, hence the apt leave being granted, when remain hence unsatisfied, thereupon, the, statutory holistic purpose, would rather be defeated, upon, the suit being put to the rigors, of, a procrastinated trial.

In view of the above, the application stands disposed of.

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

M/S Himachal Co-operative Non Agriculture Thrift and Credits Society Limited
....Plaintiff/non-applicant.

Versus

Shri Raj Kumar Mittal and another ....Defendants/applicants.

OMP No. 179 of 2018 in CS No. 21 of 2018
Reserved on: 2.11.2018
Decided on : 20.11.2018

**Code of Civil Procedure, 1908 -** Order XXXVII Rule 3(5) – Summary suit - Leave to defend – Grant of - Plaintiff society filing recovery suit on basis of cheque issued by defendant - Criminal proceedings qua dishonour of aforesaid cheque also pending before Judicial Magistrate - Defendant seeking leave to defend on ground that cheque was given towards security and writings on it are forged – Held - Court may grant unconditional leave to defend suit when defendant is able to establish that he has good triable defence – In appropriate cases, Court may grant leave to defend subject to defendant making payment in Court or otherwise securing plaintiff's claim – However, where defence put forth by defendant is illusory or moonshine then by granting leave to defendant, statutory holistic purpose of Order XXXVII Rule 3(5) would rather be defeated – On facts, defendant not found having taken plea of 'security cheque' or of 'forgery' before criminal court – Application for leave to defend declined. (Paras 20 to 23).

***Cases referred:***

State Bank of Hyderabad versus Rabo Bank, (2015) 10 SCC 521

Sunil Enterprises and anr Vs SBI Commercial & International Bank Ltd., (1998)5 SCC 354

For the plaintiff/non-applicant: Mr. B.C Negi, Sr. Advocate with Mr. N.K Bhalla and Mr. Dalip K Sharma, Advocates.

For the defendants/applicants: Mr. P.S Goverdhan, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, J**

This order will dispose of an application, cast under the provisions of Order 37 Rule 3 (5) of the Code of Civil Procedure, as, moved before this Court, by the defendants/applicants(hereinafter referred to as the "defendants"), wherethrough, they seek hence leave to defend the summary suit, instituted by the plaintiff/non-applicant (hereinafter referred to as the "plaintiff").

2. The plaintiff has instituted the instant suit, cast under the provisions of Order XXXVII, of the Code of Civil Procedure, seeking there-through, the, recovery of suit amount. An averment is embodied in the plaint, qua the plaintiff being a duly registered co-operative Society, registration whereof, is, entered at Sr. No. 687, in the apt records, maintained by the Registering Authority concerned. The plaint has been instituted by the duly authorized representative of the society. The suit has been drawn, on, anvil of cheque bearing No. 409422 of 6.9.2016, drawn on State Bank of India, Solan, embodying therein a sum of Rs. 45,50,000/-, cheque whereof, upon, its presentation before the Bank concerned, was refused to be honoured, on account of " Drawer sign not as per mandate". Photocopy of the Cheque is appended with the plaint as Annexure P-3. In sequel thereto, the apt statutory notice was served, upon, the defendants. Notice whereof, is, borne in Annexure P-5, and, upon the defendants not meteing compliance thereto, a complaint embodied, in Annexure P-6, was, instituted before the Court of Judicial Magistrate, Ist Class, (II), Solan. Clause (a) of Paragraph 5 of the plaint, details the amount(s) taken as loan, by the defendants, from the plaintiff.

3. Succinctly, the dishonored cheque borne in Annexure P-3, is, espoused to be carrying hence sum(s) of money arising, towards a legally enforceable debt. The plaintiff, through the instant plaint, cast under the afore provisions, has, upon Annexure P-7, Annexure whereof comprises a notice issued by the defendants, hence, reared a vehement contention, before this Court, (i) that the recitals borne therein, being, readable as admission(s) of the defendants, vis-a-vis, issuance, of, the afore dishonored negotiable instrument, borne in Annexure P-3, being towards a legally enforceable debt, hence, a verdict rather summarily decreeing the plaintiff's suit being pronounced, upon, the plaintiff.

4. When notice was served, upon the, defendants, the instant application, cast under the provisions, of, Order 37 Rule 3(5) of the Code of Civil Procedure, stood instituted before this Court, by the defendants, wherethrough, they seek leave of the Court, to, defend the suit, and, obviously espousals' contrary to the ones embodied in the plaint, stand reared therein. In paragraph 2 of the afore OMP, a contention is reared qua some borrowings, being made by the defendants, from the plaintiff society, and, the entire borrowings being liquidated, by the defendants, and, also disclosures rather holding concurrence, with, the afore averment, hence, also occur in the apt statement, of, account prepared up to 31.3.2016. A further averment is borne therein qua liquidation of the loan amount being made, either, through RTGs or through cheques, hence, per se, the defendants contest, that, the apt liquidation not occurring through cash payments. A denial is borne in afore OMP qua the amount embodied in the cheque aforesaid, being, not realizable, from, the defendants, hence, the suit being not maintainable, for, its being hence summarily decreed.

5. A contention, vis-a-vis, the suit being not maintainable, within, the ambit, of, Section 72 of the Himachal Pradesh Co-operative Societies Act, 1968, is, also reared, conspicuously qua the condition set-forth therein, remaining un-complied with, by, the plaintiff. Further more, the afore dishonored cheque, is, contended by the defendants to be a part of a series of blank security cheques, issued, by the defendants, to, the plaintiff before

March, 2016. Moreover, it is also contended, that, the issuance thereof being under pressure standing exerted, upon, one Raj Kumar Mittal, by one Chander Pal, Secretary of the Society. Also the details occurring on the back side of the cheque, are, averred to be made by the plaintiff, as such, the cheque is alleged to be forged. A cheque in addition, from one amongst, the series of blank cheques, and, carrying a sum of Rs. 9 lacs, stands contended to be presented for encashment by M/S A.R Associates, of which one Raj Kumar, is, stated to be a partner. Moreover, the defendants also aver, in, the afore OMP, qua forbidance being made upon one Chander Pal , from, making misuse of certain blank cheques, A notice is stated to be issued on 10.6.2016, whereunder, a request for returning, the, security cheques, was made. However, it is further averred that the plaintiff failed to do so, rather, he has instituted the instant summary suit.

6. The plaintiff meted reply to the application, and, contended that given the averments, made, in the summary suit, and, with the afore rendered admission, of, the defendants, rather renders the suit amount, to be an undisputed claim, and, with the extant summary suit being backed, by an apparent statutorily holistic purpose, and, also with the instant suit, hence satiating, all thereof apt statutory ingredients,(i) thereupon the espoused leave being granted to the defendants, would rather render the afore holistic statutory purpose hence being defeated.

7. In opposition to the statement of account, appended with the application, the, plaintiff has appended with its apt reply, hence Annexure R-1, annexure whereof, comprises the statement of account appertaining, to, the period from 1.4.2015 to 31.3.2017, wherethrough, rather ,the, disclosures borne in the prior thereto statement of account, ending up to 31.3.2016, hence stand negativated.

8. The defendants while meteing rejoinder to the reply furnished by the plaintiff, contended, that Annexure R-1 appended with the reply to the afore OMP, is, bereft of any vigor, and, is a false document.

9. Before proceeding to determine, the, validity of the aforesaid submissions addressed before this Court, by the learned counsel for the parties, it is deemed incumbent, to bear in mind the expostulations of law, as are enjoined to be applied thereon, for hence making a conclusion, qua, the espoused leave being accordable or refusable. The trite expostulations of law, are, embodied in a judgment rendered by the Hon'ble Apex Court in Case titled as **Sunil Enterprises and another versus SBI Commercial & International Bank Ltd., reported in (1998)5 SCC 354,** whereunder the Hon'ble Apex Court, has set forth the hereinafter extracted expostulations of law:-

> "4(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured."

10. The afore expostulation of law are further elaborated and reiterated, in a judgment rendered, by the Hon'ble Apex Court in case titled as **State Bank of Hyderabad versus Rabo Bank, reported in (2015) 10 SCC 521,** relevant paragraphs 15 to 17 whereof are extracted hereinafter:-

> "15. As regards the entitlement of a defendant to the grant of leave to defend, the law is well settled long back in the year 1949 in **Sm. Kiranmoyee Dassi Vs. Dr. J. Chatterjee, AIR 1949 Cal 479**, in the form of the following propositions:

If the defendant satisfies the Court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign the judgment and the defendant is entitled to unconditional leave to defend.

If the defendant raised a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately made it clear that he has a defence, yet, shows such a stage of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff`s claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.

16. It is also noticed that the law as enunciated above, has been followed by the Courts in several **cases [See also : Santosh Kumar Vs. Bhai Mool Singh, AIR 1958 SC 321, Milkhiram (India) (P) Ltd. Vs. Chamanlal Bros, AIR 1965 SC 1698, Mechelec Engineers & Manufacturers Vs. Basic Equipment Corpn., (1976) 4 SCC 687 and Sunil Enterprises & Anr. Vs. SBI Commercial & International Bank Ltd. (1998) 5 SCC 354].**

17. An analysis of the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, the plaintiff is entitled to leave to sign judgment."

11. For apt application(s), of, the inherent apt nuance, of, the afore expostulations of law, upon, the competing espousals hence reared by the plaintiff, and, for hence validating or invaliding them, rather also enjoins eruption, of, apt material personifying qua (a) an evident bonafide defence being reared by the defendants, whereupon, the defendants being enjoined to be granted, the espoused leave to defend; (b) qua the afore rearings of defence, within, the afore expostulations being not a positive good defence; (c) rather the espoused defence being both a bonafide or a reasonable defence, to the plaintiff's claim, (d), and, with imminent inference(s) being ensuable therefrom qua, upon, the defence being put to trial, there being every likelihood of emergence, of evidence, thereupon an apt inference being erectable qua the defendants hence rearing a bonafide or a reasonable defence; (e) upon the defence being illusory or sham or practically moonshine, thereupon,

the plaintiff being enjoined, to seek leave to sign the judgment, and, the defendants being dis-entitled to seek leave to defend.

12. Further more, even if the afore expostulations of law, stand satisfied by the plaintiff, and, when hence the plaintiff is enjoined to be granted, leave to sign the judgment yet, the Court may proceed to protect the plaintiff, by allowing the defence, to proceed, yet subject, to, as a measure, of, mere clemency being bestowed, upon, the defence, comprised in the directions being made, upon, the defendants, to, give an adequate security, vis-a-vis, the suit amount. Within the ambit of the afore expostulated parameters of law, this Court proceeds to determine the factum, qua, the admission, if any, of the defendants, as embodied in the notice issued by the defendants, rather hence, boosting a firm conclusion, that, the amount borne in the dishonored cheque, being an undisputed amount, (i) hence for obviating the suit being put to a procrastinated trial, upon, the apt leave being meted to the defendants, (ii) thereupon this Court rather would proceeding to grant leave, to the plaintiff to sign the judgment, (iii) also, it is enjoined to make discernments, from, the afore rendered material qua whether the defendants rather satiating the afore parameters, whereafter, this Court may proceed to grant the espoused leave to it/him/them.

13. The most pertinent documentary evidence, existing on record, whereon reliance is placed by the plaintiff-non applicant, to, contend that it carries apt admission(s), of, the defendants/applicants, is, embodied in Annexure P-7, admission whereof occurs, in, the hereinafter extracted apt paragraph, borne in paragraph 1 thereof.

> "That Shri Raj Kumar Mittal my aforesaid client being partner of first two concerns and being Director of two Private Limited Companies took loan on different dates from your society and company in order to advance business of the aforesaid concerns and companies. The said loans were taken in individual capacity and also as partner of the said concerns and companies. In order to secure repayment of loans taken on different dates Shir Chander Pal Aggarwal being officials of the Society and company used to take blank cheques signed by my said client and without filling the name of the society, company or any individual. However, whatever amount is used to be taken as loan was shown in the said cheques. My client also issued blank cheques duly signed by him in his individual capacity from his saving account which were handed over to Shri Chander Pal aforesaid. Further blank stamp papers duly signed by my client as partner of the aforesaid concerns and also in his individual capacity were obtained by your society and company and handed over to Shri Chander Pal official of the society and company."

14. However, subsequent thereto a recital occurs, in Annexure P-7, that, certain blank cheques being handed over to one Chander Pal Aggarwal, and, from one amongst the afore blank cheques, a cheque carrying a sum of Rs. 9 lacs, standing presented on 9.6.2016 by one Amit Aggarwal son of Chander Pal Aggarwal, and, hence an echoing also occurs therein that the afore misdemeanor(s) of the son of Mr. Chander Pal Aggarwal, rather rendering open an inference, that the cheque at hand, being one amongst the blank chques, and, it not carrying any undisputed realisable or decreeable amounts' of money.

15. Further more, reliance is placed, upon, notice borne in Annexure P-5, issued by the counsel for the plaintiff, and, served upon the defendants, conspicuously, prior to the institution of a complaint under Section 138 of Negotiable Instruments Act, espousals borne wherein, are, in concurrence with the recitals, borne in the complaint, and, with the defendants not meteing any reply thereto, hence subsequent thereto exculpating echoings, as, are borne in Annexure P-7, being an afterthought, and, a sheer concoction, and, also not

rendering hence effaced, the, effect of the afore sentence, occurring in paragraph 1 of Annexure P-7.

16. Nowat is to be gauged, the respective efficacy(s) of the afore submission imperatively, on, anvil of the afore apt expostulated parameters,.

17. The dishonored negotiable instrument is issued, on, 6.9.2016, and, the statement of account, appended with the the application, rather appertains to the period much prior thereto, in as much, as, qua 31.3.2016. Consequently prima-facie, the statement of account appended with the application, at hand, with disclosure occurring therein qua no loan amounts yet pending against the defendants rather is rendered insignificant. Also, any contest qua Annexure R-1, appended with the plaintiff/non-applicant's reply, conspicuously vis-a-vis, its authenticity may not be relevant. Contrarily when it constitutes an authenticated copy of the statement, of, account, and, when, it, hence holds proximity, vis-a-vis, issuance of the dishonored negotiable instrument, (i) and, when it assumes an enhanced aura of validity given, upon, a combined reading of the apt disclosures' made therein vis-a-vis cheque borne in Annexure P-3, and, with notice borne in Annexure P-5, and, also, (ii) when its' issuance occurs in contemporaneity, vis-a-vis, issuances of cheque borne in Annexures P-3 and of notice borne in P-5 (iii) thereupon unveilings rather emerging qua inter-se congruity occurring inter-se all the aforesaid Annexures.

18. Reiteratedly, in making the aforesaid conclusion, the factum of notice, comprised in Annexure P-5, remaining un-replied, by the respondent/plaintiff, thereupon the contents thereof, do acquire an aura of validity, (i) and, further more when it is issued in contemporaneity, vis-a-vis, statement of account, (ii) also, thereupon all the afore annexures acquire an alike aura of sanctity. Even though, Annexure P-7 carries therewithin, the, afore extracted apt sentence, and, with the afore Annexure standing issued, on 10.6.2016, yet the effect of the afore sentence, does rather avail an inference, that, certain borrowings, being made by the defendants, from the plaintiff, and, for liquidation thereof, the defendants issuing cheques, and, the amount borne in the cheques rather remaining un-liquidated.

19. Since the defendants hence rear a plea, that, all the liquidations hence occurring through, cheques or through RTGs mode, and, not through cash, (i) thereupon when Annexure R-1 appended with the reply, does bear proximity vis-a-vis, issuance of the dishonored negotiable instrument, (ii) thereupon, the afore sentence occurring in Annexure P-7, tantamounts to an admission qua the sums borne therein, being towards liquidation of outstanding borrowing, as, made by the defendants from the plaintiff.

20. Even otherwise the defendants prima-facie appear to raise various submissions, that, certain security cheques being issued by them to the plaintiff, and, that the figures, and, the scribings occurring therein being, not, in his/their hands. However, the defendants did not adduce any evidence qua therewith, before, the learned trial Magistrate concerned nor any disclosures stand made, in the apt testification rendered therebefore, qua the afore trite fact, hence coming under contest. The further effect thereof, is, that the espousal occurring in paragraph 2 of Annexure P-7, qua son of one Chander Pal Aggarwal, misusing a cheque for a sum of Rs. 9 lacs, comprised in his presenting it, before the Bank concerned, stands falsified, (i) besides for the reasons, that, it appertains to a period much prior to the period of issuance, of, the dishonored instruments, (ii) and, it carrying an amount lesser than the amount borne, in, the dishonored instrument, hence, also diminishes the vigor of the espousal, of, the defendants, (iii) predominantly also given despite the witnesses' concerned, of the plaintiff, while rendering testifications, before, the

learned trial Magistrate concerned, hence making echoings' qua the apt statement of account being available (iv) yet the the defendants not making adduction(s) thereof before the Court, whereas the afore adduction of statements of accounts, would facilitate the Court, in, drawing an inference qua the defendants' admission being negatived or effaced, whereupon, non-adduction thereof, gives, rather strength to the afore admission.

21. Be that as it may, for all the assigned reasons, the defendants have abysmally failed, to, establish qua theirs holding a reasonable, fair and bonafide defence, and, also grossly failed, to, at this stage ,rear a ground that if the afore defence(s) are put to trial, theirs bringing forth hence evidence, (i) whereupon, an inference may be drawable of their defence, being workable or being genuine or holding sanctity, (ii) contrarily, thereupon it is to be concluded that the apt leave being refusable or unaccordable to the defendants.

22. The defendants contest qua with the apt statutory notice contemplated in Section 72 of the Cooperative Society Act, hence remaining evidently un-issued,thereupon the suit being not maintainable. However, the aforesaid contention would gather weight, upon, the the defendants rather committing misconduct of criminal breach of trust, vis-a-vis, plaintiff's funds, and, hence his/theirs misconduct touching, upon, the management and business of the plaintiff society. However the aforesaid evidence is amiss, contrarily when the defendant is a loanee, of, undisputed sums of money, thereupon, even when the statutory notice remained un-served, prior to the institution of the instant summary suit, yet, apt leave being grantable rather to the plaintiff.

23. Further more, the aforesaid defence is illusory or moonshine, and, further if given the afore expostulated condition precedents for, hence the apt leave being granted, when remain hence unsatisfied, thereupon, the, statutory holistic purpose, would rather be defeated, upon, the suit being put to the rigors, of, a procrastinated trial.

In view of the above, the application stands disposed of.

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

Tariq Mohammad .....Petitioner.

Versus

State of H.P. & others ....Respondents.

Cr.MMO No. 467 of 2017.
Reserved on : 1st October, 2018.
Decided on : 31st October, 2018.

**Indian Evidence Act, 1872** – Sections 62 & 63 – Documentary evidence – Mode of proof - Objections thereto - In proceedings before SDM, party putting exhibits on photocopies of documents without objection - Party also calling custodian of record to duly prove those documents - SDM declining party to examine custodian of record – Petition against - Held, objections to mode of proof ought to have been decided at final stage of argument - Petition allowed- Order set aside. (Paras 5 & 6)

For the Petitioner: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

For Respondent No.1: Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. A.Gs.

For Respondent No.2: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma Advocate.
For Respondent No.3: Mr. Ashok Sood, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

During the pendency, of, Case No. 5-IV-2012, titled as Mohammad Tariq vs. Jaspal Singh, the Sub Divisional Magistrate (Urban), Shimla, pronounced orders respectively appended with the instant petition, as Annexure P-1, and, Annexure P-2. The afore annexures are impugned before this Court.

2. Uncontrovertedly, the learned Sub Divisional Magistrate (Urban), Shimla, is, seized of proceedings, as, drawn under Sections 145, 146 and Section 107, of, the Code of Criminal Procedure. On 10.10.2017, the learned Sub-Divisional Magistrate concerned, (i) answered in the disaffirmative, the, controversy appertaining to the admissibility and readability, besides, obviously the probative vigour, of, certain uncertified copies, of documents, whereon exhibit marks stood embossed. The effect, of, the afore disaffirmative pronouncements, as, made, vis-a-vis, certain uncertified copies of documents, whereon, exhibit marks stood embossed, (ii) is, obviously reiteratedly qua hence, the afore documents, under, the orders borne in Annexure P-1, rather being prematurely construed to be ripped of their vigour, and, sinew, and, theirs being discardable. The afore disafirmative pronouncement, is, omnibus in its sweep and clout, and, covers, even those uncertified copies, of, documents, though, proven through custodian of the original(s) thereof, and, whereafter, exhibits marks stood embossed thereon, (iii) whereupon, all the afore uncertified copies of documents, are, inchoately stripped of their probative vigour, hence rendering them discardable. The afore pronouncement would garner vigour, (iv) only, if there occurred specific delineation(s) in Annexure P-1, vis-a-vis, certain uncertified copies of documents, being thereat strived to be tendered into evidence, without, in simultaneity thereof, the custodian of original(s) thereof, hence stepping into the witness box. However, the afore explicit pronouncement, is, amiss in Annexure P-1, (v) whereupon, the afore disaffirmative pronouncement made vis-a-vis, certain unnamed uncertified copies of documents, whereon, exhibits marks, may stand embossed, and, in contemporaneity with the custodian of original(s) thereof, rather stepping into the witness box, being also untenably stripped of their evidentiary worth. The further sequel thereof is that (a) the learned Sub Divisional Magistrate concerned, has, at an appropriate stage, untenably rejected the probative worth, of, even, those, uncertified copies of documents, whereon, exhibits marks rather stood embossed, in sequel to the custodian(s) of original(s) thereof, hence, stepping into the witness box, and, his hence from the apposite originals, carried by him, rather proving the uncertified copies, of, documents, imperatively qua theirs being the true copy(ies), of, the original(s); (b) the learned Sub Divisional Magistrate (Urban), Shimla, at a premature stage, than, after arguments, being addressed, upon, the apposite case, has, hence prima facie untenably proceeded to discard evidence, adduced by the complainant, evidence whereof may ultimately hold some evidentiary worth, and, vigour, imperatively after considering the objections, vis-a-vis, their exhibition, raised by the opposite litigant; (c) further sequel thereof is qua the complainant's evidence, being prematurely, and, untenably foreclosed. Consequently, the afore disaffirmative pronouncement, occurring, in Annexure P-1, necessitates it being quashed and set aside.

3. Be that as it may, the afore orders, occurring in Annexure P-1 were reiterated in Annexure P-2, and, in addition thereto, despite, the learned Sub Divisional Magistrate (Urban), Shimla, on 10.10.2017, hence, ordering for service being caused or

effected, upon, Cws, and, as, made returnable for 16.10.2017, (i) yet, when, on, the latter day proceedings were drawn, upon, the apposite case, he, despite the complainant's witnesses remaining not served for 16.10.2017, rather proceeded, to, in a post haste manner, and, without application of mind, forbid the tendering into evidence, of uncertified copy(ies) of certain documents, and, also refused to permit the complainant, to, emboss exhibition marks thereon, until, the afore documents, stood, verified from, the issuing person/agency. The afore pronouncement, borne in Annexure P-2, is also reiteratedly, ridden, with a grave vice of a gross fallacy, (i) given the proceedings for ensuring the stepping into witness box, of, the complainant's witnesses, being postponed, for 25.10.2017, whereat the afore uncertified copies, of, the certain documents, may, ultimately, through, custodian of original(s) thereof, have been strived to be proven, in accordance with law, for thereafter rendering them both readable, and, admissible in evidence. Contrarily, the afore portion of orders borne in Annexure P-2, has also forestalled and frustrated, the petitioner's striving, to, tender them, both admissible and readable evidence, vis-a-vis, the afore documents, with, the further concomitant effect, of, his probable chance of proving his case, being untenably baulked.

4. For all the reasons aforestated, the impugned orders are ridden with, a, gross infirmity, and, an inherent fallacy, and, are amenable for interference.

5. Even, though, the learned Sub Divisional Magistrate (Urban), Shimla, was enjoined, to, in consonance with the verdict pronounced by this Court, on 15.12.2016, upon, Cr.MMO No.203 of 2015, to, decide the proceedings expeditiously, and, before elapse of three months therefrom, (i) yet preponderantly, when, the afore orders impugned hereat are per se infirm, hence, foreclose, the, right of the complainant, to, adduce best evidence, for, proving his case, (ii) thereupon, the orders impugned hereat, when, for all the reasons aforestated, are, concluded, to, inchoately rest, the controversy, in, respect of admissibility, and, readability, of, documents, (iii) whereas, the afore pronouncement, was, only enjoined to occur, after arguments being heard, and, objections appertaining therewith, as, reared by the apposite party, also being considered, (iv) cumulatively, hence, the afore omission, when has rather gripped the impugned orders with a vice of fallibility, thereupon, the only available mechanism, for quashing the impugned orders, is, comprised in the petitioner availing the remedy prescribed, under, Section 482 of the Cr.P.C.

6. For the foregoing reasons, the instant petition, is, allowed, and, the impugned orders, borne in Annexure P-1 and P-2, are quashed and set aside. Consequently, the learned Sub Divisional Magistrate (Urban), Shimla is directed to permit the complainant to adduce his evidence, as also, to consider, in accordance with law, all the documents whereon exhibits marks are embossed, and, further the learned Sub Divisional Magistrate, Shimla is directed to only after arguments being addressed, upon, the lis, to, thereafter consider the admissibility and readability of all documents, in accordance with law. The parties are directed to appear before the learned Sub Divisional Magistrate (Urban), Shimla, on 20th November, 2018. He is also directed to complete the proceedings within three months, from, the receipt, of, the records. All pending applications also stand disposed of. Records, if any, received, be sent back forthwith.

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

Bhisham Singh .....Petitioner.

Versus

Union of India & others .....Respondents.

CWP No. 1643 of 2016.
Reserved on : 4th December, 2018.
Decided on : 17th December, 2018.

**Central Civil Services (Pension) Rules, 1972** - Rule 9(3)- **CCS (Extra-ordinary) Pension Rules**- Rule 48-B – Disability pension - Grant of – Circumstances - In earlier civil writ petition High Court setting aside order of discharge of petitioner from service on ground of disability – LPA – Division Bench modifying order and giving benefit of Rule 48-B of CCS (Extra-ordinary) Pension Rules entitling petitioner to avail full pension payable on completion of qualifying service of 33 years – Petitioner filing another petition and praying for grant of disability pension also on basis of observations of court made in contempt proceedings - Held, in Contempt petition filed earlier there was merely direction to respondents to consider his case for grant of disability pension - Respondents duly considered his case for grant of disability pension - Petitioner not found entitled to disability pension - Petition dismissed. (Paras 5-7)

For the Petitioner: Mr. Sameer Thakur, Advocate.
For the Respondents: Mr. Balram Sharma, Sr. Penal Counsel.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The petitioner seeks quashing, of, Annexure P-6, wherethrough, the petitioner's claim for meteing qua him, the, benefit of Rule 9(3) of CCS Pension Rule-1972, stood rejected, on anvil, of his disability being assessed, only, in a statutorily ineligible per centum, of, the apposite disability, inasmuch as, it being only upto 40%. The petitioner also prays, that, the pension payment order, comprised in Annexure P-7 being also ordered to be modified for bringing it, in consonance therewith, and, also espouses qua affirmative findings, being pronounced, upon, the invalidity of Annexure P-6.

2. The entire bedrock of the claim of the petitioner, and, of the respondents' claim, qua validating or invalidating, the, afore annexure (i) is grooved in a judgment of this Court rendered, in CWP No 100 of 2000, titled as Bhisham Singh vs. Union of India and another, decided, on 28th September, 2006. In the afore writ petition, this Court had quashed the order of discharge, of the petitioner, hence from, service, (ii) order whereof was rested upon the recommendations, of, the duly constituted Medical Board, hence, recording an opinion, qua, the petitioner being unfit for retention in service, (iii) concomitant sequel thereof being qua the Writ Court hence affording to the petitioner, the, hereinafter extracted reliefs:-

> "5. As a sequel to the above discussion, writ petition is allowed, impugned discharge order dated 15.5.1997 (Annexure P-12) is quashed and the following directions are issued to the respondents:-
>
> 1. The petitioner be treated to have continued in service upto the date when he would have completed 28 years of service, i.e. 3.5.1998, and, be paid salary and all other allowance etc. from 16.5.1997 to the said date.
>
> 2. On and with effect from the day next following the date on which the petitioner would have completed 28 years of service, i.e., 4.5.1998, he be treated to have voluntarily retired under the relevant provisions of Civil

> Services Pension Rules, 1972 and given the benefits of Rule 48-B and pension and retiral benefits be paid to him accordingly, from such date.
>
> 3. Arrears of salary, in accordance with direction No.1, and arrears of retiral benefits , in terms of direction No.2 be paid to the petitioner within three months with simple interest at the rate of 9% per annum."

3. An incisive reading of the afore extracted relief, (i) makes a forthright disclosure qua the petitioner, being directed to be treated, to have continued in service, upto, the date when he would have completed 28 years of service, (ii) and, all concomitant therewith benefits being afforded to him, (iii) and, thereafter his being treated to have voluntarily retired from service, under, the relevant provisions of CCS Pension Rules, 1972, (iv) and, his being bestowed the benefits embodied in Rule 48-B, qua pension, and, retiral benefits, hence, being ordered to be accordingly rather disbursed, vis-a-vis, him.

4. The afore rendered pronouncement, made by this Court, in CWP No.100 of 2000, stood assailed by the Union of India, before the Division Bench of this Court, by its preferring, a, LPA, and, in LPA No. 5 of 2007, whereon, the, Division Bench of this Court, declined the espoused relief to the aggrieved. Subsequently, the petitioner instituted CWP No. 3753 of 2009. Upon, the afore CWP No.3753 of 2009, the hereinafter extracted pronouncements hence occur in para 7 thereof:-

> "7. It is clear from a reading of judgment dated 28.6.2006, which is available on record as Annexure P-1, that this Court had, though set aside the order of discharge, but it was in the context that the petitioner was to be treated to have continued in service up to 3.5.1998, when he would have completed 28 years of service and by addition of 5 years qualifying service, by virtue of Rule 48-B, he would have been entitled to full pension. The order nowhere says that for granting him pension on completion of 28 years actual service, he would not be entitled to disability pension, which is otherwise permissible under CCS (Extra-ordinary) Pension Rules and various orders of the Government of India, issued under the said Rules."

An incisive reading of the afore pronouncement, makes clear emergences, that though this Court, while rendering a decision upon CWP No. 100 of 2000, hence setting aside, the order of discharge pronounced, upon, the petitioner, (a) on the ground of his being declared to be medically unfit, and, also its pronouncing the afore extracted relief qua him, yet, a peremptory mandate is also recorded therein, that, the afore reliefs earlier pronounced, vis-a-vis, the petitioner, being not per se construable, to, also render dis-entitled, the, petitioner to disability pension. However, in the concluding part, of, the verdict pronounced by this Court on 18th March, 2011, upon, CWP No. 3753 of 2009, this Court, had therein directed, the Union of India to consider, the, case of the petitioner, for grant of extra ordinary disability pension. The afore verdict remained unchalleged, by the aggrieved, hence, it acquires an aura, of, conclusivity.

5. Since, the Union of India did not mete compliance therewith, hence, a contempt petition bearing COPC No. 84 of 2012, was, instituted by the petitioner, and, upon the afore contempt petition, no adversarial order, hence stood pronounced, upon, the purported contemner, (i) and, upon execution petitions No. 9 of 2014, and, 1 of 2014, the Hon'ble Principal Bench, of, this Court, also disposed of the afore execution petition(s), with the hereinafter extracted apt observations, borne in paragraph No.5 thereof:-

> "5. This Court cannot direct execution which is not in tune with order dated 7th January, 2014, made by the learned Single Judge in COPC No.84 of

2012. Even otherwise, in terms of mandate of para 9 of order, dated 18th March, 2011, made by the Writ Court in CWP No.3753 of 2009, the respondents were to consider the case of the petitioner, which they have done and passed the consideration order, dated 10th March, 2012. It is for the petitioner to seek appropriate remedy, if still aggrieved."

6. Even though, the afore extracted paragraph No.5, of, the verdict pronounced by this Court, upon, the afore execution petitions, does unfold, qua, this Court apparently validating, the impugned annexure, yet, the last sentence, occurring in paragraph No.5 "it is for the petitioner to seek appropriate remedy, if still aggrieved", is, strived to be capitalized by the petitioner, to hence in garb thereof, hence, seek the instant remedy.

7. The learned counsel appearing for the respondents contends, (i) that a reading, of, the second sentence, as, embodied in paragraph 5 of the order rendered, by the Hon'ble Principal Division Bench of this Court, upon, the aforesaid execution petitions, being peremptorily, construable, to, hence validate the impugned annexures, and, the petitioner being precluded, to thereafter, institute the instant petition, before this Court, rather for seeking quashing, of, the impugned order(s), (ii) the afore submission, carries immense strength, given, this Court while rendering, a, pronouncement, upon, CWP No. 3753 of 2009, rather in paragraph No.7 thereof, through, rendering a peremptory mandate, upon, the respondents, to, dehors, the factum of this Court setting aside, the, apposite order of discharge, qua hence, per se, thereafter, the petitioner not being disentitled to seek disbursement qua him, of, disability pension, "if, permissible under the relevant rules, under, the various orders issued from time to time", and, even though, the afore order acquires conclusivity, for, want of its being challenged, before the Division Bench of this Court, (iii) thereupon, the last sentence, borne in paragraph No.5 of the verdict recorded, upon, the afore execution petitions, is rather not readable, to, generate, a valid cause of action, vis-a-vis, the petitioner, for hence his through the instant petition, rather casting a challenge, upon, the impugned annexures, (iv) Conspicuously, given the second sentence, occurring in paragraph No.5 of the verdict, recorded by the Division Bench of this Court, upon, afore execution petitions "even otherwise, in terms of the mandate of para 9 of order, dated 18th March, 2011 made by the Writ Court in CWP No.3753 of 2009, the respondents were to consider the case of the petitioner, which they have done and passed the consideration order, dated 10th March, 2012", thereupon, rendering, the, apposite verdict to be construable, merely, a consideration order, without any trappings, of, meteing, of, peremptory compliance therewith, (v) AND, when, the, afore order(s), stand(s) read in coagulation, with para 7 of the verdict recorded, upon, CWP No. 3753 of 2009, it rather waning, and, subsiding the effect of the purported conclusive, and, binding mandate, as, borne therein. The effect thereof being qua the Union of India being not enjoined to mete peremptory compliance therewith, (vi) given, the afore espousal not apparently falling within the domain, of the germane thereto rules, and, the relevant orders, directed to be borne in mind, by the respondents, under, a verdict pronounced upon CWP No.3753/2009. (vii) Preeminently, also when this court, upon, allowing, the writ petition, would unbefittingly render, a, verdict per incuriam, vis-a-vis, the, relevant statue, and, would also impermissibly permit the relaxing, of, the trite rule(s), qua their being no estoppel against law, and, statutory rules.

8. For the foregoing reasons, there is no merit in the instant petition, and, it is dismissed accordingly. All pending applications also stand disposed of.

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

Sh. Suprio Ghosh .....Appellant/defendant.

Versus

Ms. Eva Maria Boonstra .....Respondent/Plaintiff.

RFA No. 232 of 2008.
Reserved on : 31.10.2018.
Decided on : 20th November, 2018.

**Code of Civil Procedure, 1908 -** Section 13 – Foreign judgment – When admissible in evidence ? - Held, foreign judgment pronounced by competent court of jurisdiction though conclusive in nature but will be admissible only when its certified copy along with translated copy in court language is adduced in evidence or translator is examined as witness to prove contents - Succession certificate scribed in Dutch but not accompanying with any translation in court language not admissible in absence of examination of translator - RFA allowed. (Para 7)

For the Appellant: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashishta, Advocate.

For the Respondent: Mr. Vinod Gupta, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The learned trial Court, decreed, the plaintiff's suit, for a recovery of a sum of Rs.7,28,000/-, against, the defendant along with interest at the rate of 6% per annum, from, the date of institution of the suit, till realization thereof, and, with the defendant being aggrieved therefrom, hence, has instituted the instant Regular First Appeal, before this Court.

2. Briefly stated the facts of the case are that, the plaintiff is a Dutch National with Passport No. 94699023. The plaintiff stood married to Shri Albertus Boonstra (Passport no.88738795). The plaintiff and her husband had visited India and had been staying at Sidhbari (Dharamshala). They had been in need of good residential accommodation. The defendant is stated to be owner-proprietor of house property in the area of Sokni-Da-Kot (Dharamshala). The defendant had agreed to provide/lease residential accommodation to the plaintiff and her husband for their lifetime. The plaintiff and her husband had paid a sum of Rs.6,50,000/- to the defendant. The defendant was to complete construction sought to be leased on or before 15.12.2001. The plaintiff and her husband had been requested the defendant to complete the construction within the stipulated period. The defendant had informed the plaintiff that he would perform his part of the job within the stipulated period and the plaintiff and her husband need not worry. It had been averred that the defendant did not do the construction upto 15.12.2001. The plaintiff and her husband had requested the defendant to return the amount of Rs.6,50,000/- to them. The defendant putting off the plaintiff and her husband on one pretext or the other. On 22.5.2002, the defendant had executed agreement Ex.PW1/D and had undertaken to pay the amount of Rs.6,50,000/- to the plaintiff and her husband on or before 30.09.2002. In case the defendant did not pay the amount of Rs.6,50,000/- on or before 30.09.2002, he had agreed to pay interest at the rate of 20% per annum, till payment thereof. The plaintiff and her husband had left for Germany during the end of May, 2002. In November, 2002,

Shri Albertus Boonstra had died in Germany leaving behind the plaintiff as his sole legal heir. The plaintiffs pleads that the defendant did not pay the amount of Rs.6,50,000/- to the plaintiff or her husband. The plaintiff was entitled to interest @20% per annum. However, the plaintiff had restricted her claim of interest @12% per annum. A sum of Rs.78,000/- had accrued in favour of the plaintiff on account of interest from 22.5.2002 to 21.5.2003, and, hence the suit for recovery of Rs.7,28,000/-.

3. The defendant contested the suit and filed separate written statement, wherein, he has taken preliminary objections inter alia non joinder. He had denied the relationship of the plaintiff with Mr. Albertus Boonstra. The death in November, 2002 of Sh. Albertus Boonstra had also been denied. The plaintiff was not legal heir of Sh. Albertus Boonstra. She was also not a Dutch National. The plaintiff or Mr. Albertus Bonstra had not paid Rs.6,50,000/- to the defendant. The defendant had not agreed to construct the house for the plaintiff or Mr. Albertus Boonstra for their live and possession thereof was not be delivered on or before 15.12.2001. The defendant had submitted that his father Shri B.K. Ghosh had been constructing a house. Much of the construction was complete when Mr. Albertus Boonstra had contacted him for hiring the house under construction. The plaintiff had figured nowhere during the negotiations for lease on rent for five years of the house by Sh. B.K. Ghosh in favour of Sh. Albertus Boonstra. The house required a sum of Rs.1 lac for completion. Shri Albertus Boonstra had suggested that he would pay Rs. One lac. Sh. Albertus Boonstra was stated doing construction work and had been knowing the job of electrical works and plumbing. Sh. Albertus Boonstra wanted expensive material like marble, granite and mosaic marble to be used in the house. He also wanted expensive electrical equipment in bathroom and kitchen. As per the negotiations, the expenditure over and above Rs. One lac was to be borne by Sh. Albertus. Sh. Albertus Boonstra was not to be charged rent for five years. The house stood completed in mid January, 2002. Shri Albertus Boonstra had taken possession of the house, having got the same completed with considerable modifications. However, after occupation of the house in January, 2002, Shri Albertus Boonstra had suddenly made up his mind to leave India, probably for health reasons. At that time, he had started pressurizing for payment of a sum of Rs. 6 lacs to him as the said amount was stated to have been spent for carrying out additional renovation and modifications etc. The defendant had not voluntarily executed agreement Ex.PW1/D, in favour of the plaintiff on 22.5.2002. Shri Albertus Boonstra had instituted a complaint of cheating, breach of trust and fraud against the defendant and his parents before the local police. The defendant and his father had been sent for by the local police. The local police had started shouting at the defendant and his father. They were sought to be booked in a case of breach of trust and fraud. The defendant and his father had denied having cheated Sh. Albertus Boonstra in any way. AT such stage, even the Superintendent of Police and Add. Superintendent of Police had reached the Police Station. They had entered into a discussion with other party. The defendant had been compelled to execute the agreement Ex.PW1/D. Immediately after the execution of the agreement, Sh. B.K. Ghosh had reported the matter to the Deputy Commissioner on 23.5.2002. The suit of the plaintiff was based on document Ex.PW1/D. Since, the defendant had not executed this document, the plaintiff was not entitled to any relief.

4. The plaintiff filed replication, to, the written statement of the defendant, wherein, she denied the contents of the written statement, and, re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled to the decree for Rs.7,28,000/- as alleged? OPP.
2. Whether Albertus Boonstra who claims to be one of the party to the contract has died in a foreign country? OPP.
3. Whether the plaintiff is the only legal heir to the estate of Albertus Boonstra as both the parties are Dutch Nationals, and production of judgement from a foreign court is unnecessary? OPP
4. Whether the document/agreement dated 22.5.2002 is a result of coercion exercised upon the defendant by the plaintiff in connivance with the Police, as alleged? OPD.
5. Whether Sh. B.K. Ghosh is necessary party to the present suit, as alleged? OPD.
6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, hence, decreed, the, suit of the plaintiff/respondent herein. Now defendant/appellant herein, being aggrieved therefrom, has, instituted the instant Regular First Appeal, before, this Court, wherein, she assails the findings recorded, in its impugned judgment and decree, by the learned trial Court.

7. The learned counsel appearing for the aggrieved defendant/appellant has contended with much vigour before this Court qua the plaintiff/respondent herein, holding, no locus standi, to, on demise, of, one late Mr. Albertus Boonstra, hence institute a suit, on anvil of Ex.PW1/D, given (i) her espoused claim qua hers being the wife of the afore deceased, standing, not cogently proven, in accordance with law. He submits that any reliance placed, upon, the purported succession certificate, whereunder, the apt right to succession, vis-a-vis, the estate, of, the afore, stood bestowed, upon, the plaintiff/respondent herein, succession certificate whereof stands borne in Ex.PW1/A, and, in, Ex.PW1/B AND Ex.PW1/C, though, fall within the ambit of Section 13 of the CPC, provisions whereof stand extracted hereinafter, and,:-

> "**13**.**When foreign judgment not conclusive:-**A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-
>
> (a) Where it has not been pronounced by a court of competent jurisdiction;
>
> (b) Where it has not been given on the merits of the case;
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> (c) Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
>
> (d) Where the proceedings in which the judgment was obtained are opposed to natural justice;
>
> (e) Where it has been obtained by fraud;
>
> (f) Where it sustains a claim founded on a breach of any law in force in India."

were/was hence both relevant and admissible. However, he further submits that per se, thereupon, rather Ex.PW1/A to Ex.PW1/C, being not construable, to be either admissible or readable in evidence, (a) given the afore exhibits, being scribed in a foreign language, and, when, thereupon all the scribings thereon, were, enjoined to be proven, by the competent

translator thereof, comprised, in, the latter's stepping into the witness, (b) whereas, the afore mode remaining unadopted by the plaintiff/respondent herein, (c) thereupon, the translated copies thereof, being construable to be neither readable nor admissible in evidence. The afore submission has immense vigour, and, for all valid reasons encapsulated therein, this Court proceeds to hold, that, the plaintiff/respondent herein, on, anvil of the afore exhibits, held no locus standi, to, on demise of one Albertus Boonstra, and, on anvil of Ex.PW1/D, hence, to institute the instant suit.

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

9. In view of above discussion, the instant appeal is allowed and the impugned judgment and decree is set aside. Consequently, the suit of the plaintiff is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Prabhat Sharma .....Petitioner.

Versus

Shri Ashutosh Sharma & others ....Respondents.

CMPMO No. 143 of 2016.
Reserved on : 02.04.2018.
Date of Decision: 10th April, 2018.

**Constitution of India, 1950-** Article 227**- Code of Civil Procedure, 1908-** Section 151- Interim directions – Entitlement - In suit pending before it, High Court directing Deputy Commissioner to formulate Scheme and disburse amounts payable to Pujaris of Temple in accordance with it subject to final adjudication of suit - Also directing him to keep proper records of Pujaris who act in temple on specified period - Deputy Commissioner preparing Scheme and also mentioning that Scheme would be applicable only for 15 years - Period of 15 years elapsing but Scheme continued without any orders of Court - Meanwhile suit filed in High Court dismissed in default - In another suit pending before Civil Judge (Junior Division), Pujaris filing application and seeking implementation of old Scheme - Civil Judge allowing application and directing Temple Trust to implement Scheme – Petition against - Held, after lapse of 15 years period, Scheme as formulated on orders of High Court was not binding inter-se parties - It could not have been enforced by them - Civil Judge ought to have taken fresh Scheme prepared by parties with mutual consent – Petition allowed – Order of Civil Judge set aside. (Paras 4 & 5)

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| For the Petitioner: | Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate. |
| For Respondents 1 to 5: | Mr. R.K. Bawa, Senior Advocate with Mr. Ajay Kumar Sharma, Advocate. |
| For Respondent No.6: | Mr. Hemant Vaid, Addl. A.G. |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant petition stands directed against the impugned order recorded by the learned Civil Judge (Junior Division), Bilaspur, H.P., on 26.03.2016, whereby, she allowed, the petitioner's application, constituted under Section 151 of the CPC, wherein, he sought, relief of the Deputy Commissioner Temple Trust Sh. Naina Devi Ji, Bilaspur being directed to implement orders rendered by this Court in OMP No. 392 of 1987. The genesis of the lis, is, embodied in a pronouncement recorded on 17.10.1987, by this Court in OMP No.392 of 1987, the relevant apt portion whereof stands extracted hereinafter:-

> **" In view of the aforesaid agreement arrived at between the parties, it is ordered that the amounts be paid to all the Bhojkis/plaintiffs, who may be interest in receiving the amount in accordance with the scheme formulated by the Deputy Commissioner., Bilaspur. The Bhojkis/persons entitled to receive the amounts can receive these amounts under protest and defendant No.1 shall have no objection in making the payments to these persons under protest. It is clarified that receiving of the payments by such persons shall not at all prejudice their rights to the merits of the case and there payments shall be subject to the final adjudication of the case.**
>
> **It is further ordered that defendant No.1 shall maintain a record about the names of various Pujaris/Bhojkis who act in the temple on specified periods, so that the amounts payable to them or to any other Bhojaki/Pujari may be adjusted subject to the result of the suit. The amounts shall be disbursed to the various persons within a period of one week from today. The present application is disposed of accordingly."**

2. A reading of the afore extracted pronouncement recorded, upon, the aforesaid OMP, brings to the fore qua disbursement(s) of relevant amounts amongst the Bhojakis, of, the temple concerned, being mandated to occur in accordance with the scheme formulated, by the Deputy Commissioner, Bilaspur. Consequently, with this Court, in, making a pronouncement upon OMP No.392 of 1987, hence meteing reverence thereto, thereupon, it is deemed incumbent to allude to the apposite scheme. The apt scheme is appended, as, Ex. P-6 in Civil Suit No. 17-1 of 95/87, and, the operative part thereof, stands, extracted hereinafter:

> "..... So I feel that equal distribution of 50% of offerings to all the Pujaris who have been recorded in the record of rights should go. This should be limited only to cash offerings, coconuts and ghee. Gold, Silver and Chunnis cannot be given to them because those offered to the deity by the pilgrims/devotees out of respect. If those are given to the Pujaris, the sentiments of the devotee who offer those to the deity will be shattered. I, therefore, order that because of the fact that they are performing Puja Archana they should be given 50% offerings of cash in equal shares. Apart from that the coconuts and Ghee should be converted into money and 50% of the total should be distributed amongst all the Pujaris. The Baridars/Pujaris have demanded the payment with retrospective effect from the date when the management was taken over by the trust. For their claim they had represented to Sh. I.K/ Suri, IAS (Ret.), the then Divisional Commissioner, Shimla Division, but before Mr. Suri decided anything they went in the Hon'ble High Court. The application of Bardar/Pujaris received by me on

> the 4th March, 1987. So question of giving them their shares from retrospective effect does not arise. However, the Bridar/Pujaris had given a representation to Sh. I.K. Suri, the then Divisional Commissioner, Shimla Division. When they could not get any relief, they preferred to file a writ petition in the Hon'ble High Court. From the day they went to the Hon'ble High Court, the relief accrues to them. So, I order that they will get their share from the date they filed writ petition in the Hon'ble High Court.
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> 10. With regard issue No.4, I hold that in the modern age I have discussion above, the Baridar/Pujaris have violated the Rules, and the small girls who were getting offering from the Kali Mata Temple have got no right because already the Pujaris will get offerings from deity Sh. Naina Devi Ji as per the norms I have ordered above. Another contention that the girls should be given share upto their marriage is not sustainable in the eyes of law. As a matter of fact, if that right is given that cannot be withdrawn back and that will go as dowry which is against the present social system. Their further contention was that the moment a boy attains the age of 18 years, he should be given the right of Baridari-system. Because of may discussion above, it will be unfair to create further Pujaris
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> 11. This order of mine will be operative for 15 years from the date of announcement. The distribution of offerings should take place every quarter. The Assistant Commissioner (SDM Bilaspur), who is the chairman of the Temple Trust will take action as per above decisions. This order should be communicated to all the three groups of Pujaris through the Assistant Commissioner (SDM Bilaspur)."

A reading of the operative part thereof, unravels, of, its (a) containing a clear mandate, of its, operation surviving upto 15 years, period whereof being computable, from, the date of its pronouncement, pronouncement whereof, occurred, on 15.05.1987, (b) hence, within its mandate, remaining in force for 15 years, thereupon, its mandate apparently remained alive only upto May, 2002, yet thereafter evidently it without demur remained in operation, upto 4.7.2011, whereat the apposite civil suit was dismissed in default.

3. Be that as it may, Civil suit No. 117/1 of 09/87, was, dismissed for default on 4.7.2011, and, was restored on 19.05.2015. The interregnum, inter se the dismissal in default of the apposite civil suit, and, its coming to be restored, also per se comprises an apt period, wherewithin, the orders pronounced upon OMP No.392 of 1987, remained obviously hence not in force, nor were binding upon the contesting parties, to the apposite lis. Before proceeding to dwell, upon, infraction, if any, by respondent No.6 herein, the imperative fact, which is enjoined to be borne in mind, (a) is of as aforestated the longevity of the apposite scheme, whereto reverence stood meted by this Court, in making a pronouncement, upon OMP No. 392 of 1987, rather holding longevity only upto 15 years, (b) and also qua the factum, of its, in the interregnum inter se the dismissal in default of the apposite Civil Suit, and, upto its restoration, its obviously holding no force, (c) ultimately, of, the innate spirit, of, the orders rendered upon CWP No.6819 of 2014, is, also enjoined to be incisively discerned, (d) significantly, when mandate thereof is alleged to be intentionally infringed. A conjoint reading of the aforesaid factum rather would aid this Court, in coming to a conclusion qua any purported deviations or any purported intentional infringements thereof, hence emanating, whereupon alone respondent No.6 herein would hence be rendered amenable to make compliance therewith. Obviously, thereupon, it is apt for this Court, to hereinafter extract, the relevant portion of the orders, pronounced, by this Court, upon CWP No.6819 of 2014:-

**"The petitioners are permitted to move an application under Order 1, Rule 10 CPC for impleadment in Civil Suit No. 117/1/2-9/87 within a period of three weeks from today. The application shall be decided by the learned Civil Judge (Jr. Divn.), Bilaspur, in accordance with law within two weeks thereafter. It is stated by the respondents appearing in this petition that they would not oppose such an application as and when moved. Sh. K.D. Sood, Sr. Advocate, submitted that the Deputy Commissioner has passed the orders in the interregnum, only when Civil Suit was dismissed in default and not it has been revived. Till the application is decided by the learned Civil Judge (Jr. Division), Bilaspur, the parties are directed to maintain status quo. Thereafter, the learned Civil Judge (Jr. Divn.), Bilaspur, shall pass the necessary orders, as warranted from time to time, in accordance with law."**

A perusal of the apt underlined portion thereof, makes, ex-facie disclosure(s) of this Court making direction(s) (a) that till the Civil Judge (Jr. Divn.), Bilaspur, makes a decision upon an application cast under Order 1, Rule 10, CPC, thereupto the parties being enjoined, to maintain status quo; (b) and, after the Civil Judge (Jr. Division), proceeding to make an order upon an application cast under Order 1, Rule 10, CPC, his being enjoined to pass appropriate orders , as warranted, from time to time, in accordance with law, apt underlined portion whereof, for reasons assigned hereinafter, rather holds has immense significance. The learned counsel appearing for the respondents has contended that the parlance, gathered by the apt coinage "status quo" occurring in the orders supra, pronounced by this Court in CWP No.6819 of 2014, hence carrying, an innate import besides significance (a) of an injunction being cast upon the respondents/defendants, to continue to mete deference, to the pronouncement recorded by this Court, upon, OMP No. 392 of 1987, (b) importantly when the apposite disbursement, of, funds amongst the Bhojakis, of, the temple concerned, continued to be made in consonance therewith, upto the institution of CWP No.6819.

4. However, the aforesaid submission, is grossly off the mark, and, its vigour stands denuded, by the trite factum (a) of the apposite civil suit, during, pendency whereof OMP bearing No. 392 of 1987, stood constituted before this Court, whereupon, this Court had rendered orders supra, rather standing dismissed in default on 4.7.2011, and, it standing ordered to be restored only on 19.05.2015, Ib) whereas, CWP No.6819 of 2014, coming to be instituted, prior to, the restoration of Civil Suit No. 17/1 of 2009/1987, (c) given this Court, while, making a pronouncement upon OMP No. 392 of 1987, rather meteing deference, to, the apposite scheme, longevity whereof, was, only upto 15 years, 15 years whereof, since, its commencement on 15.5.1987, rather elapsed in the month of May, 2002, hence rendered capacitated, the defendants/respondents, to hence formulate, a new scheme, and, place it before the learned Court concerned, for enabling it, to, make a fresh pronouncement(s) in consonance therewith, besides for its being concomitantly enabled to make orders, for, extending the operation of orders rendered in OMP No.392 of 1987, (d) more so when the apt aforesaid underlined portion, of, orders pronounced upon CWP No.6819 of 2014, obviously facilitated apposite motions, being made before the Civil Court (e) especially also given its longevity, being co-terminus with the scheme, whereto, deference was meted by this Court, while rendering directions, upon, OMP No.392 of 1987. However, it appears that since the apposite Civil Suit was dismissed in default, hence, the defendants/ contemners/respondents herein, omitted to make apposite motions, before, the Court concerned, for enabling it, to, extend the operation of the orders pronounced upon OMP No.392 of 1987, (f) whereas, for extending the longevity, of, orders pronounced in OMP No.392 of 1987, besides , for, meteing apt extension(s) vis-a-vis the the mandate(s), of the apposite scheme, whereto deference stood meted, thereupon rendered imperative, casting of

apposite motions before the Court concerned. Nowat, with the CWP No.6819 of 2014, for reasons aforestated, standing instituted, prior to the restoration of the Civil Suit concerned, hence, therefrom the import of the orders pronounced (supra) in CWP No.6819 of 2014, is to be marshalled. The order of status quo, directed to be maintained, by the litigating parties, is enjoined to bear a construction, of, it appertaining, to apposite prevalences therewith or qua the apposite operations, specifically appertaining to the distribution, of funds, amongst the Bhojakis, of, the temple concerned. Tritely, at the time of the apposite decision being recorded, on 29th June, 2015 in CWP No.6819 of 2014, the petitioners omitted to place on record, any material personificatory, of adherence yet being meted vis-a-vis the scheme, whereto deference was meted by this Court, while, making a decision upon OMP No.392 of 1987, (g) also when longevity thereof remained alive only upto 15 years, commencing, from May, 1987, and, force whereof hence elapsed in the month of May, 2002, whereafter its operation remain alive without any judicial order being made, yet without demur, (h) also when the apposite civil suit, given its being dismissed in default, hence remained in a state of inertia, (i) also therewithin the force of the orders, pronounced, in OMP No.392 of 1987 hence remained immobilized, (j) thereupon, hence adherence thereto being unmeteable, (k) rather omission(s) of the petitioners, to place on record any material personificatory, of, the scheme mandated to be adhered, to, by the defendants/respondents herein, under a pronouncement recorded upon OMP No.392 of 1987, specifically upto orders being pronounced upon CWP No.6819 of 2014, being the one embodied therein, besides holding clout, rather when the respondents contend, of, unprotested disbursements occurring, through a subsequently prepared scheme, (l) rather begets a conclusion of the scheme, reflected in the orders passed by this Court in the aforesaid OMP, hence not comprising the one warranting adherence being meted thereto, rather the unprotested scheme prepared subsequent, to, the dismissal of the apposite civil suit, being the one, hence, holding force and clout, at the time contemporaneous vis-a-vis this Court, making a pronouncement upon CWP No.6819 of 2014. In aftermath, with the aforesaid unprotested scheme, being the one holding prevalence, at the time contemporaneous, vis-a-vis this Court hence recording a decision upon CWP No.6819 of 2014, (m) thereupon, the status quo, ordered to be maintained by the parties, gathers the necessary implication, of, the contesting litigants, being enjoined to ensure adherence thereto, than the petitioners herein insisting upon adherence being meted vis-a-vis the orders pronounced upon OMP No. 392 of 1987, especially, when for the reasons aforestated, it held longevity for 15 years, computable from 15.5.1987 upto 14.5.2002, and, also with this Court in making a pronouncement upon CWP No. 6819 of 2014, rather empowered the learned Civil Judge concerned, to, in consonance with the apposite motions being made before him, hence render affirmative directions, empowerments whereof remained unexercised.

5. Since, for all the aforesaid reasons, the learned trial Court has rendered a fallacious conclusion(s), conclusions whereof are grooved upon an erroneous interpretation, of, an order recorded by this Court upon OMP No. 392 of 1987, rather when it was enjoined to withhold making, of, the orders impugned before this Court, (i) and, was enjoined to elicit from the Deputy Commissioner concerned, (ii) given the apparent termination, of, the longevity of the apposite scheme, an apt consensual scheme, whereafter upon considering the respective contentions of the litigating parties, it was enjoined to re-enliven the manner of apposite distribution of funds. However, the learned Civil Judge, Junior Division, Bilaspur, has, despite the apposite scheme surviving only upto 15 years, termination whereof occurred in the month of May, 2002, has made a gross mis-interpretation, of, orders pronounced, by this Court in OMP No.392 of 1987, also made an erroneous interpretation, of the pronouncement recorded, by this Court in CWP No.6819 of 2014, than, as aforestated, its, seeking an appropriate application, from, the defendants accompanied by a consensual scheme, for hence validating besides enabling the manner of distribution of

funds, amongst, the Bhojakis. Consequently, the impugned order is set aside and the learned Civil Judge, Junior Division, Bilaspur is directed, to, for facilitating the distribution of funds amongst the Bhojakis, hence seek, from, the contesting parties, appropriate applications accompanied by appropriate scheme(s), whereafter, he shall pass order(s), in accordance with law.

6. For the foregoing reasons, the instant petition is allowed. In sequel, the order impugned is set aside. The parties are directed to appear before the learned trial Court on 23rd April, 2018. All pending applications also stand disposed of. Records be sent back forthwith.

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

Sh. Liaq Ram & others .....Appellants/defendants/non-objectors.

Versus

Kamla Devi & Ors .....Respondents/Plaintiffs/Cross-objectors.

RSA No. 478 of 2007 along
with Cross Objections No. 42 of 2017.
Reserved on : 5th March, 2018.
Decided on : 12th March, 2018.

**Code of Civil Procedure, 1908** - Order XLI Rules 25 & 26 - Limited remand- Nature and scope – Whether party aggrieved by finding on issue remanded required to file separate appeal? Held, no – In pending RSA, High court remitting matter to District Judge to decide issue of limitation and remit record after recording finding - District Judge returning finding of suit being barred by limitation – Plaintiff filing cross-objections on issue of limitation in pending RSA preferred by defendants - Defendants contending that plaintiff ought to have file separate appeal as finding on issue of limitation amounts to dismissal of suit - Held, when matter is remanded with direction to lower court to record finding on issue and remit record while retaining record with it, then any party aggrieved with findings recorded on such issue entitle to file cross-objections under Rule 26 of Order XLI. (Para 9)

For the Appellants/ Non Objectors:- Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

For the Respondents/ Cross-objectors Mr. B.R. Verma, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The plaintiffs' suit for rendition of a decree, for declaration besides for rendition of a decree, for permanent prohibitory injunction, stood dismissed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the plaintiffs, the latter Court allowed their appeal besides obviously reversed the trial Court's judgment and decree of dismissal of the plaintiff's suit.

2. Briefly stated the facts of the case are that the plaintiffs' filed a suit for grant of relief of declaration to the effect that the land comprised in Khata No.8, Khatauni

No.41, Khasra No.469/183, measuring 0-13 bighas, situated in revenue estate Majjat, Tehsil and District Shimla has been wrongly and illegally mutated in the ownership and possession of the defendants, vide mutation No.1181 and 1182 of 4.9.1995, because the entries of gair marussi has been recorded in favour of predecessor-in-interest of the plaintiff and the said entries not binding on the rights of the plaintiffs. Further relief of permanent prohibitory injunction has been sought, restraining the defendants from interfering in the possession of the plaintiff over the suit land. It is averred that late Daya Nand, father of the plaintiffs stands recorded as one of the co-sharer in the above land. On the demise of late Daya Nand, the plaintiffs being his Class-1 heirs, succeeded to the suit land by way of inheritance. It is averred that as per jamabandi for the year 1960-61 with respect to khasra No.183, measuring 1-7 bighas, late Sh. Daya Nand was recorded as one of the co-sharer in the column of ownership and in column of possession. He vide sale deed of 29.12.1966 entered at Sr. No.170 in the office of Sub Registrar sold two biswa of land from the aforesaid khasra No.183 and two bighas and two biswa from Khasra No.178 and fifiteen biswa from the land comprised in Khasra No.181, total measuring 3 bigha and seven biswa to Sh. Roop Ram, predecessor-interest of defendants No.1 to 4 and in the regard mutation No.644 of 26.6.1968 was mutated in the revenue record. It has been averred that predecessor-in-interest of the defendants in collusion with the Halqua Patwari not only got the entries of two biswa out of Khasra No.183 so sold to him made in the revenue record, but got incorporated without any legal basis entry of thirteen biswa of more land of Khasra No.183, in his name, firstly on account of Bila Lagan Bawaja Rahain and later got changed those entries on account of Bila Lagan Bawaja Rahan without the knowledge of the plaintiff and their predecessor-in-interest. Further the defendants taking the undue advantage of wrong entries existing in the revenue record firstly got sanctioned a mutation No.1181, of 4.9.1995 of inheritance in their favour and on the same day vide mutation No.1182. The defendants thereafter started interfering in the peaceful possession of the plaintiffs over the suit land and the fact came to the notice of the plaintiffs on 20.09.1995. It is averred that the defendants recently on 8.4.1996 have threatened to alienate the suit land on the basis of wrong and illegal revenue entries existing in their favour.

3. The defendants contested the suit and filed written statement, wherein, they have has taken preliminary objections of maintainability, cause of action estoppel and valuation. It is alleged that late Roop Ram was owner in possession of land as entered against khasra No.469/183 min, measuring 13 biswa and the said land was purchased by late Roop Ram. Since, the date of purchase of this land, late Roop Ram owned and possessed this 13 biswa of land as of right, continuously, openly peacefully and to the knowledge of the concerned, during his life time, upto 1979, when he died and thereafter this land became absolute property of the defendants, who are legal heirs of late Sh. Roop Ram and daughters of late Roop Ram. The entries in the revenue record contrary to this claim of the replying defendants are illegal, wrong and those are not binding upon the defendants. The suit is also stated to be bad for failure to join all the necessary parties. It is alleged that out of area of khasra No.183, late Sh. Roop Ram had already purchased 13 biswas of land as is evident from the entries carried in the jamabandi for the year 1964-1965. However out of total area of khasra No.183, measuring 1 bigha, 7 biswas, late Sh. Roop Ram purchased two biswas of more land along with land as entered against khasra No.178/1, measuring 2 bighas 10 biswa and Kh. No.181 min, measuring 15 biswas, total measuring 3 bighas, 7 biswas and the requisite mutation on the basis of registered sale deed vide mutation No.644 was entered and attested in favour of late Sh. Roop Ram on 22.11.1967. The alleged collusions have been denied. It is alleged that after the purchase of this land, neither the plaintiffs, nor their predecessors were allowed to enter upon this land and during his life time, late Sh. Roop Ram owned and possessed and occupied and enjoyed this 13 biswa of land, openly, peacefully, as of right, title and interest of any kind over any

portion of this land. It is alleged that the plaintiffs have wrongly claimed the khasra No.183 as Bila Lagan Bawaja Rahain. It is alleged in the alternative, if purchase of this 13 biswa of land by late Sh. Roop Ram is not found to have been proved, though it was purchased by him prior to 1964, even then, since this area always remained during the life time of Roop Ram in exclusive ownership and possession to the knowledge of the previous owners, thereafter in possession of the defendants, hence, the defendants have become owner thereof by efflux of time.

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

1. Whether the plaintiffs are entitled for the decree of declaration, as alleged? OPP.
2. Whether the plaintiffs are entitled for the decree of permanent prohibitory injunction, as alleged? OPP.
3. Whether the suit is not maintainable? OPD.
4. Whether the suit is time barred? OPD.
5. Whether the plaintiffs are estopped from filing he present suit? OPD.
6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.
7. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/respondents. In an appeal, preferred therefrom, by the plaintiffs/respondents herein before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 23.07.2008, this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the plea of limitation as raised by the defendants having not considered by the learned District Judge though the claim was held to be barred by limitation by trial Court, therefore, the findings of the lower appellate Court are liable to be set aside?

b) Whether the material admission on the part of late Shri Daya Nand, predecessor of the plaintiffs, belies the claim of plaintiffs inasmuch as that he admitted the claim of the respondent continuously since 1964 till his death because no challenge was thrown by him to the revenue entries and also that mutations NO.1181 and 1182 having been attested in his presence in favour of the appellants on 4.9.1995, therefore, the respondents are bound by such admissions of the deceased and they are estopped to file the suit?

c) Whether as per revenue record available on record, the subject matter of dispute could not be decided in the absence of all the necessary parties because S/Shri Shanka Lal and Kanshi Ram were recorded

owners with respect to the suit land as per entries in the jamabandi for the years 1960 and 1964?

**Substantial questions of Law No.1 to 3:**

8. It is pertinent to mention here that upon the appeal coming up for hearing, before this Court, on 18.11.2010, this Court rendered the hereinafter extracted directions, upon, the learned First Appellate Court:-

> "The learned Civil Judge (Junior Division), Court No.4, Shimla has framed the following issues on 13th August, 1999:
>
> i). Whether the plaintiffs are entitled for the decree of declaration, as alleged? OPP.
>
> ii). Whether the plaintiffs are entitled for the decree of permanent prohibitory injunction, as alleged? OPP.
>
> iii). Whether the suit is not maintainable? OPD.
>
> iv). Whether the suit is time barred? OPD.
>
> v). Whether the plaintiffs are estopped from filing he present suit?OPD.
>
> vi). Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.
>
> vii). Relief.
>
> There is a short discussion on issue No.4 in para 7 of the judgment of the trial Court. The fact of the matter is that plaintiffs' suit was dismissed by learned Civil Judge (Junior Division), Court No.4, Shimla. Respondents/plaintiffs preferred an appeal before the learned District Judge, Shimla against the judgement and decree dated 17th March, 2006 passed by the learned Civil Judge (Junior Division) Court No.4, Shimla. However, surprisingly, there is no discussion on the question of limitation. The question of limitation ought to have been considered by the learned District Judge in right earnest.
>
> In view of this, with consent of the parties, the matter is remanded to the first appellate Court only to give findings on the question of limitation. It is made clear that it is a limited remand. The parties shall restrict their arguments only to the issue of limitation on the date to be fixed by the learned first appellate Court. Consequently, the parties are directed to appear before the learned first appellate Court on December, 01, 2010. The learned first appellate Court shall return the findings to this Court on the limited issue, within a period of eight weeks thereafter. The records be sent back to the first appellate Court."

A perusal of the aforesaid directions, discloses that the learned first appellate Court, was, mandated to return findings, only upon the issue appertaining to the plaintiffs' suit, being barred by limitation. The learned First Appellate Court after remand vis-a-vis it, by this Court, under directions pronounced, on 18.11.2010, proceeded to, on 14.12.2010, return affirmative findings upon the issue appertaining, to the plaintiffs' suit being barred by limitation. Consequential effect thereof being, of, the effect(s) of affirmative findings prior thereto, rendered, by the learned First Appellate Court, on issues, excepting the issue appertaining to the plaintiffs' suit being barred by limitation, hence standing obviously blunted.

9. The learned counsel appearing for the defendants/appellants herein, has contended with vigour (i) that the affirmative findings rendered by the learned First Appellate Court vis-a-vis, the apposite issue appertaining to the plaintiffs' suit being barred by limitation, (ii) especially, when hence the plaintiffs are non suited or a decree of dismissal, of their suit hence stands pronounced, (iii) thereupon, the plaintiffs were enjoined, to institute a properly constituted appeal, before this Court, (iv) whereupon the preferment of cross-objections, by the plaintiffs vis-a-vis the findings recorded by the learned First Appellate Court, on, the issue appertaining to their suit being barred by limitation, are rather rendered not maintainable. For gauging the worth, of the aforesaid submission addressed before this Court by the learned counsel appearing, for the defendants/appellants, it is imperative to allude to the provisions, borne in Order 41, Rules 25 & 26 of the Code of Civil Procedure (hereafter referred to as the CPC, Provisions whereof read as under:-

> **"25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from.-** Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred and in such case shall direct such court to take the additional evidence required; and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons there for within such time as may be fixed by the Appellate Court or extended by it from time to time.
>
> **26. Findings and evidence to be put on record—Objections to finding.-** (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.
>
> (2) Determination of appeal—After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal."

Since, this Court on 18.11.2010, (i) made an order, for limited remand, upon, the learned first appellate Court, and, when in compliance therewith, the learned first appellate Court recorded affirmative findings vis-a-vis the issue appertaining to the plaintiffs' suit being barred by limitation, (ii) also when the said issue, stood already struck earlier, whereas, non rendition of findings thereupon aptly constrained this Court, to given the aforesaid infirmity, hence direct the learned first appellate Court, to render findings thereon, (iii) obviously renders, the mandate rendered earlier, on 18.11.2010, to fall within the ambit of Order 41, Rule 26 of the CPC, AND, within the ambit, of, the phrase " or to determine any question of fact" borne in Rule 24 of Order 41 of the CPC, (iv) Rieteratedly, the learned first appellate Court, after, meteing compliance with the order, of, limited remand pronounced earlier by this Court, transmitted all the relevant records vis-a-vis this Court, (v) sequel whereof, is that the mandate comprised, in the second part of sub-rule (1) to Rule 26 of Order 41 of the CPC, is enjoined to obtain assured satisfaction, (vi) for enabling the learned counsel for the plaintiffs/respondents, to contend that the espousal, of the defendants'/appellants' counsel, that given the rendition of decree of dismissal of the plaintiffs' suit, arising, from its being barred by limitation, (vii) it was rather incumbent upon them, to, institute a properly constituted appeal before this Court, (viii) AND that the cross-objections preferred against the findings, rendered by the learned first appellate Court, upon, the issue appertaining to the plaintiffs suit being barred by limitation, in sequel to, on order of remand being pronounced by this Court, (ix) being of no legal consequence besides theirs being not

maintainable. (x) rather contrarily, significantly being meritless. The second part of sub-rule (1) to Rule 26 of Order 41, of the CPC, is couched in the phraseology "either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding" (xi) hence, it is to be guaged, whether this Court, had afforded any time vis-a-vis the plaintiffs/respondents, to, after its receiving findings, being rendered by the learned first Appellate Court, upon the issue appertaining to the plaintiffs' suit being barred by limitation, whereupon, hence evident satiation would occur vis-a-vis the nuance , of the aforesaid apt statutory phrase, (xii) upon satiation thereof being evinced, from, aforesaid orders hence existing on the file, rather would render the cross-objections being construable to be maintainable. For making the aforsaid adjudication, an allusion to the order(s), rendered by this Court, on 11.3.2011, 13.4.2011, 21.04.2011 and on 17.6.2011 is imperative, orders whereof are extracted hereinafter:-

> "11.03.2011
>
> Mr. Ramesh Verma, learned counsel for the appellants prays for and is permitted to file objection to te findings recorded by the 1st Appellate Court, within four weeks.
>
> 13.04.2011
>
> Objections stand filed by the appellants. List this matter during next week.
>
> 21.04.2011
>
> Mr. Ramesh Verma, learned counsel for the appellants prays for and is granted three weeks' time to file reply to the objections filed by the respondents.
>
> 17.6.2011
>
> Mr. Romesh Verma, learned counsel for the appellants prays for and is permitted to file reply to the objection during the course of the day. List next week."

A perusal of the aforesaid extracted orders, makes vivid disclosure (I) of the counsel for the appellants, being permitted, to file objections vis-a-vis the apposite findings recorded by the learned first appellate Court, upon, the issue appertaining to the plaintiffs' suit, being barred by limitation. Upon anvil thereof, the counsel for the appellants/defendants, contends, that no permission within, the ambit of the second part of sub-rule (1) to Rule 26 of Order 41 of the CPC was granted vis-a-vis the plaintiffs/respondents, (ii) hence for want of non satiation therewith, renders the objections constituted before this Court by the learned counsel for the plaintiffs/respondents, being construable to be not maintainable. In making the aforesaid submission(s), the learned counsel for the defendants/appellants, appears, to gather strength, from, mere inadvertence(s), occurring in the aforesaid orders. Even if, the inadvertence aforesaid, occurring, in the afore extracted orders, remained uncorrected, nonetheless a reading of the orders pronounced, on 17.6.2011, rather, nails, a firm conclusion (iii) of prior thereto opportunities, granted to the counsel for the appellant rather being construable to be opportunities being granted to the counsel for the plaintiffs/respondents, dehors no corrections thereof being made. The aforesaid conclusion is strengthened by the fact, (iv) of the apt record(s) not making any disclosure(s) of the appellants/defendants, in pursuance to the orders recorded, on 11.3.2011, proceeding to, file any objections vis-a-vis the findings recorded by the learned first Appellate Court, upon the issue appertaining to the plaintiffs' suit being barred by limitation, (v) further, even otherwise with apt affirmative findings upon the apposite issue, standing recorded vis-a-vis the defendants/appellants, obviously, hence , there is no occasion, to make any conclusion, of, apposite permissions being either sought for or granted by this Court vis-a-vis the appellants. (vi) More so, when a perusal of the order, of, 21.4.2011, unveils, of, permission

being granted by this Court to the counsel, for the appellants, to within three weeks' institute a reply to the objections, filed by the defendants/respondents, in pursuance whereof a reply thereto came to be filed by the defendants/appellants. Consequently, upon, the aforesaid construction(s), being, made by this Court, upon, the aforesaid orders made by this Court, also when hence the mandate of the apt second part of sub rule (1) to Rule 26 of Order 41 of the CPC, is meted satiation, (vii) thereupon, the cross-objections filed, by the learned counsel for the plaintiffs/ respondents vis-a-vis the findings recorded by the learned first appellate Court, upon, the apposite issue appertaining to the plaintiffs' suit being barred by limitation, are properly constituted, (viii) also they fall within the domain, of the apposite statutory provisions, (ix) AND the contention, of the learned counsel appearing for the defendants/appellants, of, theirs being mis-constituted, is not worthy for acceptance nor obviously it is befitting to conclude, of any enjoined necessity being cast, upon the plaintiffs/respondents, to institute a properly constituted statutory appeal, for theirs impeaching the findings recorded by the learned first appellant Court, upon, the issue appertaining to the plaintiffs' suit being barred, by limitation.

10. The jamabandi appertaining to the suit land, borne in Ex.PW1/A, makes, a disclosure (i) of khasra No.183 being in classification column thereof, hence reflected as ghasni and its carrying, an area of 1 bigha, and, 7 biswas. The co-owners thereof, are, one Daya Nand, predecessor-in-interest of the plaintiffs, one Shankar Lal, both of whom cumulatively hold ½ share therein, and, the third share holder thereof being one Kanshi Ram, who exclusively holds ½ share therein. Uncontrovertedly, in respect of the aforesaid khasra number, a sale deed, was, executed by the predecessor-in-interest of the plaintiffs, namely, one Daya Nand vis-a-vis the predecessor-in-interest, of, the defendants, namely one Roop Ram, (ii) sale deed whereof, was, confined only to an area, of two biswas, of, land from amongst the total holding of 6 ½ biswas, held therein by the aforesaid Daya Nand. Uncontrovertedly, an uncontested mutation, in respect thereof, was recorded besides attested on 11.4.1967, order of mutation whereof is comprised in Ex. PW1/K. (iii) A reading thereof discloses, of, it being attested only vis-a-vis two biswas of land, from amongst 6 ½ biswas of land, held by the predecessor-in-interest, of the plaintiffs, in the undivided holding, which he held along with one Shankar Lal and one Kanshi Ram. However, mutation No.1181 recorded, on 4.9.1995, mutation whereof is comprised in Ex.PW1/J, was attested vis-a-vis 13 biswas of land qua the successors-in-interest of one Roop Ram, though vis-a-vis whom, prior thereto, a mutation comprised in Ex.PW1/K, rather stood attested. On a reading of the aforesaid order of mutation, the learned First Appellate Court, had concluded, (iv) of with one Daya Nand recording his presence, therebefore, at the time contemporaneous to its attestation, both he and on his demise, his successors-in-interest hence being barred to contest its validity. The learned First Appellate Court, upon, an analysis of both the documentary as well as oral evidence, has concluded, (v) of, with the defendants/appellants being in possession of the suit property, hence, no decree of permanent prohibitory injunction being affordable vis-a-vis the plaintiffs.

11. The merit of the aforesaid contention, has to be adjudicated by juxtaposing it vis-a-vis the propagation(s), reared by the defendants/appellants in their written statement. (i) A perusal thereof discloses, that, in respect of 13 biswas of land, qua land whereof an order of mutation comprised in EX.PW1/J, was attested , being espoused therein to stand purchased in the year 1965 by their predecessor-in-interest, namely, one Roop Ram, (ii) and of since then his being in possession thereof. The aforesaid pleadings, constituted, an admission of the defendants/appellant vis-a-vis the mode of theirs asserting acquisition, of, a valid of title thereto (iii) AND of theirs hence holding an indefeasible title vis-a-vis 13 biswas of land, besides also an admission qua the evident mechanism deployed by them, for validating the order of mutation, comprised in Ex.PW1/J. However, in support thereof, no

sale deed, came to be adduced into evidence. Contrarily, the aforesaid admission, per se negate(s) the worth of any entries, existing, in any revenue record, of one Roop Ram holding, as a gair marussi, the area(s) of land, reflected in Ex.PW1/J nor any reflections occurring in Ex.PW1/J of his successors-in-interest, holding it, as gair marussi hence enjoy any aura of any truth. Contrarily ex facie any entries in negation, of, the pleadings reared by the defendants, in their written statement, render any reflection, in contradiction thereto, occurring in any order of mutation or in any revenue record, to be hence obviously negated rather they are prima facie construable to be inefficaciously and fictitiously recorded, rendering them uncreditworthy.

12. Nowat, an allusion to Ex.PW1/B is imperative, for determining the extent of lands, held, upon the suit khasra number, by the predecessor-in-interest of the plaintiffs/respondents. As aforestated, one Dayanand cumulatively along with his brother, one Shankar held 13 biswas of land, in the undivided holdings, measuring 1-7 bighas, whereas, the entire remaining ½ share was singularly held by one Kanshi Ram, (i) hence the predecessor-in-interest, of the plaintiffs/respondents, could, make a valid alienation(s) thereof, only to the extent of 6 ½ biswas, AND, not beyond thereof. Alienation vis-a-vis 2 biswas of land, borne therein, is, for reasons aforestated, a valid alienation thereof. However, the alienation(s), of, or bestowment of rights, under, Ex.PW1/J upon the successors-in-interest, of one Roop Ram, without, the defendants/appellants propagation, (a) of their predecessor-in-interest, purchasing the aforesaid area, of, land before 1964, (b) hence, withstanding evidentiary proof, being lent in consonance therewith, was rather obviously, rendered bereft of any vigour, (c) even otherwise, the aforesaid espousal is rudderless, (d) given one Dayanand, the predecessor-in-interest of the plaintiffs, not evidently being empowered, to beyond 6 ½ biwas, of, land he validly held, in the total undivided holdings, hence make any valid alienation(s) thereof vis-a-vis the plaintiffs or their predecessors-interest, (e) unless, his brother Shankar Lal, holding along with him another 6 ½ biswas also was joined in the array of legal combatants also his successors-in-interest, were added, (f) for ensuring that the aforesaid Shankar Lal, along with Dayanand, prior to 1964, hence made valid alienation of their joint shares vis-a-vis the predecessor-in-interest of the defendants, namely, one Roop Ram. However, all the aforesaid persons remained unimpleaded in the extant suit. Consequently, for their non impleadment, it is unjust to pronounce, upon the efficacy of Ex.PW1/J, (g) especially with its comprising therein, an area of land, much beyond the alienable share in the suit property, of the predecessor-in-interest of the plaintiffs/respondents, namely, one Daya Nand. Consequently, also the principle(s) of natural justice warranted impleadment of Shankar Lal and if deceased, his successors-in-interest. Contrarily, of his non impleadment, and, if deceased, his successors-in-interest, in the array of co-defendants, if the extant suit, renders the ill consequence of injustice being hence perpetuated, upon, the valid title held by one Shankar Lal in the suit property or on his demise, by his successors-in-interest. For obviating their befalment upon the aforesaid, Ex.PW1/j, necessitates, its being hence declared null and void.

13. Be that as it may, the plaintiffs' suit is, not, for recovery of possession, rather, is, for rendition, of a decree for declaration besides is for rendition of a decree for permanent prohibitory injunction. For rendering an efficacious decree for permanent prohibitory injunction, the peremptory requirements, (i) are of the party claiming it, being in evident possession of the suit property. With this Court negating, for reasons aforestated, the effect(s) of all the apposite thereto entries, if any, conspicuously on anvil of their omissions, to by cogent evidence hence prove the manner of acquisition by them, of, a valid title qua the area reflected in Ex.PW1/J, also this Court concomitantly hence ousting the effects of all reflections in any revenue record, in contradiction thereof, (ii) besides with this Court invalidating Ex.PW1/J, does concomitantly, upsurge a conclusion, of any title as

asserted, by the defendants/appellants, qua land borne in Ex.PW1/J being not amenable to be construable to be a validly asserted claim vis-a-vis it. Though upon, a demarcation report being placed on record, a firm conclusion would be nailed qua the area, in respect whereof, Ex.PW1/J stood recorded, besides qua the relevant sites or specifically delineated spot(s), vividly depicted in the apposite tatima prepared in sequel thereto, (iii) besides would stall any inference, qua the fictitiousness, of the entries recorded in the revenue record, reflecting, the defendants/appellants as owners in possession of the suit property, whereupon hence this Court, would be barred to proceed, to, for want thereof, hence, analyze or negate the worth of oral evidence testified in rebuttal thereof by the DWs. (iv) AND, this court would rather hence conclude of the presumption of truth enjoyed by the revenue tries being dislodged.

14. The oral evidence adduced by the defendant, is comprised, in the statement of DW-1. In his statement , he rendered a testification in support of the defendants/appellants, holding, possession of the suit land. His testimony, is, lent support by DW-2 and by DW-3. Implicit reliance, was placed, by the learned first Appellate Court vis-a-vis the testification of DW-2, and, upon the testification of DW-3. Consequently, the learned Appellate Court, imputed reliance vis-a-vis the testification of DW-3, merely on the ground of his holdings, existing, in close proximity, to the suit property, (i) despite the fact, of, DW-3 not graphically disclosing, the factum of, any demarcation of the suit property, being carried in his presence, (ii) in sequel whereto, a tatima was prepared with specific earmarking(s) therein of the spot, wherein the suit land existed, besides its fixing the identity of the suit property, at its relevant site, (iii) yet despite his aforesaid omission, he firmly testified of the suit property being located upon the contentious khasra No.183. (iv) AND his testification was imputed credence. The aforesaid omissions were rather significant, especially when effect(s) thereof warranted, succor, from a valid demarcation being placed on record, in sequel whereto the precise location besides the identity of the suit property, existing, upon the relevant contentious spot would stand proven. (v) Contrarily, the aforesaid omission, carries, the further effect of the defendants/appellants' espousal, of theirs holding possession, of the contentious khasra number, being not worthy for acceptance, rather only for the aforesaid omission, the plaintiffs/appellants', contention, of theirs holding possession of the contentious portion of khasra No.183, is hence amenable for acceptance, (vi) reiteratedly given all the aforesaid omissions, negating, the defendants/appellants' espousal, rather hence, thereupon, alone, the plaintiffs/respondents proving their assertions, (vii) hence galvanises a conclusion, of, with the cause(s) of action, arising, vis-a-vis the plaintiffs/respondents, upon, the defendants/appellants making invasions in respect of the suit land, thereupon, alone the plaintiff's suit is rendered construable to fall within limitation.

15. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are 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 accordingly.

16. In view of above discussion, RSA No. 478 of 2007 is dismissed, whereas, Cross-objections No. 42 of 2017 are allowed. Consequently, the suit of the plaintiffs/Cross-objectors is decreed for joint possession, of the suit land along with other co-owners, and, the revenue entries showing the defendants or their predecessor-in-interest as owner/gair marusi in respect of the suit land, comprised, in Khewat No.8, Khatauni No.41, Khasra No.469/183, measuring 13 biswas situate at revenue estate Majthal, Tehsil and District Shimla and more particularly as per mutation No.1181 and 1182 of 4.9.1995 are wrong, and

,illegal and as such are declared not binding on the right, title and interest of the plaintiffs in the suit land, as one of the co-sharers in possession. The plaintiffs are further entitled to, in accordance with law, seek partition of the suit land by metes and bounds. 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.**

Shayam Sunder .....Appellant/defendant.

Versus

Jagjit Singh & Ors. .....Respondents/Plaintiffs.

RSA No. 135 of 2007.
Reserved on : 28th February, 2018.
Decided on : 12th March, 2018.

**Specific Relief Act, 1963 -** Section 5 - Suit for possession on strength of title – Plaintiff filing suit for possession on strength of title- Defendant claiming adverse possession over suit land- Trial Court decreeing suit by holding adverse possession of defendant not proved – Decree upheld by first Appellate Court - RSA –On facts, plaintiff found having instituted suit for possession within twelve years from his dispossession – Held, possession of defendant falling short of statutory period did not mature into adverse possession – RSA dismissed – Judgments and decrees of lower courts upheld. (Paras 9 & 10).

For the Appellant: Mr. Rajnish K. Lal, Advocate vice to Mr. Sanjeev Sood, Advocate.

For Respondents: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for possession as well as for permanent prohibitory injunction qua the suit khasra number(s), was, hence decreed.

2. Briefly stated the facts of the case are that the plaintiffs filed a suit for possession of the site shown by letters ABCDEFGH shown red in colour in the site plan and for permanent prohibitory injunction, restraining the defendant from interfering, raising any construction, changing nature, cutting, removing or selling trees or fruit from or over the land denoted by letters MNOPQRSTU EFGHADCB shown in green colour in site plan being part of land measuring 0-03-95 hectares. It has been pleaded the suit land in coming in their possession along with other co-sharers and on some part, old abadies were existing which had fallen, but remains of which existed shown in red colour with letters IJKL in the site plan. The plaintiffs have planted Khatta, trees and bananas and that the defendant being shrewed and headstrong person, three years before illegally encroached upon by raising construction upon suit land shown as ABCDEFGH in the site land and has got himself recorded as Kabaj upon land measuring 0-02-94 hectares. In khasra Nos. 1976 and 1977, gair mumkin abadi of the defendant has been mentioned contrary to actual and

factual position on the spot, for which order recording him as Kabaj has been passed at the back of the plaintiffs in collusion with settlement authorities. The plaintiffs have also though admitted possession of the defendant upon Area A to E but have claimed to be in possession of remaining land shown by letters MNOPQRSTU, EFGHADCB and rooms shown by letters IJKL in the site plan. Cause of action arose to the plaintiffs when they learnt about illegal construction and when defendant started interfering in the remaining land having collection construction material.

3. The defendant contested the suit and filed written statement, wherein, they have taken preliminary objections inter alia cause of action, estoppel, maintainability, limitation, valuation, non joinder etc. On merits, claimed his abadi and cow shed upon suit land since the time of his ancestors besides stated that there was no abadi except the suit land. It is alleged that predecessors of the plaintiffs and the plaintiffs have been seeing their possession to which they never objected, thus, the plaintiffs are estopped to file the suit. Defendant further alleged ownership of suit land by adverse possession being in possession of the suit land since the time immemorial. The predecessors of the defendants had planted fruit bearing trees over the suit land 20 years back and cowshed of defendant had damaged, during rainy season. Accordingly, the defendant claimed to have become owner of the suit land by adverse possession and has resisted the suit by submitting that the plaintiffs never come in possession of the suit land in any capacity and that the order dated 2.4.1988 of A.C. 2nd Grade was passed in presence of Rattan Dev, one of the co-sharers against which plaintiffs did not prefer any appeal which has become final.

4. The plaintiffs filed replication to the written statement of the defendant(s), wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiffs are entitled to the relief of injunction, as prayed? OPP.
2. Whether the plaintiffs are entitled to the relief of possession? OPP.
3. Whether the plaintiffs have got no enforcible cause of action, as alleged? OPD.
4. Whether the plaintiffs are estopped from filing this suit, as alleged? OPD.
5. Whether the suit of the plaintiff is not maintainable, as alleged? OPD.
6. Whether the suit is not within time? OPD.
7. Whether the suit has not been properly valued, as alleged? OPD.
8. Whether the suit is bad for non joinder of parties, as alleged? OPD.
9. If issue Nos. 1 and 2 are not proved, whether the defendant has become owner by way of adverse possession, as alleged? If so, its effect? OPD.
10. 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 defendant/appellant herein before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 24.07.2008 admitted the appeal instituted by the defendant/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

> 1. Whether the findings of the Court below are perverse, based on misreading of oral and documentary evidence and the statements of DW1 and DW2, the report of the Local Commissioner, Ex.DW6/A, AW1/A to AW1/C?
>
> 2. Whether in view of admitted allegation in the plaint that the defendant was a co-sharer and had raised construction on the land and on the proof that the appellant had raised construction on the land long before the filing of the suit, a decree for demolition of structure and possession of land and injunction could be passed?

**Substantial questions of Law No.1 to 2:**

8. Uncontrovertedly, in the jamabandi, apposite to the suit land, the plaintiffs are recorded as owners-in-possession thereof. For sustaining his purported unauthorised possession of the suit khasra number(s), the defendant had canvassed (i), of, his since time(s) immemorial, with an animus possidendi, being in, unbroken and uninterrupted possession, of the suit land, (ii) hence, with his possession vis-a-vis the suit land, since then, continuing, beyond the statutorily mandated period of time, especially upto, the time of institution of the plaint, thereupon, his perfecting his title thereon, by prescription. However, the aforesaid claim of the defendant is per se negatived, by his placing on record Ex.D-2. Even if, Ex. D-2, for want of any challenge being made vis-a-vis it, in the plaint, by the plaintiff, hence, acquires conclusivity, (iii) yet with its close reading, not bearing out the contention, raised in the written statement, of the defendant, of, his with an animus possidendi, through his ancestors, since time(s) immemorial, upto, the stage, of, institution of the suit, hence, holding possession of the suit land, (iv) thereupon, his possession ripening, by prescription, into absolute ownership thereto. Corollary thereof is even if any conclusivity is acquired by Ex. D-2, (v) thereupon, reliance placed thereon, by the defendant, is scuttled (vi) besides torpedoes his contention, reared in the written statement, of his since time(s) immemorial, through, his ancestors, with an animus possidendi, holding possession of the suit land, AND his, nowat, perfecting his title thereon, by prescription. Contrarily, it has to be concluded that, only, from the date of making of Ex. D-2, the defendant rather commenced his possession over the suit khasra number(s), obviously, with the suit, standing filed, within less than 11 years elapsing therefrom, (vii) consequently, thereupon, the expiring, of, the mandated period, of 12 years, since the making , of, Ex. D-2, upto the date of institution of the suit, for the defendant being empowered to successfully rear the plea, of his acquiring title by adverse possession qua the suit land rather remains uncompleted, (viii) in sequel, the defendant can not be concluded to have perfected his title by prescription, qua the suit land. Furthermore, the order comprised in Ex. D-2, does not articulate, that possession, if any, with an animus possidendi is held by the defendant, of the suit khasra number, (ix) thereupon, also the imperative rubric, of valid acquisition of title by prescription, by elapse of the statutorily mandated period of time, is also grossly amiss therein nor on its anvil, any capitalization can be garnered by the defendant, for his giving succor vis-a-vis his aforesaid plea.

9. Be that as it may, a Local Commissioner was appointed by the learned trial Court, for determining the extent of the purported encroachment, made, by the defendant

upon the suit land, in sequel whereto, he furnished his report, report whereof is comprised in Ex.DW6/A. DW-6 stepped into witness box and was subjected, to a scathing cross-examination by the learned counsel appearing for the plaintiff. However, a close reading of his cross-examination conducted by the learned counsel appearing for the plaintiff rather unveils of his acquiescing vis-a-vis the affirmative suggestions, personificatory of the defendant hence holding possession of the suit land are embedded therein. The further effect thereof, is, especially, given its standing tendered by him, of hence the defendant acquiescing to his holding possession, of the suit khasra number. The consequence thereof, is, non rendition, if any, of any orders by the learned First Appellate Court, upon, an application filed before it, by the defendant for seeking appointment of a Local Commissioner, is wholly insignificant, for the reasons, (a) of the defendant not asserting any affirmative title vis-a-vis the suit land, anvilled upon any document bespeaking his making its valid acquisition, (b) rather when his claim qua acquisition of title by prescription or by adverse possession, stands, for reasons aforestated, negated, (c) thereupon, when, (i) appointment(s) of local Commissioner(s) may facilitate demarcation(s) of boundaries, of, contiguous lands, whereon, the respective land owners, hold, affirmative title vis-a-vis their respective adjoining estates, (ii) besides may be for determining, the extent of encroachments made by each upon the adjoining estates of others, whereon, each evidently hold affirmative valid title. (iii) Necessarily, hence, for want of any valid affirmative assertion, of acquisition, of title, by the defendant vis-a-vis the suit khasra number, it was not necessary, for the learned First Appellate Court, to proceed to appoint a local commissioner, for, the latter being enabled, to determine the extent of encroachment, if any, made by the plaintiff upon the purported adjoining estate(s) of the defendant, (iv) rather when the plaintiffs are owners-in-possession, of the suit land AND with the defendant failing to prove acquisition of title, thereon, by adverse possession, in sequel, his eviction therefrom is imperative, as aptly concurrently concluded, by both the learned courts below.

10. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not, excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondents and against the appellant.

11. In view of the above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. The appellant is directed to, within two months from today, deposit, the mense profit qua the suit land before the learned trial Court. All pending applications also stand disposed of. No order as to costs.

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

Tara Singh ..Appellant/plaintiff.

Versus

Mohinder Singh ..Respondent/Defendant.

RSA No. 658 of 2005.
Reserved on : 27.02.2018.
Decided on : 12th March, 2018.

**Specific Relief Act, 1963 -** Section 38 - Suit for permanent prohibitory injunction – Plaintiff filing suit and seeking decree of permanent prohibitory injunction by alleging defendant's interference in his possession over disputed land - Defendant contesting suit and averring suit land to be ancestral in hand of plaintiff in which he also having right, interest and title – Defendant contending suit land having been devolved upon plaintiff from 'W', his grandfather - Trial court decreeing suit - District Judge allowing appeal and dismissing suit – RSA – Documentary evidence not specifically revealing suit land having been devolved upon plaintiff from 'W'- Ancestral nature of property in hands of plaintiff vis-a–vis defendant not proved - Plaintiff recorded in exclusive possession of suit land - Held, in circumstance plaintiff entitlement for permanent prohibitory injunction – RSA allowed – Judgment and decree of District Judge set aside and of trial court restored. (Paras 9 to13)

For the Appellant: Mr. K.S. Kanwar, Advocate.
For the Respondent: Mr. Rajesh Verma, vice to Rajinder Dogra, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The plaintiff instituted a suit, claiming therein, pronouncement, of, a decree for permanent prohibitory injunction, in respect of the suit land AND vis-a-vis the defendants. The learned trial Court decreed the suit of the plaintiff in respect of relief of permanent prohibitory injunction. The defendants being aggrieved therefrom, instituted an appeal before the learned First Appellate Court, the latter Court allowed the appeal, whereupon, it reversed the judgment and decree, pronounced by the learned trial Court. Being aggrieved therefrom, the plaintiff instituted the instant appeal before this Court, wherein, reversal of the verdict pronounced by the learned First Appellate Court, is strived.

2. Briefly stated the facts of the case are that the plaintiff is owner in possession of the land comprising in Khata Khatauni No. 156/243, total measuring 63.13 bighas, including the land comprising in khasra No.565/84, 567/84, 570/458/86, 568/456/85 and 591/92 min, measuring 1.1, 10.14, 1.0, 2.2 and 19.15 bighas respectively, situate in mauza Gangoowala, Tehsil Paonta Sahib. The plaintiff's case is that the defendant has no right, title or interest in the suit land. The defendant has his separate land which was purchased by the plaintiff in the name of defendant and his two other sons, who are residing separately. The defendant is a very quarrelsome person and is trying to occupy the suit land forcibly. The plaintiff being an old person of 80 years of age cannot resist the illegal acts of the defendant. As such, the plaintiff filed a suit for permanent injunction seeking to restrain the defendant from interfering or occupying the suit land.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections of maintainability and collusion. The defendant has pleaded that 12-13 years ago, the plaintiff made a family settlement of his property in order to bring peace and cordial relations between the family members and in family settlement, he has given land comprised in khasra No.591/92/1, measuring 7 bighas, khasra No.568/456/85/1, measuring 17 biswas and Khasra No. 567/84/1 measuring 7.11 bighas, total land measuring 15.8 bighas and he is in physical possession of the same. That apart, the defendant's case is that he was given one room for residence, when he was separated by the plaintiff. Apart from the aforesaid land, the plaintiff also purchased 15 bigha of land from the income of the ancestral land and the same was purchased in the name of defendant, Harjeet Singh and Gurmeet Singh about 20-25 years back. Defendant's further

case is that on account of the separation from the family on account of family settlement, he on getting the land in settlement made improvements on the same and about three years back, he built a pucca house on the land allotted to him and also constructed a boundary wall. His further case is that the suit land is joint Hindu family coparcenary property of plaintiff, defendant and his two brothers. Waryam Singh, father of the plaintiff was the son of Subha. Subha had five sons, namely, Jagat Singh, Gurbachan Singh, Waryam Singh, Ran Singh, Mehar Singh and Jota Singh. Defendant's further case is that his grand father Waryam Singh, pre-deceased his father Subha. After the death of Subha, his estate qua the estate of father of plaintiff, was inherited by the plaintiff and his two brothers, being the sons of Waryam Singh vide mutation No.271, dated 11.6.1955. Apart from the land inherited by the plaintiff from his grand father Subha, he had also inherited the land from his father Shri Waryam Singh round about and prior to 1950. Thus, the entire land in the hand of the plaintiff is ancestral coparcenary property and defendant being the member of joint Hindu family as well as being coparcener has a right by birth which right had been duly admitted and accepted by the plaintiff, therefore, according to the defendant, the plaintiff effected the family settlement and gave land measuring 15.8. bighas to him. Apart from that, the plaintiff has also purchased 15 bighas of land which was purchased by him in the name of defendant, Harjeet Singh and Gurmeet Singh from joint family income as well as income from ancestral land, 20-25 years back.

4. The plaintiff/appellant herein filed replication to the written statement of the defendant/respondent wherein, the plaintiff 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 defendant is interfering in the suit land, as alleged? OPP.
2. Whether the plaintiff is entitled to the relief of permanent injunction, as prayed for? OPP
3. Whether the suit is not maintainable? OPD.
4. Whether the suit property is coparcenary property, if so, its effect? OPD.
5. Whether in a family settlement, defendant was allotted land measuring 15.8 bighas, if so, its effect? OPD.
6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/appellant herein qua relief, of, permanent prohibitory injunction. In an appeal, preferred therefrom by the defendant/respondent herein before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 07.03.2006, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether there can be a family settlement settling a portion of the suit property in favour of the defendant without the consent of all persons having existing or future interest in the property to be settled?

2. Whether the findings of the learned District Judge are result of misinterpretation and misconstruction of the pleadings, oral and documentary evidence on record ad ignored the admissible evidence, which if considered would have resulted in opposite findings?

**Substantial questions of Law No.1 and 2:**

8. The plaintiff's suit, for, rendition of a decree, of permanent prohibitory injunction vis-a-vis suit land, comprised in Khata Khatauni No. 156/243 min bearing Khasra Nos. 565/84, 567/84, 570/458/85, 568/456/85 and 591/22 min, respectively measuring 1-1, 10-14, 1-0, 2-2 and 19-15 hence stood decreed by the learned trial Court. However, the suit of the plaintiff was resisted by the defendant. The resistance posed by the defendant vis-a-vis the plaintiff's suit, was embedded in (a) of the entire suit being ancestral coparcenary property, given its, in an unbroken chain, from, his immediately/preceding two ancestors, hence standing transmitted vis-a-vis the plaintiff, (b) till occurrence of dismemberment of the joint estate, the plaintiff being barred, to claim exclusivity of possession, of any portion of the suit khasra numbers nor his being entitled to seek, qua them, any decree of permanent prohibitory injunction, (c) rather the defendant, espoused in his written statement, that in pursuance to, a family settlement recorded inter se the parties at contest, the land(s) comprised in Khasra No.591/92/1, measuring 7 bighas, Khasra No.568/456/85/1, measuring 17 biswas and Khasra No.567/84/1,measuring 7-11 bighas, total measuring 15-8 bighas, being delivered to him, factum whereof being denoted in a tatima prepared by the Patwari besides his raising a residential house thereon AND constructing a boundary wall, as well as, a khurali about three feet high and twenty five to thirty feet in width and length, for his tethering cattle and for storing fodder.

9. Preceding the attestation of mutations vis-a-vis the suit land, mutations whereof are borne respectively in Ex. DC, Ex. DD, Ex. DF and Ex. DE, the suit khasra numbers, were, held as co-owners by Waryam Singh and Subha. Waryam Singh, is, the directly preceding predecessor-in-interest, of, the plaintiff AND is the grandfather of the defendant. Hence, the defendant's propagation(s) that all the suit khasra numbers, stood transmitted, in an unbroken line, from, Subha and Waryam Singh, upto Tara Singh, the latter being the last male holder of the suit property, thereupon rendered him incumbent to place on record reliable, cogent and best documentary evidence, making vivid disclosure, of (i) the suit khasra numbers denoted in the plaint, standing also specifically reflected in the apposite mutations, as stood attested in contemporaneity, with the opening(s) of succession vis-a-vis the estate(s) of the predecessor(s)-in-interest, of the parties at contest, (ii) whereupon, this Court would be enabled, to efficaciously, make apposite collations therewith, besides form a firm conclusion qua apposite analogity(s) thereof, significantly, vis-a-vis suit khasra number(s), (iii) also concomitantly this Court would be constrained, to firmly conclude that the apposite best documentary evidence, hence, unfolding, of, the suit khasra numbers, being, in an unbroken chain held by Waryam Singh and Subha, besides therefrom theirs uninterruptedly standing transmitted, upto, the third generation, generation whereof is constituted by the plaintiff, (ii) thereupon, the suit property partaking the trait and character of ancestral property, hence disabling the plaintiff, to till occurrence of dismemberment, of the joint holdings, by metes and bounds, to, seek exclusivity of possession of any portion, of the joint holdings also disabling him, to seek qua it, any decree of permanent prohibitory injunction. A closest and circumspect reading of the evidence on record comprised in the best documentary evidence, for, hence resting the

aforesaid trite factum, stands, comprised in the aforesaid apposite mutations attested vis-a-vis the suit khasra numbers, rather unveils, of it being both vague and imprecise, (iv) inasmuch as therein, though occur reflections qua the area(s) of lands falling to the share(s) of the predecessor(s)-in-interest of the plaintiff, (v) yet therein the apt khasra numbers remain unreflected, (vi) in absence of denotation(s) thereof, in the apposite orders attesting mutations, orders whereof stood attested during the life time(s) of the respective predecessor(s)-in-interest of the plaintiff, it is extremely hazardous, to form any conclusion, (vii) of, therein, hence, occurring any palpable and firm analogity inter se the lands in respect whereof mutations stood attested respectively, at stages, whereat, the apposite estate(s) hence opened for succession nor hence, it is possible to firmly conclude, of, land measuring 63-13 bighas, in its entirety, dons, the trait and character, of ancestral coparcenary property.

10. Even otherwise, a perusal of jamabandi borne in Ex. PA rather marks the factum of the plaintiff being recorded therein, to be owner in possession of 63-13 bighas of land, (i) whereas, the dimensions of land(s) in respect(s) whereof mutation(s) of inheritance, stood attested, qua the apposite predecessor(s)-in-interest of the plaintiff, on theirs' respective demise(s) AND thereafter vis-a-vis the plaintiff, stands computed at 37 bighas, (ii) whereas, the suit land in its entirety measures 63-13 bighas. (iii) Naturally, hence, besides assumingly, if an area measuring 37 bighas, does partake, the trait and colour of ancestral property, (iv) AND yet as aforestated, given, even if the order attesting mutation(s) in respect thereto, omit to delineate the specific khasra numbers, in respect whereof they stood recorded, (v) nonetheless merely thereupon, the validity of the plaintiff's claim for rendition, of, a decree of injunction, may not, be a bewildering task, significantly, when an allusion to the respective pleadings, cast, respectively by the contesting parties, may ultimately, aid, this Court in clinching the substratum of the contentious claim(s), also reiteratedly when it stands embedded therein.

11. An allusion vis-a-vis of the contention raised, by the defendant, in his written statement brings forth, the imminent factum, of, existence therein, of, a precise espousal, with respect to possession, of khasra numbers 591/92/1, measuring 7 bighas, 568/456/85/1, measuring 17 biswas, 467/84/1 measuring 7-11 bighas, total measuring 15-8 bighas, being hence standing delivered to him, in pursuance to a family settlement, which occurred inter se the purported joint owners. Obviously, the validity of the aforesaid espousal, alone is to be tested, (i) for hence determining qua in respect of the aforesaid khasra numbers, of, the plaintiff holding any right, to seek a relief of permanent prohibitory injunction, (ii) or contrarily assumingly, if, the aforesaid khasra numbers, may don, the character and trait, of ancestral coparcenary property, whereupon, they may also be amenable, to recording of a family settlement inter se the joint owners concerned, (iii) besides, if, affirmative findings thereon vis-a-vis the defendants are rendered, thereupon, it is to be concomitantly fathomed, qua the validity, of, the defendant's claims, to, deprive the plaintiff, from, seeking the relief as canvassed by him, in the plaint. Tritely with the defendant's resistance to the plaintiff's suit, being restricted vis-a-vis the khasra numbers elucidated in the written statement, thereupon, vis-a-vis them alone, validity(ies) thereof is to be clinched.

12. Before proceeding to rest the aforesaid controversy, it is of utmost relevance, to allude to the reverence, meted by the learned First Appellate Court, to, the admissions made by the plaintiff AND his witnesses vis-a-vis the suit khasra numbers, hence, donning the trait and character of ancestral coparcenary property, (i) despite when, for the aforesaid reasons, the non reflections, of suit khasra numbers, in the respectively recorded orders of mutation(s), may present a hazardous task, for, this Court to firmly conclude, qua

existence, of, imminent analogity inter se the suit khasra numbers vis-a-vis the ones reflected, in the respectively recorded orders of mutation, wherefrom, a further difficulty would arise, for, firmly concluding, of, the suit land, hence, being ancestral coparcenary property. The admission(s) relied, upon, by the learned First Appellate Court, for, concluding, of, all the suit khasra numbers, hence donning, the trait and colour of ancestral coparcenary property, is erroneously omnibusly drawn, it remaining wholly unmindful qua only an area of 37 bighas of land, standing received, by the plaintiff, under the apposite orders, of, mutation(s), (i) whereas, the total land comprised, in the suit khasra numbers, is comprised in an area of 63-13 bighas, (ii) also it has erupted, from gross discarding(s), by the learned First Appellate Court, of an averment, occurring in the paragraph No.2, of the plaint, of the plaintiff, out of the joint fund(s) of the family, purchasing land, in the name of defendant and his two other sons. Thereupon, the effect of the admissions, if any, was confined only vis-a-vis the pleadings cast in paragraph No.2, of the plaint and was not extendable, to the entire land, borne in all khasra numbers nor it was appropriate for the learned First Appellate Court, to conclude that the propagation of the defendant, rather fell, within an area of 37 bighas. More so, when for the reasons aforestated, lack of ascription in the relevant orders of mutations, of specific khasra numbers, in respect whereof, the apposite mutation(s) of inheritance stood attested, rather forbid any firm conclusion, as untenably drawn by the learned First Appellate Court. (iii) Moreover, when the trite resistance aforesaid, propagated by the defendant, in his written statement alone hence warrants rendition of an apt verdict thereon.

13. Be that as it may, nowat, while excluding the admission(s) made by the plaintiff and his witnesses rather confining, them to the averments made in paragraph No.2 of the plaint, thereupon, for, the purported family settlement, for its obviously securing validity, was, enjoined, to, with specificity delineate therein, those khasra numbers, in respect whereof it stood executed, (i) for hence delivery of possession of land, espoused by the defendant, in his written statement, being concomitantly construable to be in consonance thereto, whereupon, it would acquire validity and also would ultimately, non suit the plaintiff. The defendant, for proving his contention, was enjoined, to adduce firm evidence, comprised in adduction into evidence, of, the apposite tatima, prepared by the Patwari concerned besides its bearing consonance with his espousals occurring in paragraph No. 4, of his preliminary objections, embodied in his Written Statement, apposite averment whereof reads as under:-

> "4.....In the family settlement, the defendant was given land of Khasra No.591/92/1, measuring 7 bighas, land of khasra NO.568/456/85/1, measuring 17 biswas and land of khasra No.567/84/1, measuring 7-11 bighas, i.e. total land measuring 15-8 bighas, situated in mauza Gangu Wala, Jamniwala. The location of the land of the defendant has been shown in the tatima prepared by the patwari on 27.06.2003....."

However, the tatima prepared by the Patwari concerned as comprised in Ex, DG, omits to bear out, the espousal aforestated, occurring in paragraph No.4, of the preliminary objections, existing in the written statement, furnished to the plaint, by the defendant. The obvious consequence thereof, is that the staking(s) of claim(s) by the defendant vis-a-vis the khasra numbers enumerated in paragraph No.4 of the preliminary objections, existing in the written statement, hence, remaining uncorroborated, besides remained abysmally unproven. In sequel, the lands mentioned therein, even if assumingly alongwith other suit khasra numbers, don, the mantle and character of ancestral coparcenary property, yet resistance(s) for rendition of a decree, in respect thereto, cannot come to be vindicated by this Court, rather with the jamabandi apposite to the suit land, conveying, of, the plaintiff being owner

in possession of the suit land, is rather to be imputed truth besides conclusivity. In sequel thereto, it has to be held that the plaintiff, is owner in possession of the suit khasra numbers, hence, he is entitled, to, the relief of permanent prohibitory injunction. However, it is clarified that if desired, the co-owners are, in accordance with law, entitled to seek, dismemberment, of the ancestral coparcenary property, by metes and bounds.

14. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Accordingly, both the substantial questions are answered in favour of the plaintiff/appellant and against the defendant/respondent.

15. In view of above discussion, the present Regular Second Appeal is Allowed. In sequel, the impugned judgment and decree rendered by the learned District Judge, Sirmaur District at Nahan, H.P. in Civil Appeal No.88/1 of 2003 is set aside, whereas, the judgment and decree rendered by the learned Civil Judge (Jr. Division), Court No.1, Paonta Sahib, District Sirmaur, H.P. in Civil Suit No.88/1 of 2003 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Ashutosh Sharma ....Petitioner.

Versus

Smt. Mansi Sahai and other ....Respondents.

COPC No. 709 of 2015.
Reserved on :21.03.2018.
Decided on: 12th April, 2018.

**Contempt of Courts Act, 1972** –Sections 11 & 12 – Non –Compliance of Court orders - Contempt – Circumstances – High Court directing Deputy Commissioner to prepare scheme and disburse amount payable to Pujaris of temple in accordance with that – Also directing him to keep proper record of Pujaris who act in temple on specified period – Petitioners filing contempt by alleging non-compliance of said directions- On facts, Deputy Commissioner preparing scheme and directing it to be operative for 15 years only - Period of fifteen years elapsing but scheme continued without court orders- Meanwhile suit filed in High court dismissed in default- Held, during period falling between dismissal of suit (4.7.2011) and its restoration (19.5.2015), direction of High Court directing distribution of amount as per formulated scheme was not in force – It was not binding on contesting parties – There was no deliberate intentional or willful disobedience on part of respondents - Petition dismissed. (Paras 3 to 5).

For the Petitioner(s): Mr. R.K. Bawa, Sr. Advocate with Mr. Prashant K. Sharma, Advocate.

For the Respondent(s): Ms. Jyotsana Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate.

The following judgment of the Court was delivered:

**Per Sureshwar Thakur, Judge.**

Through the instant petition, constituted under Sections 11 and 12 of the Contempt of Courts Act, 1972 read with Article 215 of the Constitution of India, the petitioners ventilate affording, of, relief, of the respondents being in consonance therewith hence dealt, (i) given theirs willfully, intentionally and deliberately omitting, to comply with the orders pronounced by this Court, in CWP No. 6819 of 2014. The genesis of the alleged infractions is embodied in a pronouncement recorded on 17.10.1987, by this Court in OMP No.392 of 1987, the relevant apt portion whereof stands extracted hereinafter:-

> **" In view of the aforesaid agreement arrived at between the parties, it is ordered that the amounts be paid to all the Bhojkis/plaintiffs, who may be interest in receiving the amount in accordance with the scheme formulated by the Deputy Commissioner., Bilaspur. The Bhojkis/persons entitled to receive the amounts can receive these amounts under protest and defendant No.1 shall have no objection in making the payments to these persons under protest. It is clarified that receiving of the payments by such persons shall not at all prejudice their rights to the merits of the case and there payments shall be subject to the final adjudication of the case.**
>
> **It is further ordered that defendant No.1 shall maintain a record about the names of various Pujaris/Bhojkis who act in the temple on specified periods, so that the amounts payable to them or to any other Bhojaki/Pujari may be adjusted subject to the result of the suit. The amounts shall be disbursed to the various persons within a period of one week from today. The present application is disposed of accordingly."**

2. A reading of the afore extracted pronouncement recorded, upon, the aforesaid OMP, brings to the fore qua disbursement(s) of relevant amounts amongst the Bhojakis, of, the temple concerned, being mandated to occur in accordance with the scheme formulated, by the Deputy Commissioner, Bilaspur. Consequently, with this Court, in, making a pronouncement upon OMP No.392 of 1987, hence meteing reverence thereto, thereupon, it is deemed incumbent to allude to the apposite scheme. The apt scheme is appended, as, Ex. P-6 in Civil Suit No. 17-1 of 95/87, and, the operative part thereof, stands, extracted hereinafter:

> "..... So I feel that equal distribution of 50% of offerings to all the Pujaris who have been recorded in the record of rights should go. This should be limited only to cash offerings, coconuts and ghee. Gold, Silver and Chunnis cannot be given to them because those offered to the deity by the pilgrims/devotees out of respect. If those are given to the Pujaris, the sentiments of the devotee who offer those to the deity will be shattered. I, therefore, order that because of the fact that they are performing Puja Archana they should be given 50% offerings of cash in equal shares. Apart from that the coconuts and Ghee should be converted into money and 50% of the total should be distributed amongst all the Pujaris. The Baridars/Pujaris have demanded the payment with retrospective effect from the date when the management was taken over by the trust. For their claim they had represented to Sh. I.K/ Suri, IAS (Ret.), the then Divisional Commissioner, Shimla Division, but before Mr. Suri decided anything they went in the Hon'ble High Court. The application of Bardar/Pujaris received by me on

the 4th March, 1987. So question of giving them their shares from retrospective effect does not arise. However, the Bridar/Pujaris had given a representation to Sh. I.K. Suri, the then Divisional Commissioner, Shimla Division. When they could not get any relief, they preferred to file a writ petition in the Hon'ble High Court. Form the day they went to the Hon'ble High Court, the relief accrues to them. So, I order that they will get their share from the date they filed writ petition in the Hon'ble High Court.

10. With regard issue No.4, I hold that in the modern age I have discussion above, the Baridar/Pujaris have violated the Rules, and the small girls who were getting offering from the Kali Mata Temple have got no right because already the Pujaris will get offerings from deity Sh. Naina Devi Ji as per the norms I have ordered above. Another contention that the girls should be given share upto their marriage is not sustainable in the eyes of law. As a matter of fact, if that right is given that cannot be withdrawn back and that will go as dowry which is against the present social system. Their further contention was that the moment a boy attains the age of 18 years, he should be given the right of Baridari-system. Because of may discussion above, it will be unfair to create further Pujaris

11. This order of mine will be operative for 15 years from the date of announcement. The distribution of offerings should take place every quarter. The Assistant Commissioner (SDM Bilaspur), who is the chairman of the Temple Trust will take action as per above decisions. This order should be communicated to all the three groups of Pujaris through the Assistant Commissioner (SDM Bilaspur)."

A reading of the operative part thereof, unravels, of, its (a) containing a clear mandate, of its, operation surviving upto 15 years, period whereof being computable, from, the date of its pronouncement, pronouncement whereof, occurred, on 15.05.1987, (b) hence, within its mandate, remaining in force for 15 years, thereupon, its mandate apparently remained alive only upto May, 2002, yet thereafter evidently it without demur remained in operation, upto 4.7.2011, whereat the apposite civil suit was dismissed in default.

3. Be that as it may, Civil suit No. 117/1 of 09/87, was, dismissed for default on 4.7.2011, and, was restored on 19.05.2015. The interregnum, inter se the dismissal in default of the apposite civil suit, and, its coming to be restored, also per se comprises an apt period, wherewithin, the orders pronounced upon OMP No.392 of 1987, remained obviously hence not in force, nor were binding upon the contesting parties, to the apposite lis. Before proceeding to dwell, upon, the commission of contempt, if any, by the purported contemners/respondents herein, the imperative fact, which is enjoined to be borne in mind, (a) is of as aforestated the longevity of the apposite scheme, whereto reverence stood meted by this Court, in making a pronouncement, upon OMP No. 392 of 1987, rather holding longevity only upto 15 years, (b) and also qua the factum, of its, in the interregnum inter se the dismissal in default of the apposite Civil Suit, and, upto its restoration, its obviously holding no force, (c) ultimately, of, the innate spirit, of, the orders rendered upon CWP No.6819 of 2014, is, also enjoined to be incisively discerned, (d) significantly, when mandate thereof is alleged to be intentionally infringed. A conjoint reading of the aforesaid factum rather would aid this Court, in coming to a conclusion qua any purported deviations or any purported intentional infringements thereof, hence emanating, whereupon alone the purported contemners/respondents hence would render themselves amenable to face action, under the Contempt of Courts Act. Obviously, thereupon, it is apt for this Court, to hereinafter extract, the relevant portion of the orders, pronounced, by this Court, upon CWP No.6819 of 2014:-

**"The petitioners are permitted to move an application under Order 1, Rule 10 CPC for impleadment in Civil Suit No. 117/1/2-9/87 within a period of three weeks from today. The application shal be decided by the learned Civil Judge (Jr. Divn.), Bilaspur, in accordance with law within two weeks thereafter. It is stated by the respondents appearing in thi petition that they would not oppose such an application as and when moved. Sh. K.D. Sood, Sr. Advocate, submitted that the Deputy Commissioner has passed the orders in the interregnum, only when Civil Suit was dismissed n default and not it has been revived. Till the application is decided by the learned Civil Judge(Jr. Division), Bilaspur, the parties are directed to maintain status quo. Thereafter, the learned Civil Judge (Jr. Divn.), Bilaspur, Shall pass the necessary orders, as warranted from time to time, in accordance with law."**

A perusal of the apt underlined portion thereof, makes, ex-facie disclosure(s) of this Court making direction(s) (a) that till the Civil Judge (Jr. Divn.), Bilaspur, makes a decision upon an application cast under Order 1, Rule 10, CPC, thereupto the parties being enjoined, to maintain status quo; (b) and, after the Civil Judge (Jr. Division), proceeding to make an order upon an application cast under Order 1, Rule 10, CPC, his being enjoined to pass appropriate orders , as warranted, from time to time, in accordance with law, apt underlined portion whereof, for reasons assigned hereinafter, rather holds immense significance. The learned counsel appearing for the respondents has contended that the parlance, gathered by the apt coinage "status quo" occurring in the orders supra, pronounced by this Court in CWP No.6819 of 2014, hence carrying, an innate import besides significance (a) of an injunction being cast upon the respondents/defendants, to continue to mete deference, to the pronouncement recorded by this Court, upon, OMP No. 392 of 1987, (b) importantly when the apposite disbursement, of, funds amongst the Bhojakis, of, the temple concerned, continued to be made in consonance therewith, upto the institution of CWP No.6819.

4. However, the aforesaid submission, is grossly off the mark, and, its vigour stands denuded, by the trite factum (a) of the apposite civil suit, during, pendency whereof OMP bearing No. 392 of 1987, stood constituted before this Court, whereupon, this Court had rendered orders supra, rather standing dismissed in default on 4.7.2011, and, it standing ordered to be restored only on 19.05.2015, Ib) whereas, CWP No.6819 of 2014, coming to be instituted, prior to, the restoration of Civil Suit No. 17/1 of 2009/1987, (c) given this Court, while, making a pronouncement upon OMP No. 392 of 1987, rather meteing deference, to, the apposite scheme, longevity whereof, was, only upto 15 years, 15 years whereof, since, its commencement on 15.5.1987, rather elapsed in the month of May, 2002,hence rendered capacitated, the defendants/respondents, to hence formulate, a new scheme, and, place it before the learned Court concerned, for enabling it, to, make a fresh pronouncement(s) in consonance therewith, besides for its being concomitantly enabled to make orders, for, extending the operation of orders rendered in OMP No.392 of 1987, (d) more so when the apt aforesaid underlined portion, of, orders pronounced upon CWP No.6819 of 2014, obviously facilitated apposite motions, being made before the Civil Court (e) especially also given its longevity, being co-terminus with the scheme, whereto, deference was meted by this Court, while rendering directions, upon, OMP No.392 of 1987. However, it appears that since the apposite Civil Suit was dismissed in default, hence, the defendants/ contemners/respondents herein, omitted to make apposite motions, before, the Court concerned, for enabling it, to, extend the operation of the orders pronounced upon OMP No.392 of 1987, (f) whereas, for extending the longevity, of, orders pronounced in OMP No.392 of 1987, besides , for, meteing apt extension(s) vis-a-vis the the mandate(s), of the apposite scheme, whereto deference stood meted, thereupon rendered imperative, casting of

apposite motions before the Court concerned. Nowat, with the CWP No.6819 of 2014, for reasons aforestated, standing instituted, prior to the restoration of the Civil Suit concerned, hence, therefrom the import of the orders pronounced (supra) in CWP No.6819 of 2014, is to be marshalled. The order of status quo, directed to be maintained, by the litigating parties, is enjoined to bear a construction, of, it appertaining, to apposite prevalences therewith or qua the apposite operations, specifically appertaining to the distribution, of funds, amongst the Bhojakis, of, the temple concerned. Tritely, at the time of the apposite decision being recorded, on 29th June, 2015 in CWP No.6819 of 2014, the petitioners omitted to place on record, any material personificatory, of adherence yet being meted vis-a-vis the scheme, whereto deference was meted by this Court, while, making a decision upon OMP No.392 of 1987, (g) also when longevity thereof remained alive only upto 15 years, commencing, from May, 1987, and, force whereof hence elapsed in the month of May, 2002, whereafter its operation remain alive without any judicial order being made, yet without demur, (h) also when the apposite civil suit, given its being dismissed in default, hence remained in a state of inertia, (i) also therewithin the force of the orders, pronounced, in OMP No.392 of 1987 hence remained immobilized, (j) thereupon, hence adherence thereto being unmeteable, (k) rather omission(s) of the petitioners, to place on record any material personificatory, of, the scheme mandated to be adhered, to, by the defendants/respondents herein, being vis-a-vis the one one borne in a pronouncement recorded upon OMP No.392 of 1987, and also its holding sway specifically upto orders being pronounced upon CWP No.6819 of 2014, besides its thereupto holding clout, (l) begets an inference, of, rather when the respondents contend, of, unprotested disbursements occurring, through subsequently prepared scheme(s) qua thereupon the scheme, reflected in the orders passed by this Court in the aforesaid OMP, hence not comprising the one warranting adherence being meted thereto, (m) rather reiteratedly the unprotested scheme prepared subsequent, to, the dismissal of the apposite civil suit, being the one, hence, holding force and clout, at the time contemporaneous vis-a-vis this Court, making a pronouncement upon CWP No.6819 of 2014. In aftermath, with the aforesaid unprotested scheme, being the one holding prevalence, at the time contemporaneous, vis-a-vis this Court hence recording a decision upon CWP No.6819 of 2014, (m) thereupon, the status quo, ordered to be maintained by the parties, gathers the necessary implication, of, the contesting litigants, being enjoined to ensure adherence thereto, than the petitioners herein insisting upon adherence being meted vis-a-vis the orders pronounced upon OMP No. 392 of 1987, especially, when for the reasons aforestated, it held longevity for 15 years, computable from 15.5.1987 upto 14.5.2002, and, also with this Court in making a pronouncement upon CWP No. 6819 of 2014, rather empowering the learned Civil Judge concerned, to, in consonance with the apposite motions being made before him, hence render affirmative directions, empowerments whereof remained unexercised.

5. Be that as it may, the learned counsel appearing, for the petitioner also contended, that with this Court, while making a pronouncement, upon, CWP No. 6819 of 2014, its further directing the Civil Judge (Jr. Divn.) concerned, to render orders as warranted, from time to time, and, with the Civil Judge (Jr. Divn.), concerned, after making an order, upon, an application cast under Order 1, Rule 10 of the CPC, hence, his/hers begetting compliance, with the apposite orders pronounced by this Court, in CWP No.6819 of 2014, and, hers/his also rendering an order, upon, an application cast before him under Section 151 of the CPC, whereunder she/he approbated, the manner of the distribution of funds, amongst, the Bhojakis of the temple concerned, in the manner ordained /mandated, in the orders recorded by this Court in OMP No.392 of 1987, (a) thereupon, also per se contempt being committed by the contemners, (b) imperatively when since the stage of the restoration of the civil suit upto the pronouncement recorded by this Court, upon the apposite CWP, they hence were enjoined to mete deference thereto, and, also make the

apposite disbursement(s), in consonance therewith. The aforesaid submission is falteringly made, and, with a co-ordinate bench of this Court while pronouncing, a, decision upon, CMPMO No. 143 of 2013, for reasons stated therein hence rendering a mandate qua the parlance, borne by the apposite part, of the mandate supra recorded by this Court in CWP No.6819, (c) being, of, adherence by the litigating parties vis-a-vis, the unprotested scheme, than, in prevalence, hence, any insistence, upon, the respondents herein, for theirs adhering, to the mandate occurring in OMP, aforesaid, is per se grossly impermissible. Moreover, the defendants/respondent s herein, also tender their unconditional apology, hence purge themselves from contempt, thereupon, it appears that there is no deliberate, intentional or willful disobedience, by the defendants/respondents herein vis-a-vis the mandate recorded by this Court in CWP No.6819 of 2014.

6. For the foregoing reasons, there is no merit in the instant petition which is accordingly dismissed and the respondents are discharged. All pending applications also stand disposed of.

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

Ram Swaroop & others ....Plaintiffs.

Versus

Inder Singh (since deceased) through his legal heirs. ....Defendant.

Civil Suit No. 77 of 2010.
Reserved on : 13.04.2018.
Date of Decision: 18th April, 2018.

**Specific Relief Act, 1963-** Section 10 – Agreement to sell – Specific performance - Entitlement- On facts, execution of agreement to sell in favour of plaintiffs not in dispute - Plaintiffs present in office of Sub-Registrar on date fixed for execution of sale deed- Affidavit regarding his presence in office of Sub-Registrar on appointed day proved by Public Notary attesting it – Plaintiffs found ready and willing to perform their part of agreement- Suit for Specific performance decreed. (Paras 7 to 11 & 14)

**Specific Relief Act, 1963**- Section 10- Agreement to sell – Specific performance- Part consideration paid under earlier agreement – Effect - Plaintiffs paying part consideration under agreement to sell – Time stipulated for execution of sale deed extended by subsequent agreement - Defendant contending that part payment paid under earlier agreement stood forfeited and specific performance if any is to be subject to payment of entire consideration – Held, subsequent agreement was executed only for extending time for purposes of execution of sale deed – Part consideration paid under earlier agreement became requisite earnest money or advance vis -a-vis total sale consideration. (Para 10)

For the Plaintiff: Mr. Rakesh Thakur, Advocate.
For the Defendants: Mr. H.S. Rana, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The plaintiffs' case in brief is that the plaintiff No.1 is a businessman, whereas, plaintiffs No.2 to 6 are joint investors with plaintiff No.1. It is pleaded that plaintiffs and the sole defendant Inder Singh entered into an agreement of sale on 22nd May, 2007, to sell the suit land @ Rs. 11,50,000/- per bigha to the plaintiffs, land whereof is comprised in Khata Khatoni NO.2/4 min, Khasra No.535, measuring 0-14 bighas, Khasra No.536 measuring 0-14 bighas, Khasra No.537, measuring 1-7 bighas, Khasra No.544, measuring 7-5 bighas, kita -4, total measuring 10 bighas, situated at village Dollowal, Hadbast No.69, Tehsil Nalagarh, District Solan, H.P. The aforesaid land was agreed to be sold, for, a consideration of Rs.1,15,00,000/-. Out of the said consideration, the defendant, in the presence of the witnesses, had also received earnest money from the plaintiffs to the tune of Rs.30,00,000/-, and, he had also assured the plaintiffs that the sale deed will be executed on or before 7.09.2007. It has been pleaded that before the expiry of the appointed date i.e. 07.09.2007, the plaintiffs requested the defendant to get the sale deed executed and registered qua the suit land, in favour of the plaintiffs. However, the sole defendant expressed his inability to execute the registered deed of conveyance, before 7.9.2007. It has been pleaded that plaintiffs along with balance sale consideration, visited, the office of Sub Registrar, Nalagarh on 7.09.2007, and, remained thereat till 4.50 P.M. However, defendant has failed to record his presence in the office of Sub Registrar, Nalagarh on the appointed day. The plaintiff No.1 got prepared, and, attested an affidavit, from, Notary Public qua his recording, his presence on 7.9.2007 in the Office of Sub Registrar, Nalagarh. Thereafter, on 8.9.2007, plaintiff No.1 personally met the defendant, and, asked him to extend the date of execution, of agreement as per his convenience, and, he assured the plaintiff No.1 that needful would be done within two days, however, till date nothing has been done, despite, several telephonical and oral messages conveyed, by the plaintiffs to the defendant. The defendant has not complied with his part of the contract, though, he has received a sum of Rs.thirty lacs as earnest money from the plaintiffs. It has been pleaded that the plaintiffs are ready and willing to, and, still are willing to perform their part of contract but the defendant has been avoiding the execution and registration of sale deed, on payment of balance sale consideration. Hence the suit.

2. That the sole defendant, namely, Inder Singh (now deceased) contested the suit, and, filed written statement, wherein he has taken preliminary objections, inter alia, locus standi, maintainability, limitation, estoppel, time being the essence of contract, suppressions of material facts etc. On merits, execution of agreement of 22.5.2007 qua the suit land is admitted. However, it is submitted that defendant entered into an agreement, with, plaintiff No.1 Sh. Ram Swaroop on 22.09.2006, for, sale of the suit land, on payment of sale consideration of Rs.1,15,00,000/-, and, only earnest money of Rs.30 lacs was given in advance and the sale deed was to be executed on or before 22.05.2007 subject to the payment of entire balance payment. It has been pleaded that plaintiff No.1 is a businessman, and, is dealing in sale and purchase of properties, and, did not come forward for the registration of the sale deed within the stipulated period, and, was not ready and willing purchaser. On 22.05.2007, Sh. Ram Swaroop again requested the defendant to give some time, and, to extend the period of agreement, and, again asked to execute other agreement, and, at that time he introduced the names of other purchasers in the agreement. Thereafter agreement to sell of 22.05.2007 was entered into plaintiff No.1, and, the defendant. As per the agreement the sale deed was to be executed on or before 7.09.2007, and, the time was made the essence of the contract. It was also mandated in the agreement, that, in case the sale deed is not executed within the fixed period, the amount of Rs.30,00,000/- paid as earnest money earlier on 22.09.2006, will be forfeited. It is submitted that the agreement was unfortunately rescinded, and, the defendant had to suffer huge irreparable loss, on account of illegal acts of the plaintiffs. It is submitted that the plaintiffs were never ready and will buyer, and, never approached the defendant for

execution and registration of the sale deed till 7.9.2007 nor they had sufficient money to liquidate the entire balance payment vis-a-vis them. It is submitted that in fact the defendant went on 7.9.2007 to Sub Registrar's office, Nalagarh for execution of the sale deed, and, waited for the plaintiffs till 4.15 p.m., but none of them came there for purchase of land. To this effect an affidavit was sworn before the notary public in the presence of Sucha Singh. It is denied that the defendant was ever contacted telephonically or personally, by the plaintiffs, for the purchase of property, even after 7.9.2007, as alleged. It is submitted that it is the defendant, who, sent the notice of 12.9.2007, extending time, to the plaintiffs to execute the sale deed by 22.09.2007, and, also warned them, that, thereafter agreement shall stands cancelled/rescinded, and, the advance money paid by them shall stand forfeited. Thereafter, another notice of 25.09.2007 served upon the plaintiff informing him that the agreement stands cancelled and rescinded, and, the money paid by him to the defendant also stands forfeited.

3. The plaintiffs herein filed replication to the written statement of the defendant, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

4. On the contentious pleadings of the parties, this Court on 12.03.2012, struck the following issues inter-se the parties at contest:-

1. Whether the plaintiffs are entitled for relief as per agreement dated 22.05.2007?
2. Whether plaintiffs are entitled for refund of Rs.30,00,000/- from the defendant, as already paid to the defendant, as earnest money? OPP
3. Whether the plaintiffs have no locus standi to file the present suit? OPD.
4. Whether the suit is barred by period of limitation? OPD.
5. Whether plaintiffs are estopped to file the suit by their own acts, deeds, acquiescences etc.? OPD.
6. Whether the time was the essence of the contract under dispute as sale deed was to be executed and registered on or before 22.05.2007 and the plaintiffs failed to perform their part despite several opportunities? OPD.
7. Whether the plaintiffs have not come to the Hon'ble Court with clean hand and has suppressed material facts? OPD.
8. Whether the plaintiffs having failed to perform their part of the contract are not entitled to the relief claimed? OPD.
9. Whether the suit is not maintainable in the present form? OPD.
10. Relief.

5. For the reasons to be recorded hereinafter, my findings on the aforesaid issues are as under:-

Issue No.1..... Yes.

Issue No.2..... No.

Issue No.3..... No.

Issue No.4..... No.

Issue No.5..... No.

Issue No.6..... No.

Issue No.7..... No.

Issue No.8..... No.

Issue No.9..... No.

9. Relief..... Suit of plaintiff is decreed as per the operative portion of the judgment.

**Reasons for findings.**

**Issues No.1, 2, 6 and 8.**

6. All theses issues are taken up together for discussion, as they are common in nature besides common evidence thereon stands hence adduced by the parties.

7. The initial agreement to sell, was, entered inter se plaintiff Ram Swaroop with deceased sole defendant Inder Singh, agreement to sell whereof, was, entered into inter se them, on 22.09.2006. However, thereafter the apposite hereat agreement, to sell was executed inter se the parties at contest, on 22.05.2007, agreement to sell whereof, is exhibited as Ex.PW2/D. In proof of execution of aforesaid Ex.PW2/D, the plaintiff stepped into the witness box as PW-2, and, has made a testification, in consonance, with, the averments borne in the plaint. He has in his testification, admitted, the occurrence, of his signatures in read circle 'A', in Ex.PW2/D. Since, time was the essence of the contract and the contract to sell, comprised in Ex.PW2/D, was enjoined to be consummated, on or before 7.09.2007, by execution of a registered deed of conveyance vis-a-vis the suit property, (a) hence, in proof, of the plaintiff(s) recording, on the appointed day, hence his/their presence in the office of Sub Registrar concerned, plaintiff Ram Swaroop in his tesitifcation, hence, relied upon, an affidavit borne in Ex.PW1/A, wherein, disclosures occur of his, on 7.09.2007, recording his presence before the Sub Registrar concerned, for ensuring qua the apposite deed of conveyance being registered vis-a-vis the suit khasra numbers, (b) whereas, the sole defendant, namely, Inder Singh, rather omitting to record his presence thereat, (c) on anvil thereof, the plaintiffs hence espoused, through, their counsel, of theirs, readiness, and, willingness to perform their part of contract, on the date(s) specified, in the contract of sale, borne in Ex.PW2/D, (d) whereas, the sole defendant Inder Singh, hence, omitting to record his presence, on 7.9.2007, before the Sub Registrar concerned, his thereupon personifying, his unwillingness, whereupon, a decree for specific performance of agreement to sell, comprised in Ex.PW2/D, is enjoined to be pronounced against the defendants.

8. The testification of PW-2, with respect to valid execution, and, attestation of affidavit, borne in Ex.PW1/A, is meted corroboration by PW-1. The cross-examination of PW-1, omits to make any unfoldings, of his falsifying, the recitals borne, in Ex.PW1/A, hence, it is to be concluded, of the plaintiff rather recording his presence, on 7.9.2007, in the office of Sub Registrar concerned. However, also it is to be ascertained, from, the evidence existing on record qua the defendant, as espoused by the counsel for the plaintiffs, rather failing to record his presence, on the aforesaid date, before the Sub Registrar concerned, or whether as espoused by the counsel for the defendant, the latter recording his presence, before, the Sub Registrar concerned, whereas, contrarily, the plaintiffs omitting to record their presence, before, the Sub Registrar concerned, hence, contrarily concomitantly there being unwillingness of the plaintiffs, to perform their part, of contract, comprised in Ex.PW2/D. The learned counsel appearing for the defendant(s), in making the aforesaid contention before this Court, has depended upon the testification of DW-2, (a) who in his testification borne in is examination-in-chief, has made communications, of, on the relevant date, the plaintiffs omitting to record their presence in the office of the Sub Registrar concerned, (b) and also qua subsequent thereto, notices, comprised in Ex.DW2/1, being, as depicted by Ex.DW2/2 hence standing served upon the plaintiffs, (c) and, also disclosed qua

another notice comprised in Ex.DW2/3, being also on instruction(s) of his father, standing prepared by an advocate, and, its being, as displayed by receipt borne in Ex.DW2/4, hence, served upon the plaintiffs. (d) Hence, the respective probative vigours of the aforesaid exhibit(s), tendered into evidence vis-a-vis the vigour of Ex.PW1/A, is enjoined to be cumulatively assessed, for, hence gauging qua the plaintiffs or the defendant recording or not recording their respective presences, on 7.9.2007, in the office of Sub Registrar concerned. Though, in the aforesaid notices, recitals do occur of the sole defendant, Inder Singh, on the date recited therein, hence recording his presence before the Sub Registrar concerned. Nonetheless, when assessing the compatible probative vigour of the apposite recitals borne therein, vis-a-vis the recitals borne in affidavit comprised in Ex.PW1/A, (e) especially, with contents of Ex.PW1/A being corroborated by Public Notary concerned, who has testified as PW-1, and, who during the course of his cross-examination, was, rather omitted to purvey any suggestion, for, hence falsifying all the recitals borne therein, (f) whereas, Ex.DW2/1, and Ex.DW2/3, being merely notices served by the counsel for the defendant, upon, the plaintiffs, and, also with the counsel remaining unexamined, in Court, thereupon, the probative vigour of affidavit, borne in Ex.PW1/A, is, of a graver degree vis-a-vis the degree of vigour of the notices, borne in Ex.DW2/1, and, in Ex.DW2/3. (g) More so, when the defendant(s) could well have made an affidavit in respect of the recitals, borne in the respective notices, rather than his taking to issue notices, upon the plaintiffs, (h) besides even if the notices held truthful disclosure, thereupon, it was imperative upon the defendant(s) to lead into the witness box, the counsel concerned, who hence prepared, scribed or authored them. Omission of the defendant(s) to lead into the witness box, the counsel, who prepared, scribe or authored the apposite notices, rather constrains a conclusion, of all, the recitals occurring therein, being entirely invented besides contrived, only, for smothering the effect of Ex.PW1/A.

9. Be that as it may, the learned counsel, for the defendant(s) has relied, upon an admission occurring, in the cross-examination, of the plaintiff (PW-2), (i) of his not making any intimation to the defendant qua his, on 7.9.2007, hence, arriving at the office of Sub Registrar concerned. (ii) Nonetheless, the effect thereof is waned by the factum of DW-2 making, for reasons aforesaid, rather an untruthful testification, of, on the aforesaid day, contrarily his father, the sole defendant Inder Singh remaining present in the office of the Sub Registrar concerned, and, whereas the plaintiff(s) not recording his presence thereat, whereupon, it is concomitantly inferable qua his acquiescing vis-a-vis an apposite intimation vis-a-vis the relevant purpose, rather being held by him. (iii) Sequel thereof is of it, being, hence inferable therefrom of the plaintiffs being ready, and, willing to perform their part of their obligation(s) borne in Ex.PW2/D, and, the defendant derelicting to perform his part of contract, borne in Ex.PW2/D.

10. Nowat it is to be discerned, qua whether a part of the sale consideration, comprised, in a sum of Rs.30,00,000/-, as evidently paid in contemporaneity vis-a-vis the execution, of, the initially executed agreement to sell, and, with time of consummation thereof, rather standing extended, through, Ex.PW2/D, qua whether the aforesaid tenderings, of, part, of, sale consideration also being reckonable, as part, liquidation(s) vis-a-vis the agreement drawn, and, exhibited, as Ex.PW2/D. In making the aforesaid conclusion, an allusion to the testification, of, the son of deceased sole defendant Inder Singh, is imperative. He while testifying as DW-2, has, in his cross-examination rather acquiesced, to the suggestion, of, at the time of execution of the initial apposite agreement to sell, a part of the sale consideration, comprised, in a sum of Rs.30,00,000/- being tendered by the plaintiff(s) vis-a-vis his deceased father. However, yet, the learned counsel appearing for the defendant, has contended that the aforesaid testification, rendered by the son of deceased sole defendant Inder Singh, not garnering any conclusion of the part of sale consideration,

tendered earlier, being also construable vis-a-vis tenderings qua agreement to sell, borne in Ex.PW2/D, (a) rather its tendering being construable, only, with respect to the prior thereto agreement to sell executed inter se the plaintiff Ram Swaroop, and, deceased Inder Singh, and concomitantly with no amount being paid, at the stage, of, execution, of Ex.PW2/D, (b) thereupon, the tenderings, of, part of sale consideration borne in a sum of Rs.30,00,000/-, purportedly, as earnest money, by the plaintiffs vis-a-vis the deceased sole defendant, enjoining, its being forfeited, and, its not being reckonable as advance or earnest money vis-a-vis Ex.PW2/D, (c) and that even if assumingly, this Court renders a decree for specific performance of contract, borne in Ex.PW2/D, thereupon, the plaintiffs being enjoined, to liquidate vis-a-vis the defendants, the entire sale consideration, comprised in a sum of Rs.1,15,00,000/-. However, the aforesaid submission, cannot be accepted, given it being admitted, in the apposite pleadings drawn by the defendant, of Ex.PW2/D being executed only for extending time(s), for the relevant purpose, as stood initially embodied, in the prior contract of sale, executed solitarily inter se plaintiff Ram Swaroop vis-a-vis the deceased sole defendant Inder Singh. If, Ex.PW2/D was hence executed for extending time, for ensuring complete execution of the apposite registered deed of conveyance vis-a-vis th suit khasra numbers, (iii) thereupon, ipso facto hence the earnest money, earlier tendered by co-plaintiff No.1 vis-a-vis the sole defendant Inder Singh, especially under a prior agreement to sell, also became, the requisite earnest money or advance, vis-a-vis the total sale consideration, (iv) besides obviously, hence, thereupon, the forfeiture clause, hence, occurring in the prior agreement of contract of sale, also stands annulled, and, the aforesaid submission is rendered rudderless, and, is rejected. Hence, issues No.1, 2, 6 and 8 are decided in favour of the plaintiffs and against the defendants.

**Issue No.3 to 5.**

11. No evidence exists on record to show that as to how the plaintiffs have no locus standi, or that as to how the plaintiff's suit is barred by limitation, as also, as to how the plaintiffs are estopped from filing the instant suit, hence, both the aforesaid issues are decided in favour of the plaintiffs and against the defendants.

**Issue No.7:**

12. There exists no evidence on record to show that as to how the plaintiffs have not come to this Court with clean hand, hence, issue No.7 is decided in favour of the plaintiffs and against the defendants.

**Issue No.9**

13. In view of my findings on Issues above, the plaintiff suit is maintainable in the present form, hence, issue No.9 is decided in favour of the plaintiff and against the defendants.

**Relief.**

14. In sequel to findings on issues aforesaid, the suit of plaintiffs is decreed, and, a decree is hereby passed in favour of the plaintiffs, and, against the defendants for specific performance of the agreement to sell of 22.05.2007, and, the defendants are directed to, in accordance with law, within two months, from today, execute a registered deed of conveyance vis-a-vis the plaintiffs in terms of the agreement qua the suit land comprised in Khata Khatoni No.2/4 min, Khasra Nos.535, measuring 0-14 bighas, 536, measuring 0-14 bighas, 537, measuring 1-7 bighas, 544 measuring 7-5 bighas, Kita 4, total measuring 10 bighas, situated at village/mauja Dollowal, Hadbast No.69, Tehsil Nalagarh, District Solan, on payment of remaining sale consideration of Rs.85,00,000/-, as also, are directed to

deliver vacant and peaceful possession, of, the suit land, to the plaintiffs. Decree sheet be prepared accordingly. All pending applications also stand disposed of.

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

Man Singh (since deceased) through his LRs and others
..Appellants/defendants.

Versus

Dinesh Kumar and others ..Respondents/Plaintiffs.

RSA No. 107 of 2007.
Reserved on : 16th March, 2018.
Decided on : 19th March, 2018.

**Specific Relief Act, 1963**- Section 5 – Suit for possession on strength of title- Defendants claiming adverse possession – Trial court decreeing suit – District Judge affirming decree in appeal – RSA – Defendants pleading wrong appreciation of evidence by lower courts – Facts reveling that plaintiff came to know of defendants unauthorized possession only recently when demarcation of land took place - Prior to that he was not aware of defendants holding his land – Therefore, no question of defendants possessing such land adversely and with hostile animus to knowledge of plaintiff prior to demarcation – Long possession of defendants without being open and with hostile animus did not mature into adverse possession- RSA dismissed - Judgments and decrees of lower courts upheld. (Paras 7 to 11)

For the Appellants: Mr. Karan Singh Kanwar, Advocate.
For Respondents No.9,11 to 19: Ms. Megha Kapoor Gautam, vice counsel.
Other respondents already ex-parte.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiffs' suit for possession of the suit land, was, hence decreed.

2. Briefly stated the facts of the case are that the plaintiffs are owners of land comprised in khata Khatauni No.22 min/31 min, Khasra No.52, measuring 1-16 bighas, situated at Mauza Kotri, Tehsil Paonta Sahib, District Sirmaur, H.P. and that their residential houses are situated on a portion of it denoted by khasra No.52/2 and that the remaining portion of land as denoted by Khasra No.52/1 was cultivable and that on the boundary of this Khasra No.51/1, there are trees of "Dheu', mango and Chakotra (citrus). As far as defendants are concerned, they have got no right, title or interest qua this land comprising Khasra No.52. Despite this, on 24.1.1999, they collected material on Khasra No.52 and forcibly constructed a boundary wall on it with the result, it was divided into two parts. In fact, such construction of boundary wall had been raised, during the night intervening 25/26.1.1999. They also constructed a thatched room and another room of wooden supports covered with a in roof and a latrine in khasra No.52, forcibly without any right, title or interest on 26.1.1999. Although, the plaintiffs had tried to stop them from

occupying the aforesaid khasra number and from dispossessing them from its possession and also from raising construction, but they did not pay any heed to their request. In this way, they forcibly occupied a portion of Khasra No.52 by dispossessing the plaintiffs. On 3.2.1999, a tatima was got prepared from Patwari Illaqua and it was found that the defendants were in possession of khasra No.52/1, measuring 1-1 bighas as shown in the tatima. It was further alleged that their possession over the suit land is illegal and that of a trespasser. On 3.2.1999, the defendants had been requested to remove the structures and the boundary wall from the suit land to hand over its vacant possession to them, but they refused to do so. Hence the suit.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections inter alia cause of action and maintainability etc. On merits, it was denied that the plaintiffs are owner in possession of the suit land. In fact, the ancestors of the defendants had occupied the suit land on the day of 'Lohri' on 13.1.1948 and constructed a dwelling house for residential purposes thereon. They also planted trees of mangoes, Dheu, citrus etc., on the suit land and as such, since then the suit land is being possessed continuously, peacefully, openly on the spot by the defendants to the knowledge and exclusion of the plaintiffs, who have lost their title over the same and the defendants have perfected their title by way of adverse possession and became owners of the same. As far as their possession over the suit land is concerned, the plaintiffs did not raise any objection. It was further asserted that due to the passage of time, the old 'Chhaper' which was in dilapidated condition was renovated and a tine sheet was put on the roof of the same and rest of the entire house remained in old shape. The suit land was also covered with boundary wall by the defendants, which has been existing, on the spot, for the last more than 50 years. On account of its being muddy and Katcha one, it had fallen. Other allegations were denied.

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

1. Whether plaintiffs are entitled to the relief of possession on the basis of title? OPP
2. Whether the defendants are in adverse possession? If so, its effect? OPD.
3. Relief.

5. 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 herein before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

6. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 22.4.2008 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 Courts below have misconstrued, misinterpreted and misapplied the oral and documentary evidence on record in returning the findings that the defendants have not acquired title on Khasra No.52/1 measuring 15 biswas, by way of adverse possession?

2. Whether the Courts below have erred in not considering admission made by Dinesh Kumar plaintiff himself and as Special attorney of other plaintiffs in the application dated 16.10.2000 along with accompanying affidavit proving the adverse possession of defendants on suit land and, therefore, the impugned judgment, decree are liable to be set aside?

**Substantial questions of Law No.1 to 2:**

7. Ex. P-1, exhibit whereof, is the jamabandi vis-a-vis the suit land, makes display of the plaintiffs being recorded owners of the suit land. Ex.PW2/A prepared in the year 3.2.1999, makes, a graphic disclosure, of the defendants, hence, to the extent of 15 biswas encroaching upon khasra No.52/1. However, the defendants asserted acquisition of title vis-a-vis the aforesaid portion of khasra No.52/1, (a) on anvil, of theirs through their ancestors since 1948 with an animus possidendi, holding, possession thereof, continuously upto the institution of the suit, (b) hence by elapse of the statutorily prescribed period of time, theirs acquiring prescriptive title thereof. Apparently, the propagation aforestated made by the defendants, does prima facie reveal(s) (a) of theirs through their ancestors since the year 1948, and, with an animus possidendi rather holding possession of the suit land; (b) of theirs hence continuously holding it since then upto the institution of the suit; (c) of theirs committing an overt act thereon, comprised in theirs raising a dwelling house; (d) of hence theirs overt act aforestated also being connotative, of theirs openly, to the knowledge of the plaintiffs, and, with an interest adverse vis-a-vis the plaintiff, hence holding possession thereof. Obviously, hence the aforestated contentions reared by the defendants, in their written statement, do per se prima facie satiate the apposite statutory ingredients constituted, in the apposite Article, of the Limitation Act, for theirs hence being prima facie construable to have acquired prescriptive title vis-a-vis the suit land.

8. However, apartfrom the pleadings, efficacious evidence in support thereof, is also enjoined to be adduced by the defendants. However, in proof of the aforesaid contentions reared by the defendants in their written statement, DW-1 in his cross-examination, has rather rendered an echoing, with a clear voicing therein, (i) of his denying the title of the plaintiffs over the suit land, (ii) of his rather asserting the defendants' title thereon. Alike DW-1, DW-2 rendered a testification in consonance therewith, (iii) whereupon, it is apt to conclude that the essential rubric for a plea of acquisition, of title by adverse possession, achieving success, comprised, (iv) in the litigants concerned canvassing it, also being enjoined to accept, the title of the adversary or of the landowners concerned, and, also being enjoined, to echo of possession thereof, though illegal, yet being adverse vis-a-vis the party whereagainst whom, it is asserted, (v) rather contrarily remaining wholly unsatiated. Moreover, with the purported overt act, espoused by the defendants, to be, committed by their predecessor-in-interest vis-a-vis the suit land, especially in the year 1948, contended to be comprised in theirs raising a structure upon the suit land, is belied by Ex.PW2/A, not, making any voicing in consonance therewith. Consequently, if no overt act(s) stood committed, vis-a-vis the suit land, hence, possession if any thereon, with a purported hostile animus, staked by the predecessors-in-interest of the defendants vis-a-vis the suit land, rather hence galvanizes the trite inference(s) (a) of no open adverse proclamation, vis-a-vis the suit land, hence, being made in the year 1948 by the predecessors-in-interest of the defendants, (b) nor obviously possession of the suit land, since then, upto the date of institution of the suit, being through their predecessors-in-interest, hence derived by the defendants nor obviously, the essential ingredients thereof, of, the defendants, through, their predecessors-in-interest, and, to the knowledge of the plaintiffs, uninterruptedly upto the date of the institution of the suit, further continuously, with an animus possidendi holding possession of the suit land, remain(s) satiated.

9. However, be that as it may, the learned counsel for the defendants, strived to make capitalization, from an affidavit sworn by co-plaintiff Dinesh Kumar, wherein, he has admitted (a) of the defendants holding possession of the suit khasra number since 12 years prior to the institution of the suit; (b) his making an echoing therein of the predecessors-in-interest of the defendants, one Chura Ram about 50 years ago rather planting mango trees on the suit land; (c) of an old thatched house being also purportedly raised thereon, by one Chura Ram, house whereof with elapse of time becoming dilapidated, and, it being renovated, and, tin sheets being placed, about 15 years ago, on the roof of the same, (d) for his contending that the aforesaid disclosures, efficaciously proving, the espousal of the defendants, of theirs perfecting title vis-a-vis the suit land. However, the learned counsel for the defendants/appellants has, mis-read, the import of the aforesaid echoing existing, in the affidavit, sworn by one Dinesh Kumar, and, his only focusing upon the aforesaid facets, (e) misreadings whereof, spur, from his omitting to read disclosures, borne therein, qua the apposite awakenings, of the plaintiffs qua the defendants, hence, holding possession of the suit land, being sequel of a demarcation being held, in the year 1999. The aforesaid echoing hence enhances, (f) an inference that prior to the demarcation of the suit land being held, the plaintiffs being not aware of the defendants, holding possession, of any part of the suit khasra numbers, (g) with consequential effect ,of, the plaintiffs/respondents being neither aware nor holding knowledge of the defendants/appellants or their predecessor-in-interest, holding possession of any part of the suit kahsra numbers, (h) nor it can be concluded, of, the defendants/appellants openly, to the knowledge of the plaintiffs, rather commencing, and, with an hostile animus hence possession of the suit khasra number. Contrarily, reiteratedly, when knowledge, of the aforesaid possession, stood gained, by the plaintiffs, only upon a demarcation being held, (i) besides when no entry, is borne in any revenue record, in personification, of the defendants, ever holding possession of the suit khasra number, (j) whereupon, it could be inferable of the plaintiffs, prior to the demarcation being thereat carried of the suit khasra number, being aware of the defendants/appellants holding possession of the suit khasra numbers, (j) wherefrom, it may be firmly concluded, of, thereat theirs holding knowledge, (k) hence any possession qua the suit land as, held, by the predecessors-in-interest of the defendants/appellants or by the defendants, lacks the essential element, of it, being to the knowledge of the true owner or it being held, openly or adversarially against, the interest of the plaintiffs or their predecessors-in-interest.

10. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the plaintiffs/respondents and against the defendants/appellants.

11. In view of above discussion, there is no merit in the instant appeal and it is dismissed accordingly. Consequently, the judgment and decree rendered by the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Smt. Reeta Awasthi & others. .....Appellants.

Versus

Dalip Thakur & another .....Respondents.

FAO No. 8 of 2018.
Reserved on : 13th March, 2018.
Decided on : 19th March, 2018.

**Motor Vehicles Act, 1988** – Section 166- Code of Civil Procedure 1908 -Order XXII Rule 3 – Motor accident – Bodily injuries – Claim application – Death of claimant – Consequences – Held, when, death of claimant is not on account of injuries sustained in motor accident, cause of action does not survive – Principle of maxim actio personalis Mortiur cum persona would be attracted in such case – His legal representatives can not be substituted in such claim proceedings. (Para 5).

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| For the Appellant: | Ms. Anu Tuli, Advocate. |
| For Respondent No. 1 : | Mr. Balwant Kukreja, Advocate. |
| For Respondent No.2: | Mr. Ravinder Sandhu, Advocate. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The appellants herein are aggrieved, by the award rendered by the learned Motor Accident Claims Tribunal, Shimla in MAC Case No.106-S/2 of 2013.

2. The victim/injured one Ajit Awasthi, expired, during the pendency of the apposite claim petition, and, on his demise, his legal representatives were ordered to be brought on record. The order recorded by the learned Tribunal on 18.12.2014, whereupon, the legal heirs of deceased Ajit Aswasthi, were, enjoined to be brought on record, especially for want of its being assailed, by the respondents, hence, has acquired conclusivity.

3. The relevant accident occurred, on 12.12.2012, whereas, the demise of victim Ajit Awasthi, occurred subsequent thereto. However, there is no evidence on record, of, the demise of victim Ajit Awasthi being a sequel of his sustaining injuries, in the motor vehicle accident concerned.

4. Be that as it may, the learned tribunal, had under the head(s) of medical expenses incurred, during the hospitalization of the victim, and, for rendition of service vis-a-vis him, by his successors-in-interest, importantly during the period of the hospitalization of the victim, determined lump sum compensation, borne in a sum of Rs.40,000/-. (i) However, the learned Tribunal for want of cogent proof, being adduced vis-a-vis, 32% permanent disability being entailed upon the injured/victim, in sequel to the injuries suffered by him, in the relevant accident, hence, refrained to determine any compensation, qua permanent loss of enjoyment of life, hence, befalling upon victim Ajit Awasthi, (ii) also, declined determination of compensation under the aforesaid head vis-a-vis victim Ajit Awasthi, (iii) reiteratedly for no evidence existing on file, of, in sequel to the disability befalling upon him, in consequence of injuries suffered by him, in the motor vehicle accident either his promotional avenues being diminished or his suffering the ill fate of demotion in service. The aforesaid reasons afforded by the learned Tribunal, from its abstaining to determine compensation vis-a-vis the legal heirs of deceased victim Ajit Awasthi, under the head of loss of enjoyment of life or for perennial trauma being entailed upon him, does withstand an incisive scrutiny of the evidence germane thereto.

5. Be that as it may, the substantial question of law, enjoining determination(s) is whether given lack of efficacious evidence existing on record, for erecting a firm conclusion qua the demise of victim one Ajit Awasthi, being a sequel to the injuries sustained by him in the motor vehicle accident concerned, (i) thereupon, whether it was befitting, for the learned tribunal concerned, to, on his demise, hence, order for his being substituted, by his successors-in-interest, (ii) besides whether hence the innate nuance, of, the maxim *actio pesonalis moritur cum persona* is squarely attracted heart, with a further sequel, of victim of the tort hence being solitarily entitled, to stake claim for determination of compensation, under, various head(s) and of his legal heirs or dependents, rather being disentitled to seek determination, of compensation under various heads. The aforesaid conundrum, is answered, by the learned Single Judge of the Karnataka High Court, Circuit Bench a Dharwad, in case titled as ***Sri Gangappa vs. Sri Mohan,*** decided on 28th November, 2012 bearing ***Misc. First Appeal No. 22719 of 2010 (MV)*** by relying upon a Full Bench, wherein the Full Bench arrived at the following conclusion encapsulated, at paragaph No.12 of the Full Bench's judgment:-

> "12. In the result, the Full Bench answers the question referred for its decision by the Division Bench, thus: (I) a claim petition presented under Section 110A of the Motor Vehicles Act, 1939, by the person sustaining bodily injuries in a motor accident, claiming compensation for peronal injuries, as also, for compensation towards expenses, loss of income etc. (loss of estate) cannot, on such person's death occurring not as a result of consequence of bodily injuries sustained from a motor accident, be prosecuted by his/her legal representatives, but (ii) a claim petition presented under Section 110A of the Motor Vehicles Act, 1939, by the person sustaining bodily injuries in a motor accident, claiming compensation for personal injuries, as also, for compensation towards expenses, loss of income etc., (loss of estate) can, on such person's death occurring as a result or consequence of bodily injuries sustained in the motor accident, be prosecuted by his/her legal representatives only in so far as the claim for compensation in that claim petition relates to loss of estate of the deceased person due to bodily injuries sustained in the motor accident."

It has been firmly pronounced therein (i) that where the demise, of the deceased is not proven to be ascribable, to injuries suffered by him, in a motor vehicle accident, (ii) thereupon, the principle of maxim *actio pesonalis moritur cum persona,* being attracted, and, where in his personal capacity, he institutes a claim petition for staking determination of compensation vis-a-vis him, under various heads, (iii) yet upon occurrence of his demise, during the pendency of the claim petition, rather dis-empowering the learned tribunal concerned, to order for his substitution, by his legal heirs. The aforesaid mandate, is squarely attracted hereat, given, forceful evidence existing on record, of the demise of Ajit Awasthi, standing not proven, to be a sequel of injuries sustained, by him in the relevant accident. Furthermore, the order for his substitution by his legal heirs, given, his demise occurring during the pendency of claim petition, is, contrary to the mandate supra.

6. Be that as it may, when, for the aforesaid reason, the order recorded by the learned tribunal concerned for substitution of the deceased victim, by his legal heirs, hence, acquire conclusivity nor with the respondents instituting cross-objections, or any cross-appeal, for assailing the validity, of, the assessment of compensation vis-a-vis the dependents of the deceased victim, thereupon, alone this Court, deems it not fit to interfere with the impugned award, dehors, for the aforesaid reasons, the order rendered by the MACT concerned, for substitution of the deceased victim, by his legal heirs besides determination of compensation vis-a-vis them being hence both infirm and invalid.

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

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

Surinder Singh ....Appellant/plaintiff.
Versus
Goverdhan Dass ....Respondent/defendant.

RSA No. 278 of 2006
Reserved on : 15th March, 2018
Decided on : 19th March, 2018

**Special Relief Act, 1963-** Sections 38 and 39 – Suit of permanent prohibitory and mandatory injunctions –Interference with Customary right of irrigation – Plaintiff seeking prohibitory injunction for restraining defendant from drawing water from natural source (Nallah)- Also praying for direction to him to remove Alkathene pipe from source through which he is taking water to his land – Trial Court decreeing Suit – In appeal, District Judge, allowing appeal and dismissing Suit– RSA - On facts, Wazib-ul-arz of estate entitling right holders to carry water for drinking and irrigation by creating channels without causing damage to natural source –Defendant being riparian right holder entitled to carry water through alkathene pipe – Other right holders also found taking water through alkathene pipes for their use - No evidence of damage to natural course of source – Plaintiff not having exclusive right to take water from rivulet – Held, defendant can not be deprived of using water of rivulet in exercise of his customary rights –RSA dismissed- Decree of first Appellate Court up held. (Paras 8 to 11)

For the Appellants: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the Respondent: Mr. Vipul Sharda, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The plaintiffs' suit for rendition of a decree, for permanent prohibitory injunction besides for rendition of a decree, for mandatory injunction, stood decreed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the defendant, the latter Court allowed his appeal besides obviously reversed the trial Court's judgment and decree.

2. Briefly stated the facts of the case are that the plaintiff is owner in possession of land comprised in Khasra Nos. 39,40, 106 and 107 in Khatauni No. 2 min/3 min as per misal Hakiyat of Mauza Malandi, Pargana Chhabishi, Tehsil Kumarsain, District Shimla . H.P. It is averred that the aforesaid suit land is irrigated land and is shown as Kiar Doem in the Missal Hakiyat and it is irrigated from Danal Nullah Kuhal from time immemorial i.e. form the time of the forefathers of the plaintiff. Besides this, the plaintiff has developed khasra No.107 as an apple orchard and there is plantation of more than 25

years in age and the plants are at a fruit bearing stage since long. There is Mauza Danal Hadbast No.113 on the upper side of mauza Malandi. Both these Chaks are contiguous and both are sloppy. On the southern side of the land of the plaintiff in mauza Danal, there situates a spring comprised in Khasra No.750 and just near to the said Bowari a tiny stream (rivulet) which falls in Khasra No.760 also joins and thereafter it becomes Danal Nullah and the said nullah has been shown in revenue papers by Khasra No.741 in mauza Danal, the water of the Bowri comprised in Khasra No.750, flows down in natural way and in defined direction without any obstruction from anyone towards mauza Malandi in which the land of the plaintiff is situated and there is another tiny rivulet flowing from eastern side also joins the above said Danal nullah which has been shown by khasra No.733 in Aks Latha of mauza Danal. The water of both the rivulets flows by the side of the land of the plaintiff and there is a permanent kuhal constructed from time immemorial from point A to B ( as shown in attached site plan) to irrigate Khasra No.39 and another Kuhal from point C to D has been constructed to irrigate the land and plantation thereon comprised in Khasra No.107 in mauza Malandi. The said Kuhal (as shown in attached site plan) from point C to D was constructed by the plaintiff in the year 1975 and since then the plaintiff has been using the water of Danal Nullah and its rivulets for such irrigation continuously and without any interruption from one either in Chak Danal or in Chak Malandi, as it is the plaintiff only, who is in the use of said water exclusively. The water in said nullah which originates from Khasra No.760 is not plenty but in dry weather it reaches upto the land of the plaintiff just about an inch which is hardly sufficient for irrigating the land of the plaintiff. It is further alleged that defendant has been shown to be owner in possession of Khasra No.740 along with his brother in mauza Danal but in fact this land is in exclusive possession of the defendant as the same was allotted to him in family settlement. The land in the possession of the defendant is not ancestral property but the same was allotted to the father of the defendant by the government of H.P. under Nautor scheme. The defendant or his predecessor never cultivated this land but the defendant straightway planted apple trees thereon. Not only this, the defendant has also encroached upon some government land adjoining to his nautor land which is shown as Khasra No.739 measuring 0-31-75 hectare. In the month of June, 2002, the defendant without any legal and customary rights laid Alkathine pipe of 1 inch dia from point E to point F and diverted the water of nullah aforesaid just from the point adjacent to khasra No. 750 in Chak Danal and due to this, the defendant has diverted the natural source of water and diminished the flow of the water in the nullah which has ultimately affected the right of the plaintiff to use the water of Danal nullah for irrigation purpose. This has been done by the defendant without any permission or consent of the plaintiff and the defendant has no right to do so. The plaintiff asked the defendant to remove the pipe but the defendant is not ready and willing to do so. This has caused substantial damage to the plaintiff because not sufficient quantity of water is left in the Danal Nullah. The right of the plaintiff to use the water of Danal Nullah from point A to B and C to D in Khasra Nos. 39, 40,106 and 107 matured by way of customary easement exclusively. The right of the plaintiff has been recognized by the people of the are as the plaintiff and his forefathers have been exercising the same from time immemorial. Accordingly, the plaintiff has filed the suit with prayer to restrain, the defendant from taking or diverting the water in any quantity by laying pipe of any quality or kind, artificial or otherwise or by digging open Kuhal for any purpose from any point situated in Khasra Nos. 760, 750 and 741 which is entirely known as Danal nullah in mauza Danal and for mandatory injunction directly the defendant to remove the alkathene pipe or any other pipe from point E to F or any other type in Danal nullah upto the land of the plaintiff.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections of maintainability, cause of action and estoppel. On merits, it is alleged by the defendant that the defendant and other general public as well as

the persons having theirs lands by the side of the nullah in question are natural and riparian users of the water from time immemorial in the area and no such Kuhal has been constructed by the plaintiff from point C to D as alleged nor the plaintiff is irrigating this land from the last 45 years from nullah in question, as alleged. As per defendant, the land of the plaintiff is barren at the spot and the plaintiff has recently planted apple plants on it. The plaintiff was not in exclusive use of the water in question, as alleged. In fact, earlier there was plenty of water and with the passage of time and continuous dry weather conditions, the flow of water has been diminished. But the plaintiff is trying to cook up a story of the user of water exclusively by him just to get the entire water to the exclusion of other owners of the land in the nearby. It is further alleged that the nautor land was sanctioned to the defendant in the year 1968-69 and thereafter crops were in that land upto the year 12-13 continuously and the apple plants are in the age of 18-25 years or so. It is further alleged that the plaintiff has nothing to do with the encroachment of Govt. Land by the defendant. The defendant has denied that he has laid the pipe of one inch dia but claimed that the pipe is only for half inch dia and moreover at least five other persons have laid down the pipes in the same source for their personal use. The defendant has further alleged that the plaintiff has started residing at the present place for the last about 15 years only and he never irrigated his land through the water source in question for he objected to the laying of the pipe and has chosen to file the suit. Lastly, it is alleged that plaintiff intends to deprive the others from their right to use the water with the help of Court.

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 has been irrigating his lands through the water of Danal nullah drawn through Kuhal as depicted in the annexed site plan, from times immemorial, as amtter of customary right, as alleged? OPP.
2. If issue No.1 is proved, in affirmative, whether the defendant in the month of June, 2002 laid Alkathine pipe of one inch diameter from Point A to F and thereby diverting and diminished the aforesaid water supply of plaintiff as alleged ? OPP.
3. If issue No.1 2 proved, in affirmative whether the plaintiff is entitled to relief of mandatory injunction, as prayed for? OPP.
4. Whether the plaintiff is also entitled to the relief of permanent prohibitory injunction, as prayed for? OPP.
5. Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD
6. Whether the defendant has also got right to use the water of Danal nullah? OPD.
7. Relief.

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

6. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for

admission, on 15.05.2007, 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 there is a misreading of evidence both oral as also documentary by the learned first Appellate Court, who has also not given the reasons for reversing the findings of the trial Court?

**Substantial question of Law No.1:**

7. The land owned and possessed by the plaintiff is provided assured water, from, Dalan Nullah. The permanent irrigation channel since times immemorial, is, depicted in, Mark-A, to, commence, from point A to B, and, from point C to D, and, another irrigation channel has been constructed by the plaintiff to irrigate his lands borne in khasra No.107, situated in mauza Malandi. The irrigation channel, from, point C to D shown in Mark A, stands constructed by the plaintiff, in the year 1979, and, since then he has been drawing water therefrom, for his irrigating his lands. The defendant is averred in the plaint, to, in the month of June, 2002, without any entitlement in him, of, any indefeasible right, either legal or customary to lay alkathine pipe of 1 inch dia, from point E to F, (I) hence sequelling diversion of water, from Dalan nullah, (ii) with a consequential effect of hence diminishing(s) occurring vis-a-vis flow of water, onto the irrigation channels, (iii) besides with a natural consequential effect, of deprivations/diminishings occurring qua availability of water, to the plaintiff, for the latter irrigating his land(s). The defendant had contested the validity of the propagation(s) made by the plaintiff, of his holding no indefeasible right either customary or legal, for utilizing the waters of "Dalan Nullah".

8. For resting the aforesaid factum, the apt documentary material enjoining allusion thereto, is borne, in Ex.PW1/G, exhibit whereof, is a Wazib-Ul-Arz, wherein, stand embodied, the apposite rights of estate right holders, qua user of water of "Dalan Nullah". The apt portion of Ex.PW1/G is extracted hereinafter:-

> "(a) That all the right holders/owners of the land have right to take water for themselves and for the cattle and for their drinking and for irrigation.
>
> (b) That for irrigation, the right holders can create canals free of costs subject to the condition that the creation of canal does not damage the existing Kuhal for irrigation or water mill.
>
> (c) That no person can change the course of Khad/nullah without the consent of the other owners of the adjoining estate.
>
> (d) That no one can erect water mill in the Govt. land without the permission of the Govt."

9. A perusal of Ex.PW1/G, makes an evident display, (a) of all the estate right holders, holding a right to use water of khad/Nullah, both for drinking and irrigation purpose, (b) and each of the estate right holders, for facilitating, theirs enjoying the water(s), of Dalan Nullah, theirs holding a right to create channel(s) therefrom, (c) yet subject to theirs not damaging the existing Kuhal or water mills, (d) and, it being impermissible to the estate right holders, to, without the consent of other estate right holders, to hence change the course of the Khad/Nullah. The afore extracted apt portions, of Ex. PW1/G yet would not firmly rest the controversy, qua the defendant being an estate right holder, and, hence his holding, in the aforesaid manner, an indefeasible right, to use the waters of Dalan Nullah, for all the purpose(s) enunciated therein, (e) unless evidence surged forth, qua his satiating the indispensable condition, of his being a estate right holder, and, his land being situated

in close proximity to Dalan Nullah, besides his land being situated in proximity to the water channels, constructed from the source of Dalan Nullah. The apt evidence, in respect of the aforesaid facet, is encapsulated in the testification, borne in the cross-examination of the plaintiff, who, has voiced therein, of the waters of Dalan Nullah being available, for user by land owners, for the purposes encapsulated, in Ex.PW1/G, (f) in case their lands are situated on both sides, of the source, of Dalan Nullah or on either side of course(s) of rivulets. Nowat, with PW-1 in his cross-examination making a further disclosure, of the defendant's land, being located, on either side of the course, of Dalan Nullah, thereupon, when the defendant obviously being a riparian land holder, (g) hence, all the rights embodied in Ex.PW1/G especially vis-a-vis users by him, of the waters of Dalan Nullah, are, naturally available, to be exercisable by him. Consequently, there is no merit in the contention of the learned counsel for the plaintiff, of, the defendant, not, holding any indefeasible right, either legal or customary, to use the waters of Dalan Nullah.

10. Be that as it may, the plaintiff may succeed, in securing a decree for permanent prohibitory injunction, and, a decree for mandatory injunction, in case, firm evidence, had been adduced by him, in display of the defendant, in laying an alkathine pipe, from, the source, and, upto his field, (i) his damaging the existing water channel, (ii) evidence stood adduced, of his changing the course, of, rivulet, especially without the consent of other estate right holders. Contrarily, with Ex. PW1/G, making, an explicit pronouncement of the estate right holders, being evidently entitled, to user of waters of Dalan Nullah, for both irrigation and drinking purpose, and, being also entitled to create canals, (iii) hence, with the defendant laying alkathine pipes, from, Dalan Nullah upto his house for drinking purpose, and, when its laying demonstrably does not damage the existing Kuhal, (iv) thereupon, in the defendant, laying alkathene pipe, from, Dalan Nullah, he cannot, be construed to violate the mandate of Ex.PW1/G. Furthermore, when the plaintiff's witnesses, in their respective cross-examinations, acquiesced of some other persons, also through pipes hence drawing water, from, the source of Dalan Nullah, and, who yet remained unimpleaded, rather with the plaintiff, for reasons known to him, singularly choosing to implead the defendant, does rear an inference of his suit being prima facie not bonafide. Moreover, the plaintiff has averred, of the laying of alkathene pipe, from, Dalan Nullah upto the defendant's house hence diminishing the flow of water upto his fields, yet the aforesaid averment is not validated, by Ex.PW1/G, whereunder, occurs no mandate, (i) of any, of the estate right holders, holding any right to deprive the other estate right holders, from, using the waters of Dalan Nullah, (ii) much less, his holding any right, to ensure qua upon occurrence of any deficiency in supply of water to his fields, his further holding any right to prohibit other estate right holders, from, using the water of Dalan Nullah or his holding any right to seek pronouncement, of, a decree of mandatory injunction vis-a-vis other estate right holders, if they, though laying any alkathene pipe, for feeding their fields from the waters, drawn, from the Dalan nullah, hence, reduce supply(ies) thereof, onto the lands, of the plaintiff.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Substantial questions of law No.1 answered in favour of the respondent and against the appellant.

12. In view of above discussion, there is no merit in the instant appeal and it is dismissed accordingly. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No.3 of 2005 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Yoginder Paul .....Appellant/plaintiff.
Versus
Rup Lal .....Respondent/defendant.

RSA No. 467 of 2005
Reserved on : 15th March, 2018
Decided on : 19th March, 2018

**Special Relief Act, 1963 –** Sections 5 & 39- Suit for possession and mandatory injection by demolition of unauthorized constructions-Grant of - Trial Court relying upon demarcation report, decreeing suit and ordering removal of defendant's structures from suit land- In appeal, District Judge discarding demarcation report, accepting appeal and dismissing suit – RSA – On facts, demarcation though found conducted on basis of Musavi after ascertaining Pucca points and in presence of parties, but local commissioner wrongly construed western dimensions of disputed land as 6 Karams instead of 9 Karams – Held, misderivation of western dimensions of disputed land resulted in error in demarcation – Demarcation report not worth credence – No fresh demarcation can be ordered without correction of Musavi prepared at time of settlement- RSA dismissed. (Paras 8 & 9)

For the Appellants: Mr. Ashwani Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.
For the Respondent: Mr. K.D. Sood, Sr. Advocate with Mr. Rajneesh K. Lall, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The plaintiffs' suit for rendition of a decree, for permanent prohibitory injunction besides for rendition of a decree, for mandatory injunction by way of apposite demolition(s), stood decreed by the learned trial Court. In an appeal carried therefrom, by the defendant, before the learned First Appellate Court, the latter Court allowed his appeal besides obviously reversed the trial Court's judgment and decree.

2. Briefly stated the facts of the case are that the plaintiff has filed a suit for permanent prohibitory injunction and for possession by way of demolition against the defendant. It has been pleaded that he and his brothers, namely, Roshan Lal, Desh Raj, Onkar Chand and mother Smt. Rupan Devi are owner in possession over the land in suit comprised in Khata No.77, Khatoni NO.92, Khasra No.931, measuring 0 Kanal 15 Marlas, as per jamabandi for the year 1966-97 (hereinafter referred to as the suit land), situated at Tika Paplah, Tappa Mowa, Tehsil Bhoranj, District Hamirpur, H.P. It is further averred that the plaintiff, his brother and mother have exchanged the entire Khasra number with owner Shri Parkash etc., who are in exclusive possession over the land in suit and as such the plaintiff has become owner in possession this land in suit with his brothers and mother. It is alleged that defendant is stranger to the suit land, who is co-owner of the adjoining land, who has started digging the land in suit, for the purpose of raising illegal construction. The

plaintiff requested the defendant several times to admit his claim qua the suit land, but all in vain, hence, the present suit has been filed. The cause of action is stated to have accrued in favour of the plaintiff and against the defendant on 27.2.2001.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections of maintainability, cause of action and estoppel etc. On merits, it is claimed that defendant had already constructed his house in the year 1992-93 over his own land comprised of Khasra No.932, which he purchased from Shri Kiali Ram and Rattan Chand of village Paplah to the extent of 0Kanal 15 Marlas. It is further claimed that the plaintiff has no cause of action. The suit land was being demarcated by revenue expert in the year, 1991. During course of demarcation, pucca bannas were fixed by the revenue expert and the defendant has constructed his house within less than his share. It is alleged that the plaintiff has started interference in the land of defendant comprised of Khasra No.932. The defendant has spent huge amount for the construction of his house in the year 1991 and at that time the plaintiff did not raise any objection qua the same. Therefore, on the grounds above, the dismissal of suit is sought by the defendant.

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 to the relief of permanent prohibitory injunction as prayed for? OPP.
2. Whether the plaintiff is entitled for the relief of possession by way of demolition 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 in the present suit? OPD.
5. Whether the plaintiff is estopped to file the present suit by his own act or conduct? OPD.
6. Whether the suit is bad for non joinder of necessary parties? OPD.
7. Relief.

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

6. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 9.9.2007, 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 questions of law:-

a) Whether the impugned judgment passed by the learned First Appellate Court is the result of total misreading and mis-appreciation of pleadings and evidence adduced on record and resultant findings and conclusions are wrong and incorrect, as such, such issues are liable to be determined afresh under Section 103 CPC?

b) Whether the learned Court below has committed error of law in discarding the demarcation report (Ex. PW3/B) and thereby, the

judgment and decree passed by learned trial Court in favour of appellant/plaintiff was illegally and incorrectly reversed?

**Substantial questions of Law No.1 & 2:**

7. The Revenue Officer concerned, in pursuance to his holding demarcation of the adjoining estates, of the parties at contest, prepared an apposite report, and, during the course of his testification tendered it into evidence, whereat, it was exhibited as Ex.PW3/B. A perusal of Ex.PW3/B, underscores, the trite factum (i) of the defendant while holding construction, upon, land owned and possessed by him, as comprised in khasra No.932, his deviating therefrom onto the land of the plaintiff, comprised in Khasra No.931. (ii) The encroachment, hence, made by the defendant upon the plaintiff's land, carries dimensions of one Karam in width and five karams in length. The learned trial Court had accepted the report of the Local Commissioner concerned, borne in Ex.PW3/B, whereas, the learned First Appellate Court discarded its legal worth. Since, the demarcation, conducted, of the adjoining estates of the parties at contest, by the demarcating officer, was, anvilled upon a musabi borne in Ex.PW3/C also with its standing conducted n the presence of the parties at contest,(iii) besides when preceding the revenue officer concerned hence holding demarcation of the adjoining estates, of the parties at contest, his from Ex.PW3/C, ascertaining the relevant fixed points, (iv) whereafter, he relayed them onto the relevant site, (v) thereupon, prima facie per se, hence, the aforesaid determinations made from the apt record, and, alsocarrying of demarcation(s) by the Revenue Officer concerned, cannot be construed, to be either flawed or faulted. (v) In original musabi, borne in Ex.PW3/C, the western dimension, of Khasra No.931 is visibly depicted to be 9 Karams, (vi) whereas, the Local Commissioner has construed the western dimension of Khasra No.931, to be rather carrying a dimension, of 6 karams. The Local Commissioner at the end of his cross-examination, has, rendered an affirmative echoing, to an affirmative suggestion, (vii) of in case, his taking the depicted dimensions in the musabi, of Khasra No.931, being 9 karams, thereupon, there would occur variation(s) in the determination, of fixed points. The aforesaid admission made by PW-3, at the end, of his testification, tacitly underscores, (viii) the factum of the aforesaid mis-derivation, of the western dimensions, of Khasra No. 931, from 9 Karams, as disclosed in the musabi borne in Ex.PW3/C, to 6 Karams, (ix) hence, per se sequelling an error in the demarcation, conducted by him of the adjoining estates of the parties at contest. Significantly, hence, the further sequel thereof, is that, the report furnished by PW-3, exhibited as Ex.PW3/B, being unwrothy of credence, nor on its anvil, any inference being derived, of hence, the defendant in raising the construction upon his land, comprised in Khasra No.932, his deviating onto the land of the plaintiff, borne in Khasra No.931. The further reason for making the aforesaid conclusion, (x) is of both PW-3 and DW2, unanimously echoing in their respective testification(s), of their existing a 'galli', separating the constructions, made by the plaintiff and the defendant, upon their respective adjoining estates. The aforesaid existence of a gali, and its rather separating, the constructions, made upon their respective estates, by the litigants concerned, also underscores, an inevitable inference, of there being a gross error, in the holding of demarcation by PW-3, (xi) besides sequelly, a gross error hence seeping into his report, borne in ex.PW3/B, rendering it to be susceptible to acceptance. Even though, PW-3 for rendering, his rather credibly construing the western dimension, of khara No.931, as 6 karams, from its denoted dimensions, of 9 Karams in the musabi, borne in Ex.PW3/C, and also has concerted to validate it, by ascribing the reason, of, old Khasra No.1495/1173 being partitioned between the co-owners, and, in the apposite partition, the western dimension(s) thereof being indicated as 6 karams, yet he omitted to adduce, any evidence in respect thereof. Even if, the aforesaid alterations, hence, occurred, in the western dimensions of old khasra number(s) upon their partition, (xii) yet all compatible alterations, were, enjoined to be depicted besides carried also in the Aks musabi, borne in Ex.PW3/C,

(xiii) whereas, the aforesaid purported alterations, in the western dimensions, of unpartitioned khasra No. 1495/1173, from, its hitherto dimension(s) of 9 Karams, to 6 Karams, has visibly remained uneffected, in Aks musabi, borne in EX.PW1/C, (xiv) thereupon, the aforesaid validation concerted to be meted by PW-3 vis-a-vis his taking the western dimension of the apt khasra number, as 6 Karams from 9 Karams,, is rendered enfeebled nor is amenable to acceptance.

8. Be that as it may, the learned counsel appearing, for the plaintiff/appellant, has contended that with the reasons ascribed by the learned First Appellate Court, for its hence upon the aforesaid anvil, rather discarding the report of the demarcation Officer, borne in Ex.PW3/B, being visibly not in consonance with the objections, in respect thereof reared by the defendant/respondent, hence any dis-imputation of credence by the learned First Appellate Court vis-a-vis Ex.PW3/B, is not credit worthy. However, the aforesaid contention is rudderless, for the reasons (a) the defendant/appellant rather rearing objection No.3, objection whereof, directly appertains to the aforesaid error, made, by the demarcating Officer concerned, in his conducting the demarcation of the adjoining estates of the parties at contest, (b) error whereof is engendered by his drawing erroneous dimensions, of the apposite zone, of khasra No.931, (c) even if assumingly no pointed objection in respect thereof, stood raised, the courts of law are not barred, to in case evidence unfolding the aforesaid pervasive infirmity rather surges-forth, to hence, revere the infirmities nor are barred to hence invalidate the demarcation, conducted by the demarcating Officer concerned.

9. The learned counsel appearing for the plaintiff/appellant, has contended with vigour, that in case any infirmity, exists in the report furnished by the demarcating officer, yet this Court holding ample jurisdiction, to order for carrying, of, a fresh demarcation in accordance with law. However, the aforesaid submission is unacceptable, for this Court, (a) given the demarcation conducted by the Revenue Officer concerned, being evidently conducted in gross transgression(s), of denotations, in Aks musabi, of the western side of khasra No.931, being 9 Karams, and, also rather his overriding the aforesaid scribed denotations therein, of the, western dimensions of khasra No.931, and, his untenably computing them to be six Karams, (b) especially when he also, for the reasons aforestated, ascribes rather a tenuous besides a weak reason, qua facet aforesaid, (c) thereupon, in case a fresh demarcation is ordered, the dispute existing inter se the parties at contest would, yet remain unrested, (d) unless, musabi borne in Ex.PW1/C, is subjected to correction, in settlement proceedings, for hence bringing it, as testified by PW-3, in consonance with the pre-consolidation record, whereat, upon partition, of, khasra No.1495/1173, hence, alterations purportedly occurred in the western side of Khasra No. 1495/1193, from, 9 karams to six karams, besides preponderantly when awaiting corrections thereto, if any, required, and, if imperative would render any nowat demarcation, to be also susceptible to skepticism . (e) Even otherwise, the aforesaid submission made by the counsel for the appellant/plaintiff is inefficacious, for the reason, the plaintiff's suit, being merely for rendition of a decree of permanent prohibitory injunction, as also, for rendition of a decree of mandatory injunction, pointedly in respect of a cause of action, arising on 27.2.2001, whereat, the defendant purportedly started excavation work purportedly upon the plaintiff's land. However, uncontrovertedly, and, even as testified by the plaintiff, the construction(s) raised by the defendant, appertain, to the year 1992. However, in respect thereto, no trite averment is cast in the plaint, of its, existing upon khasra No.931, owned and possessed by the plaintiff. It appears, that as soon as a demarcation report, was prepared by PW-3, especially with its preparation evidently occurring prior to the plaintiff stepping into the witness box, thereupon, the latter fashioning, and, orienting his testification, in consonance therewith. However, the aforesaid oriented testification, of the plaintiff merely, for bringing

it, in consonance with Ex.PW3/B, prepared earlier therewith, cannot overcome, the omissions of the plaintiff, to plead in the plaint, of constructions uncotrovertedly raised, in the year 1992, by the defendant, being raised upon khasra No.932, khasra No. whereof is owned and possessed by the defendant, more so, when no demarcation report was appended with the plaint. Obviously, hence, in case the aforesaid espousal of the counsel, for the plaintiff is accepted, it would tantamount to this Court proceeding to afford relief, on anvil, of, for reasons aforestated, of, yet an invalid demarcation report rather surging forth, also it would tantamount, to this Court, rendering a decree in respect of construction qua wherewith, no relief has been espoused in the plaint, importantly, when no application stands yet moved by the plaintiff, wherein, he weeks the leave of the court, to incorporate, in the plaint, pleadings or relief(s), in consonance with the invalid report, of the demarcating officer, whereupon, unnecessary litigation would hence spur.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Substantial questions of law No.1 and 2 are answered in favour of the respondent and against the appellant.

11. In view of above discussion, there is no merit in the instant appeal and it is dismissed accordingly. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No.72 of 2004 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Dhanpat Seth and others .....Plaintiffs.

Versus

M/s Nilkamal Plastic Ltd. .....Defendant.

Civil Suit No. 69 of 2005 along with
Counter Claim No. 20 of 2006.
Reserved on : 22.06.2018.
Date of Decision: 29th June, 2018.

**Patents Act, 1970 –** Sections 2(ja) and 64(1) **- Inventive Step - Cancellation of Patent –** Circumstances – Plaintiff obtaining patent with respect to device for manually hauling of agricultural produce – However, Defendant started producing device for carrying agricultural produce similar to one patented by plaintiff – Plaintiff filing suit for injunction and damages for infringement of their patent – Defendant contesting suit and filing Counter claim for cancellation of patent on account of lack of inventive step involved in plaintiff's patent – Plaintiff arguing that patent once granted is unimpeachable – Held: patent once granted is not unimpeachable – Look alike of traditional products is not an invention – On facts, patented product found similar to traditional device used for carrying agricultural produce – Mere change in size and raw materials do not make the product an invention (para 16) – Workshop improvement is not inventive step – Mere new form of known substance does not prove enhancement of efficacy– Patent canceled – Suit dismissed and counter-claim decreed. (Para 17)

For the Plaintiffs: Mr. Vinay Kuthiala, Sr. Advocate with Ms. Vandana Kuthiala, Advocate.
For the Defendant: Mr. B.C. Negi, Sr. Advocate with Mr. P.P. Singh Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The plaintiffs have filed the present suit for grant of an injunction against the defendant, given the latter infringing, the apt Patent, and, for the recovery of damages amounting to Rs.51 lacs, on account of loss, of, profit, and, for future mesne profit(s).

2. Cause of action, as disclosed in the plaint, may be summed up thus. The plaintiffs are members, of, the same family, and, plaintiffs No.2 to 7, have duly authorised plaintiff No.1, to, file the instant suit, on their behalf. The plaintiffs are partners in a registered firm under the name and style of Niovel Appliances India, but since the right to file the present suit has accrued to them in their individual capacity, the same is being filed by them jointly. It is averred that the plaintiffs have been granted patent No.195917, on, 11.07.2005, for " a device for manually hauling of agricultural produce" w.e.f. the date of their application, for, grant of patent i.e. 24.05.2002. The grant of the patent has been recorded by the patent office, Govt. of India Mumbai, in the register of patent, on, 24.8.2005. The plaintiffs have been granted the patent, for, complete specifications, design as well as the claim in respect of the device, and, the same are annexed with the plaint along with photographs and details. The defendant is a public limited company incorporated under the Companies Act 1956, and, is being sued through its Managing Director, who is also the Principal Officer of the corporation. The defendant is engaged in the business of manufacturing various plastic products. The defendant is supplying its products in various states, throughout, India including Himachal Pradesh and the plaintiffs are aggrieved by the action of the defendant in the latter infringing the apt patent granted to the invention of "A devise of manually hauling of Agriculture Produce," hereinafter referred to as the "Invented Device" for the sake of brevity. The defendant has infringed the claim of Patent as provided in the complete specification, under section 10 of the Patent Act, 1970, and, the plaintiffs are thus entitled to the relief claimed in the present suit. The defendant has infringed the patent by manufacturing, and, supplying and offering for sale, a device in accordance with the claims of Patent No.195917, in, the state of Himachal Pradesh and in other states. It is averred that the defendant was fully aware that the plaintiffs had conceptualized and visualized the development and invention of the invented device, since, 1999 but despite this the defendant covertly managed, to obtain information about the same and not only manufactured, it but sold it, without, the consent of the plaintiffs to the Govt. of H.P., as well as private parties, in the State of H.P. It is averred that the inventor of the said patent product is Mr. Dhanpat Seth. It is submitted that a device for hauling agriculture produce comprising a container of synthetic polymeric material, defined by a hollow frusto-conical body open at the top and closed at the based and tapering, from, the operative open at the top, and, closed at the based, and, tapering from the operative open top to the base, with, perforated walls said perforations being essentially quadrilateral in configuration, and, reducing in dimensions from the operative top to the base; said wall having a contour adapted to proximate the back of a human body; and removable harnessing means secured to the container in the upper perforations, said harnessing means having straps and buckle formations adapted to be irremovably secured in and around the perforations, in the said walls, and, loping means around the back and the shoulders of an individual, said straps and buckle components of the harnessing means being adjustable to permit the harnessing means to be secured to the container at varying locations on the wall of the container in the

perforations, and, the loping means adapted to be adjusted to accommodate individual of different heights and body structure. It is averred that in 1999 when the inventor was in Shimla, the inventor noticed that in Himachal Pradesh the farmers and the general people were using long basket made of bamboo for carrying agricultural produce wood and other items. The bamboo baskets are locally known as Kilta. The Inventor also noticed that carrying a Kilta on the back was really painful because for securing the Kilta it was supported by a thick rope and tied to the forehead. There was no provision for laying the Kilta to the waist. On making inquiries from the hospitals, doctors and the farmers in and around Shimla, the inventor then thought of an idea of making a long basket in plastic and allied material to replace the Kilta. After development of prototype, the inventor finalized the design in consultation with orthopedic doctors. Various prototypes were taken for survey to the Horticulture Board, Govt. Departments, Cooperative Societies and the farmers in Himachal Pradesh and finally a design with the features as claimed in the said Indian Patent No.195917 hence was frozen. It is further submitted that Immediately after the presentation of the invented device in the seminar/conference, held, at Shimla on 4th April, 2002, a patent and design application for the invented device developed by the inventor, was filed on 24th May, 2002. The plaintiffs commenced commercial production of the plastic long basket/invented device. Till the time of commencement of commercial production the plaintiffs along with the inventor, have spent substantial amount towards the development costs. These include expenses towards development of mould infrastructure, samples, travelling and promotion of product etc. The formal marketing of the invented device in accordance with patent application and the design started around 15th June, 2002. The said design was registered under Design No. 189150 on 9th September, 2002. It is submitted that the plaintiff supplied the invented device w.e.f. 2002 to H.P. Govt. Corporations such as HIMFED, and, HPMC through its distributor Rohini Enterprises, Sanjauli,Shimla. It is submitted that under the mistaken impression that suppliers of long basket (kilta) were required to be empanelled with National Horticulture Board, Govt. of India, Gurgaon, before orders were placed on them, the plaintiffs submitted an application with NHB for inclusion of the name of their firm in the panel of parties, for, the purpose of supply of this item. Since, the NHB did not deliberately take any decision on the plaintiffs application for empanelment, they filed a writ petition No.208 of 2005, before, this Court and the aforesaid writ petition was disposed by this Court, on, 29.04.2005. The plaintiffs lateron came to know that some officials of the Directorate of Horticulture Govt. of H.P., in connivance with the defendant, withheld, this fact from this Court, and, that pursuant to the negotiations held in December, 2004, the Director Horticulture had already placed supply orders for plastic long basket i.e. the invented device, upon the defendant. These orders have been placed in utter violation of all the norms and the procedure to be adopted while doing so, and, the defendant has illegally, and, in glove with the officials of Directorate of Horticulture (H.P.), supplied goods worth about Rs.72 lakhs, by infringing the apt patent and has played a massive fraud, and, has subjected the state, to, a massive loss of about Rs.7 lacs, on a supply of Rs. 72 lakhs approximately. The supply order was placed on the defendant @ 282/77 per piece whereas the plaintiffs firm had quoted Rs.252/61 per piece. It has further submitted that on coming to know of this fraud, the plaintiffs firm, filed, a PIL CWP No. 732 of 2005, before this Court. In the reply filed to the aforesaid petition, the defendant admitted that it had manufactured and supplied the plastic long Basket i.e. the invented device to the Director of Horticulture, Govt. of H.P. Further defendant also admitted that it had supplied similar long baskets as the invented device worth over Rs.40 lakhs to various other parties in Himachal Pradesh. It is averred that the defendant after seeing the product of the plaintiffs which was created by the Inventor, hence copied the product and are now supplying the same in the market, after, making cosmetic changes in the product, and, are committing acts of infringement of the Patent. It is submitted that the

defendant's product consists of a device comprising a synthetic polymeric material having a hollow frusto-conical body open at the top, and, closed at the based, and, tapering from the operative open top to the base. The product has perforated walls. The perforations are essentially quadrilateral in configuration and reducing in dimensions from the operative top to the base. The configuration of the wall is also contoured adapted to proximate the back of a human body. The device has removable harnessing means secured to the container having straps and buckle formations for looping the strap around the back and the shoulders of an individual, being adjustable to permit the harnessing means secured at varying locations on the container and to accommodate individuals of different heights and body structure. Sale of the defendant's products in violation of the patent rights of the plaintiff has also caused wrongful loss and damage to the plaintiffs and the plaintiffs, therefore, seek damages to the extent of Rs.51 lakhs. The plaintiffs have been subjected to massive loss by the defendant by infringing the patent and supplying the material in the State of H.P. and elsewhere. The plaintiffs have spent huge amount in the development of the invented device and would have earned over 25 lakhs as profit on the sales made by the defendant in Himachal Pradesh till date. The product of the defendant is also inferior in quality and is harming the reputation of the plaintiffs in marketing his invented device. The plaintiffs are suffering a loss of about Rs.25 lakhs on this account and will also suffer further losses, if the defendant makes any more sales by infringing the patent and the plaintiffs seek future mesne profit of Rs.1 lakh for every 1000 long baskets/copied invented device sold by the defendant in future. Hence the suit.

3. The defendant contested the suit and instituted the written statement to the plaint, wherein it has taken the preliminary objections qua maintainability, patent being wrongly obtained by the plaintiffs and being wrongly granted n contraventions of the provisions of the Patents Act and the rules framed thereunder. It is submitted that the patent is bad for want of subject matter at the first instance itself. The plaintiffs failed to define the nature of invention and to disclose the process which produces results to be aimed at. The subject matter is neither a matter of new manufacture nor art. There is no novelty or inventiveness in the subject matter of the patent as opposed to what was already known before the relevant date. Pith and essence of the alleged invention as compared to the pith and essence of traditionally known Kilta (long Basket) is identical/ similar in each respect. The device does perform the function of hauling. It is nothing but simply a long basket. The device does not produce any new result or a new article of manufacture or art than before. It is the manual function which facilitate the hauling, of, agricultural produce and storing them in bucket type device/container, and, not the device which performs the function of hauling. The plaintiff cannot claim monopoly in a simple plastic basket. It is submitted that the patent rights can be claimed, under the law, in respect of an article which is new, inventive and industrially applicable. There is nothing new or inventive in the device popularly known as Kilta. The patented device is merely an application, of, an old device known as Kilta, for, the purpose of storage or collection of inter alia agricultural produce. The utility of Kilta had traditionally been known much prior to the relevant date. The title of invention is ambiguous and misleading. The device does not constitute an invention. The subject matter of invention, so far as claimed in the complete specification, is “obvious” and does not involve any “inventive steps”. The plaintiffs have not shown to have taken any inventive step over the known devices. Any workman skilled in the art could have carried out the manufacture of Kilta using other raw material(s). The element of invention claimed by the plaintiffs on the known device is obvious to a person skilled in the art and is mere trade variant and does not constitute any inventive step within the meaning of Section 2(1)(j) (a) of the Patent Act. The invention, so far as claimed in the claims of the complete specification, was anticipated having regard to the knowledge available in India as well as in many other countries in the world, on, the relevant date. The anticipation by

prior disclosure with the consent of the plaintiffs, commercial working commercial use/sale, public exhibition is admitted by the plaintiffs in the pleadings as well as the documents produced on record. The letter of 19th April, 2002, produced on record by the plaintiffs clearly establish anticipation, lack of novelty, prior publication and prior use of device in question. The defendants submit that launching of plastic Kilta in Shimla on 4th April, 2002, in the presence of Minister of Horticulture, other government officials and many leading apple growers, in, Himachal Pradesh in itself, is, sufficient to defeat the claim for the grant of Patent. The defendants crave leave to refer to the letter of 14.03.2005 issued on behalf of the plaintiffs admitting and acknowledging the availability of the device in question in the market much prior to the relevant date. The plastic basket, long as well as short were being openly manufactured, sold and offered for sale not only in the state of Himachal Pradesh but also all over India much prior to the relevant date, to, the knowledge of the plaintiffs. It is submitted that the claims made in the complete specification are not "inventions" within the meaning of the Act. As a matter of fact, a simple plastic bucket of a particular size, shape and configuration popularly known as Kilta is misdescribed as a "device" for hauling agricultural produce. There is no functional aspect of hauling in the device in question, and, the functional aspect claimed as invention, is, not the result of the device but manual hand of farmer. The utilitarian value of the plastic bucket popularly known as Kilta was already known prior to the relevant date. The traditional Kiltas were carried or capable of being carried on shoulders as well as tied to the waist. The size, shape and configuration of Kilta continues to be the same as known traditionally with frusto conical body open at the top and closed at the base with perforated walls. In any event no patent can be claimed or granted by mere change of shape, size or configuration. Mere use of different raw material for manufacture of known device does not constitute an invention. The word "haul" is defined by Oxford English Dictionary to mean (I) pull or drag forcibly, (ii) transport by Lorry, Cart, (iii) turn a ships course. It is thus clear that there is no hauling function performed by the device or manually by the farmer. It is a simple case of farmer plucking fruits from the tress and storing it in a long basket secured by belts to his body. The plaintiff have admitted that such device known as Kilta was in use prior to relevant date. The only new feature alleged to have been adopted by the plaintiffs, is, the raw material i.e. "synthetic polymeric material" replacing bamboos/wood. Synthetic polymeric material is in use as a substitute to Rubber for many years for manufacture of hollow frusto conical body like bucket, dust bins etc. The mere fact that raw material bamboo/wood as were allegedly being used for manufacture of typical device, for, hauling agricultural produce, does not, tantamount to an invention or an inventive step, within, the meaning of Section 2(1)(j)(i) of the Act. It is submitted that the raw material used by the defendant for the manufacture of their Kiltas, is, High Density Polyethylene, the technical name of which is HDP. The material used by plaintiffs is polyprophylene copolymer, the technical name thereof is PP. The limitation of PP is their low temperature bitterness which is not in case of HDP. Both material PP and HDP differ in their respective characteristics. The plaintiff cannot claim a patent in "synthetic polymeric material" at the first instance or the use thereof, as a substance, for the manufacture or sale of traditionally known device, bucket, container, used or capable of being used as storage basket.

4. It is further submitted that the defendant conceived and invented new and novel design for Kilta in 2001. The artistic drawings used as a blue print, for, the preparation of injunction mould, and, Kilta were originally created by in house design department headed by Mr. A.B.. Ambekar, during, the course of their employment with the defendant company, and, in discharge of their official duties. The said original drawings were created on 20th November, 2001, and, the same were forwarded by the defendant to Arries Stell Mould Co. Ltd. Taiwan, for designing the injection mould, as, required for the purposes, of, manufacture of Kilta. The said drawings were received by Arries Moulding Co.

Ltd., Taiwan in December, 2001, and, the work for the designing of the injection mould, commenced immediately thereafter. The designing of the injection mould was taken up by Arries Steel Mould Company Limited immediately, and, the final mould design, of Kilta, after incorporation, of, necessary technical modifications, were finalised, and, forwarded to the defendants, by Arries Steel Mould Company Limited. The technical specifications and drawings used for the purpose of manufacture of Kilta are original "artistic works" within the meaning of Copyright Act, and, the defendant, is, the owner thereof. Being the owner of copyright, the defendant has got an exclusive right, to, reproduce the artistic features thereof, in any material form, and, restrain others from committing an act of infringement. The plaintiffs have infringed defendant's copyright, in, the artistic drawings, by reproducing the same in three dimensions. No person is entitled to claim patent in a substance, resulting, in the aggregations, of, the properties of the components thereof or a process for producing such substance. The patent No.195917 is purported to have been sealed only, on 11th July, 2005, and, has not stood the test of time and scrutiny. The patent is rent. It is also submitted that the feature of belt claimed as another element of the patent specification, in itself, is not new or inventive. In any even, the mode of affixing belt to Kilta in the defendants product is entirely different. Specification belt-fitting slot has been provided in the defendant's product at the upper and the bottom portion of the device for better utility. There is no belt fitting slot provided in the specification of patent in question. It is also submitted that the this Court, does not, have either the territorial jurisdiction or the pecuniary jurisdiction, to, entertain and try the present suit. It is further claimed that the present suit has malafidely been filed by the plaintiffs with a view to scuttle legitimate competition in the market and amounts to an abuse of process of law.

5. On merits, the averments made in the plaint are denied. It is submitted that patent No.195917, has fraudulently been obtained by the plaintiffs, and, has illegally been granted by the Controller of Patent in utter breach and disregard to the provisions, of, the The Patent Act. It is submitted that the mere grant of Patent, is, not in itself sufficient to confer monopoly right in favour of the plaintiffs. The plaintiffs have miserably failed t establish the validity of the patent which is seriously disputed and challenged by the defendants. It is denied that the plastic long basket is an inventive device. There is no inventive step taken by the plaintiffs for the manufacture of plastic long basket called Kilta. Mere use of expression in the specification and the claims does not make an ordinary long plastic basket to be an inventive device. It is submitted that the baskets made of plastic are not only being manufactured by the defendants prior to the relevant date, but such like products are being manufactured and sold in India and many other countries in the world much prior to the relevant date. The manufacture of Kilta by using plastic as a raw material is nothing more than the mere workshop improvement and does not satisfy the test of inventions or an inventive steps, within, the meaning of the Patent Laws, as applicable. It is denied that Mr. Dhanpat Seth is the inventor or any invention has been made in the manufacture of plastic basket. The claims made by the plaintiffs are obvious, pre-published, pre-known, pre-used and does not constitute an invention. It is submitted that the history of creation ion of the so-called invention has got no relevance to the fact in issue. The plaintiffs have admitted that HDP as an ingredient, was, in use for the manufacture of plastic devices prior to the relevant date, and, at least in 1989. The raw material which is being used by the defendant for the manufacture of their plastic buckets/baskets, is High Density Polyethylene, the technical name of which is HDP. It is denied that the alleged inventor visited Himachal Pradesh in 1999 and discovered the people using long basket made of Bamboo. Long baskets made of bamboo for multiple usage and purposes are being traditionally used for decades by the farmers and labourer in plains as well as in hills for the transportation of material. It is submitted that the plaintiffs have again made vague statement about the persons carrying Kilta having lost their balance or rolled down from the

mountain slops. It is denied that there was any mishap or a case of rolling down the mountain slopes on account of persons carrying a traditional Kilta.It is submitted that the plastic bucket/basket in small and long sizes were already manufactured and sold, in the market by large number of manufacturers, when the alleged idea of making a long basket in plastic, is, claimed to have occurred to the so-called inventor. None of the features disclosed in the Indian Patent No.195917, constitute, any infringement or inventive steps, within the meaning of the Patent Act. The plaintiffs have deliberately not disclosed the period of time when the design of the basket/device, subject matter, of Patent No.195917, was finalized or taken for service or submitted to the Government department. It is submitted that the long baskets/Kilta made of plastic material was being openly sold in the market, prior to, the date of filing the application, for the grant of Patent on 24th May, 2002. It is denied that any valid claim for patent was made on 24th May, 2002 by the plaintiffs. It is submitted that in the representation made to the National Horticulture Board, Gurgaon, the plaintiffs have themselves admitted having introduced the round basket during 2000-2001 and long basket during 2001. The plaintiffs have deliberately suppressed the entire correspondence exchanged from National Board. It is further denied that the sale of the defendant's products is in violation of the alleged patent rights, of, the plaintiff or that the same has caused any wrongful loss or damage to the plaintiff.

6. The plaintiffs 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.

7. The defendant instituted a counter claim against the plaintiffs, for seeking cancellation, of, Patent No.195917, with, averments that the defendant company is Asia's Largest manufacture of injection moulded plastic articles since 1985. The defendant is an ISO 9001 and ISO 14001 company, and, has pioneered the business of manufacturer of wide range of furniture and material handling crates, having its factory(ies)/units at various parts of India. The defendants Nilkamal Products are self designed articles and retain its pioneer position, with, a large chunk of market share, in the industry. The defendant conceived and invented new and novel design of Kilta, in, 2001. The artistic drawings used as a blue print for the preparation of injunction mould and Kilta, were, originally created, by in house design department headed, by Mr. A.B.. Ambekar, during, the course of their employment with the defendant company, and, in discharge of their official duties. The said original drawings were created on 20th November, 2001, and, the same were forwarded by the defendant to Arries Steel Mould Co. Ltd. Taiwan, for designing injection mould, as, required, for, the purposes of the manufacture of Kilta. The said drawings were received by Arries Moulding Co. Ltd., Taiwan in December, 2001, and, the work for the designing of the injection mould, hence commenced immediately thereafter. The designing of the injection mould, was, taken up by Arries Steel Mould Company Limited immediately and the final mould design of Kilta, after incorporation necessary technical modifications, were finalised, and, forwarded, to the defendant, by Arries Steel Mould Company Limited. The technical specifications and drawings used for the purpose of manufacture of Kilta are original “artistic works”, within, the meaning of Copyright Act, and, the defendant is the owner thereof. Being the owner of copyright, the defendant has got an exclusive right, to reproduce, the artistic features thereof in any material form, and, restrain others from committing any act of infringement. The plaintiffs have infringed defendant's copyright, in the artistic drawings, by reproducing the same in three dimensions. It is submitted that the petitioner is well known manufacturer and seller of devices comprising, of, containers of various sizes, designs made by synthetic polymeric material and/or High Density Polyethylene defined by hollow frusto conical body open at the top and closed at the base with perforated walls. No person is entitled to claim, any monopoly, in a substance resulting in the aggregation of the

properties of the components thereof or a process for producing such substance under the provisions of law, as applicable. The plaintiffs have obtained patent No.195917 by making false statements, claims and representations. The patent No.195917 is purported to have been sealed on 11th July, 2005. The aforesaid patent has fraudulently been obtained by the plaintiffs and it is liable t be revoked under Section 64, of, the Patents Act, 2005. The aforesaid patent was wrongly obtained by the plaintiffs, and, was wrongly granted by Controller of Patents, in, contravention of the provisions of the Patents Act, and, the rules framed thereunder. The subject matter of any claim, of, the complete specification of Patent No.195917, is, not patentable under the provisions of the Act. The patent is bad for want of subject matter, at, the first instance itself. The plaintiffs failed to define the nature of invention, and, to disclose the process, which produces results to be aimed at. The subject matter is neither a matter of new manufacture nor art. There is no novelty and inventiveness in the subject matter of the patent, as opposed, to what was already known before the relevant date. Pith and essence of the alleged invention as compared to the pith and essence of traditionally known Kilta, is, identical similar in each respect. The device does perform the function of haling. It is nothing but simply a long basket. The device does not produce any new result or a new article of manufacture or art than before. It is the manual function which facilitates the hauling, of, agricultural produce, and, storing them in bucket type device/container and not the device which performs, the, function of hauling. The plaintiff cannot claim monopoly in a simple plastic basket. It is submitted that the patent rights can be claimed, under the law, in respect of an article which is new, inventive and industrially applicable. There is nothing new or inventive in the device popularly known as Kilta. The patented device is merely an application of old device known as Kilta for the purpose of storage or collection of inter alia agricultural produce. The utility of Kilta had traditionally been known much prior to the relevant date. The title of invention is ambiguous and misleading. The device does not constitute an invention. The subject matter of invention, so far as claimed in the complete specification, is “obvious” and does not involve any “inventive steps”. The plaintiffs have not shown to have taken any inventive step over the known devices. Any workman skilled in the art could have carried out the manufacture of Kilta, using, other raw material(s). The element of invention claimed by the plaintiffs, on, the known device is obvious to a person skilled in the art, and, is mere trade variant and does not constitute any inventive step, within, the meaning of Section 2(1)(j) (a) of the Patent Act. The invention, so far as claimed in the claims of the complete specification, was anticipated having regard to the knowledge available in India as well as in many other countries in the world, on, the relevant date. The anticipation by prior disclosure with the consent of the plaintiffs, commercial working commercial use/sale, public exhibition, is, admitted by the plaintiffs, in the pleadings as well as the documents produced on record. The letter of 19th April, 2002, produced on record by the plaintiffs clearly establish anticipation, lack of novelty, prior publication and prior use of device in question. The defendants submit that launching of plastic Kilta in Shimla on 4th April, 2002, in the presence of Minister of Horticulture, other government officials and many leading apple growers in Himachal Pradesh in itself is sufficient to defeat the claim for the grant of Patent. The defendants crave leave to refer to the letter of 14.03.2005, issued, on behalf of the plaintiffs admitting, and, acknowledging the availability, of the device, in question in the market, much prior, to the relevant date. The plastic basket, long as well as short were being openly manufacture, sold and offered for sale not only in the state of Himachal Pradesh but also all over India much prior to the relevant date to the knowledge of the plaintiffs. It is submitted that the claims made in the complete specification are not “inventions” within the meaning of the Act. As a matter of fact, a simple plastic bucket, of, a particular size, shape and configuration popularly known, as, Kilta is misdescribed as a “device” for hauling agricultural produce. There is no functional aspect of hauling in the

device in question and the functional aspect claimed as invention is not the result of the device but manual hand of farmer. The utilitarian value of the plastic bucket popularly known as Kilta, was, already known prior to the relevant date. The traditional Kiltas were carried or capable of being carried on shoulders as well as tied to the waist. The size, shape and configuration of Kilta, continues, to be the same as known traditionally with frusto conical body open at the top and closed at the base with perforated walls. In any event no patent can be claimed or granted by mere change of shape, size or configuration. Mere use of different raw material for manufacture of known device, does not, constitute an invention. The word "haul" is defined by Oxford English Dictionary to mean (I) pull or drag forcibly, (ii) transport by Lorry, Cart, (iii) turn a ships course. It is thus clear that there is no hauling function performed by the device or manually by the farmer. It is a simple case of farmer plucking fruits from the tress and storing it in a long basket secured by belts to his body. The plaintiff have admitted that such device known as Kilta was in use prior to relevant date. The only new feature alleged to have been adopted by the plaintiffs is the raw material i.e. "synthetic polymeric material" replacing bamboos/wood. Synthetic polymeric material is in use as a substitute to Rubber for many years for manufacture of hollow frusto conical body like bucket, dust bins etc. The mere fact that raw material bamboo/wood as were allegedly being used fr manufacture of typical device, for, hauling agricultural produce, does not tantamount, to an invention or an inventive step, within, the meaning of Section 2(1)(j)(i) of the Act. It is submitted that the raw material used by the defendant for the manufacture of their Kiltas, is High Density Polyethylene, the technical name of which is HDP. The material used by plaintiffs is polyprophylene copolymer, the technical name thereof is PP. The limitation of PP is their low temperature bitterness which is not in case of HDP. Both material PP and HDP differ in their respective characteristics. The plaintiff cannot claim a patent in "synthetic polymeric material" at the first instance or the use thereof as a substance for the manufacture or sale of traditionally known device, bucket, container, used or capable of being used as storage basket. It is submitted that thus it is apparent from the above that there is no invention in the subject matter; there is nothing new or novel; there is no method or process performed by the device and cannot be the subject matter of patent; there is no inventive step involved in the manufacture of the device; the invention claimed by the plaintiffs is obvious; and without prejudice to the above, the invention claimed by the plaintiffs, was, anticipated on the relevant date and as such the patent is liable to be revoked for the grounds enumerable under Sections 64(1)(a), (c), (d) to (I) and (q) of the Patents Act, 1970. It is submitted that this court has jurisdiction to entertain and try the present petition, as, the plaintiffs have instituted a civil suit alleging infringement, of patent No.195917 before this Court, and, that the provisions of the Patents Act, provides, that a petition for cancellation of a patent can be instituted in the Court where a suit for infringement, is, instituted for proper adjudication of controversy, between, the parties in infringement proceedings, and, in cancellation action.

8. The plaintiffs instituted written statement to the rectification petition/counter claim instituted by the defendant, wherein, they have taken preliminary objection qua maintainability, valuation for the purpose of court fee and jurisdiction, cause of action suppression of material facts etc. On merits, the averments cast in the counter claim, by the defendant have been denied in toto. It is denied that the plaintiffs have obtained Patent No. 195917, by making false statements or claims. It is submitted that the patent has been granted in favour of the plaintiffs, in accordance with law, and, the same is valid. It is submitted that the patent has been granted in favour of the plaintiffs, after, complying with all the statutory requirements, and, the plaintiffs have a right to prevent a third party, from, infringing his patent. The patented article involves advance as compared to the existing knowledge, and, has economic significance, and, is not obvious to a person skilled in the art. Thus the patent in question has been validly granted in favour of the

plaintiffs. It is denied that a technical advance does not tantamount to an invention or an inventive step.

9. On the contentious pleadings of the parties, this Court on 30.10.2007, struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff is entitled to the grant of a decree for permanent prohibitory injunction restraining the defendant from infringing Patent No.195917 in any manner whatsoever? OPP
2. Whether the plaintiff is entitled to a decree for mandatory injunction directing the defendant not to infringe Patent No.195917 in any manner whatsoever, as alleged? OPP.
3. Whether the plaintiff is entitled to damages on account of profits and mesne profits as prayed for?
4. Whether the goods supplied by the defendant by infringement of the Patent are liable to seizure, forefeiture and destruction? OPD.
5. Whether a plastic 'Kilta', as manufactured by the plaintiffs, can be granted a Patent? OPD.
6. Whether there exists a legal and a valid Patent of a 'Kitla' with the plaintiffs? OPD.
7. Whether the suit is maintainable in its present form? OPD.
8. Whether the suit is properly valuedfor the purposes of Court fee? OPD.
9. Relief.

10. For the reasons to be recorded hereinafter, my findings on the aforesaid issues are as under:-

Issue No.1..... No.
Issue No.2..... No.
Issue No.3..... No.
Issue No.4..... No.
Issue No.5..... No.
Issue No.6..... No.
Issue No.7..... No.
Issue No.8..... No.
9. Relief..... Suit of plaintiff is dismissed, whereas, counter claim instituted by the defendant is decreed as per the operative portion of the judgement

**Reasons for findings.**

**Issues No.1 to 6.**

11. All the aforesaid issues are being disposed, of by, a common discussion, given, all the aforesaid issues being common in nature besides when in proof thereof, common evidence stands adduced.

12. The plaintiffs avers qua the defendant hence infringing, the, apposite patent granted qua them, vis-a-vis, (i) a device for manually hauling of agricultural produce, (ii)

device whereof, comprises a container of synthetic polymeric material defined by a hollow frusto-conical body open at the top, and, closed at the base, and, tapering, from, the operative open top, on the base, with perforated walls", (iii) infringements whereof, are contended, to be made by the defendant, comprised in its, as testified by DW-1, in his cross-examination, qua inter se the kiltas manufactured, by the defendant and, vis-a-vis the patented product, there occurring only minimal differences, in, size(s) and perforations thereof. Consequently, the counsel, for, the plaintiffs, contends, that there, hence, being an open breach, of the patent, granted, vis-a-vis, the plaintiff company, and, as embodied in Ex.PW1/C-2, hence, the contracts made upon the defendant, for supplying Kiltas, to the appropriate authority, rather visiting the plaintiffs, with pecuniary damages, hence, pecuniary compensation, borne in a sum of Rs.51 lacs, being meted vis-a-vis the plaintiffs, by an apposite decree in respect thereof, being pronounced, by this Court.

13. Be that as it may, an appeal bearing No. OA/5/2—7/PT/Num, for revocation(s) of the apposite patent, and, as preferred before the Intellectual Property Appellate Board, Chennai, is, yet awaiting pronouncement, of, an adjudication thereon. However, dehors, the pendency, of, the revocation appeal, before, the aforestated Board, this Court would yet be vested, with, the apt jurisdiction, to make a pronouncement, upon, the extant suit, (i) given the provisions, borne in Section 64(1) of the Patents Act, 1970, (hereinafter referred to as the Act), hence, bestowing a right, upon the aggrieved to either seek revocation of the grant of patent, by availment, of, the apt statutory remedy or through, a counter claim instituted, in the plaintiffs' suit, for infringement, of the apt patent. Since, the defendant, has, hereat instituted a counterclaim, wherein, it agitates the factum probandum, of, the purported patented product, not, within the ambit of the provisions, of, Section 2 (j)(a) of the Act, mandate whereof stands extracted hereinafter, hence, being an inventive step, (ii) also when they contend, of, the Kilta, supplied to the department(s) concerned, rather falling within the ambit, of clauses (d), (f), and, (p) of Section 3 of the Act, (iii) wherein, are encapsulated, the, apposite exclusionary provision(s) hence for rendering, rather inefficacious, the, validity of the patent accorded, vis-a-vis, a patentee, and, vis-a-vis, a specific product, (iv) thereupon, with the counter-claim, instituted by the defendant, hence, carrying therein, all apt contentions, falling within, the ambit, of, the provisions supra of the Act, (v) hence, this Court, dehors, the pendency of an appeal before the Intellectual Property Appellate Board, Chennai, as, preferred therebefore, by the aggrieved defendant, wherein, a challenge, is, cast to the patent granted, vis-a-vis, the apposite product, rather would hence, proceed, to, dwell upon the validities, of, the respective contentions, reared by the plaintiffs, and, by the defendant. Provisions of Section 2(ja) of the Act read as under:-

> "(ja) "inventive step" means a feature of an invention that involves technical advance as compared t the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art;"

Provisions of clause (d), clause (f) and clause (p) of Section 3, of, the Act read as under:-

> "(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of the substance or the mere discovery of a ny new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.
>
> (f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way;

(p) an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components"

14. However, before proceeding, to make an adjudication, upon, the merits of the respective contentions, as, reared herebefore, respectively by the plaintiffs, and, by the defendant, it is also deemed imperative, to bear in mind, the provisions, borne, in sub section (4) of Section 13 of the Act, provisions whereof stand extracted hereinafter:-

> **"13. Search for anticipation by previous publication and by prior claim**.-(1) The examiner to whom an application for a patent is referred under section 12 shall make investigation for the purpose of ascertaining whether the invention so far as claimed in any claim of the complete specification-
>
> (a) has been anticipated by publication before the date of filing of the applicant's complete specification in any specification filed in pursuance of an application for a patent made in India and dated on or after the 1st day of January, 1912;
>
> (b) is claimed in any claim of any other complete specification published on or after the date of filing of the applicant's complete specification, being a specification filed in pursuance of an application for a patent made in India and dated before or claiming the priority date earlier than that date.
>
> (2) The examiner shall, in addition, make such investigation [3] [***] for the purpose of ascertaining whether the invention, so far as claimed in any claim of the complete specification, has been anticipated by publication in India or elsewhere in any document other than those mentioned in sub-section (1) before the date of filing of the applicant's complete specification.
>
> (3) Where a complete specification is amended under the provisions of this Act before [4][the grant of patent], the amended specification shall be examined and investigated in like manner as the original specification.
>
> (4) The examination and investigations required under section 12 and this section shall not be deemed in any way to warrant the validity of any patent, and no liability shall be incurred by the Central Government or any officer thereof by reason of, or in connection with, any such examination or investigation or any report or other proceedings consequent thereon."

In the afore-extracted apt provisions borne, in, sub-section (4), of, Section 13, of the Act, there occurs a statutory engraftment, (a) whereunder, the examiner, wherebeforewhom, an apt application, cast under Section 12, of the Act, for grant of patent, stands prereferred, is, thereafter rather statutorily obliged, to make investigations thereof, and, besides the apt investigations, as, carried under the substantive portion, of Section 13 of the Act or any report prepared in sequel thereto, are, statutorily per se constituted unbefittingm, to warrant, the apt validity of any patent, (ii) thereupon, upon reading(s), of, the aforestated statutory engraftment, as, borne in sub section (4) of Section 13 of the Act, in entwinement, with sub-section (1), and, with sub-section (4) of Section 64, of, the Act, (iii) wherewithin, the, aggrieved, is, bestowed, with, a right, to challenge the grant of patent, to a patentee, either by availing the apt statutory remedy/mechanism or through a counter claim, (iii) cumulatively and reinforcingly thereupon, dehors, the patent granted, to, the patentee/plaintiff company, and, as embodied in Ex.PW1/C-2, this Court would proceed, to hence dwell, upon, the aforesaid espousal(s), reared by the defendant, in its counter claim, given, conspicuously the grant of patent, embodied in Ex.PW1/C-2, not, hence per se

comprising, any, unimpeachable evidence, vis-a-vis, the validity, of, the apposite patented product.

15. Even though, as aforestated, the deposition of DW-1, does tentatively bear out the contention, of, the plaintiff qua apart from the apt minimal difference(s), in the size(s), and, perforations, of, the Kilta, manufactured by the defendant, drawings whereof, are borne in Ex.DW1/E-1 to Ex.DW1/E-4, vis-a-vis, the kiltas manufactured by the plaintiffs, in respect whereof, the apt patent was granted, vis-a-vis, the plaintiffs, (a) yet per se, thereupon, it cannot be concluded, of, hence the defendant, rather infringing the apposite patent. Contrarily, this Court, is, enjoined to mete, an, appropriate adjudication, vis-a-vis, the espousal(s) reared by the defendant, in its counter-claim, (b) anchored upon the definition, of, "inventive step", borne in Section 2(ja) of the Act, (c) and, also, upon, the contention, of the defendant, grooved, in the provisions borne in clauses (d) and (p) of Section 3 of the Act, (d) and, upon ingredients, of, provisions thereof, being satiated, by adduction, of, cogent evidence, this Court, would negate the claim of the plaintiffs, (e) besides upon evidence on record, making forthright and invincible displays, of, the patented product not being an "inventive step", thereupon, also the claims of the plaintiffs, would stand obviously, hence omnibusly negated. Consequently, it is imperative, for this Court to initially, decipher, from the evidence on record, qua the patented product, constituting, an "inventive step", as, defined in Section 2 (ja) of the Act.

16. Before proceeding to search, for, the apt evidence, as may be adduced, in satiation, of all the ingredients, borne, therein, it is, of utmost significance to bear in mind the statutory connotation, ascribed in Section 2 (ja) of the Act, vis-a-vis, an "inventive step", (i) therein "inventive step" is ascribed the signification, of, a feature of an invention that under takes technical advance, as compared to the existing knowledge; (ii) or having economic significance or both; (iii) that makes invention, not, obvious to a person skilled in art. In case, the learned counsel, for the defendant/counter-claimant, hence succeeds, in establishing, that the features of the patented product, uncontrovertedly a Kilta, does not bear out, the trite fact of it being an invention, (a) given, its evidently not involving any technical advance, vis-a-vis, the existing knowledge prevailing qua it or if he establishes, that dehors its holding, any economic significance or both, (b) that even, too, a person skilled in the art, the patented product not carrying any inventive features, rather, upon, a person skilled in the art, on, sighting the patented product, his gathering, an impression, that, it carries a look alike, vis-a-vis, the traditional product, (c) thereupon, the patented product hence would not be construable to be a "inventive step", nor hence, any, replicate thereof, save and except, minimal differences, inter se both, specifically in size(s), and, in user therein, of any alternate raw material, would not hence constitute, any infringements, of the apt patented product. In the aforesaid assay, the learned counsel, appearing for the defendant, has drawn the attention, of this Court, to, the bespeakings hence occurring in the cross-examination, of, PW-3, and, as appertain to the kilta, in respect whereof, patent was granted, bespeakings whereof loudly rather echo qua the kiltas, hence being in use in the country side, since, times immemorial, (d) and, qua further acquiescence(s), also occurring, in, his further cross-examination, qua, instead of user, of, bamboo, as a raw material in manufacture thereof, the plaintiffs, using plastic, as a raw material, in manufacture of the product, in respect whereof, the plaintiffs claim a patent. The aforesaid testification, borne in the cross-examination, of, PW-3, does bear out, the, contention of the counter-claimant/defendant, that the patented product, does not display, any feature of any invention, and, also that hence no technical advance, has occurred, in, its fabrication or manufacture, vis-a-vis, the prevalent knowledge, with respect, to the patented product, (e) except, the apt inter se both hyphenated/segregable, trite factum, qua except bamboo, the hitherto used raw material, rather the patented product, hence,using plastic as a raw

material. Conspicuously also, the, parlance ascribable, vis-a-vis, the statutory coinage, "technical advance", (f) is, of, the plaintiffs being enjoined to make evident display, of, apart from user, of, the aforesaid substituted substance, as, a raw material, in the manufacture of Kilta, hence any significant mechanical, automated or robotic advances, visibly occurring, (g) whereupon, the apt automated or mechanical hauling, of, agricultural produce, has substituted the manual hauling, of, agricultural produce, (h) whereas, hereat gross absence, of, the aforesaid evidence, renders the purported patent being not construable to hence secure a technical advance, vis-a-vis, traditional Kilta, nor it can be constituted to be an apt "inventive step". Furthermore, the plaintiffs also omitted to adduce any material, personificatory, of the inventive product, in respect whereof, the apt patent was granted, holding economical significance, vis-a-vis, the traditional kilta, evidence whereof, is, comprised, in, the purported inventive product holding higher economical viability, vis-a-vis, the manufacturing, of, or user of, and, longevity, of, the traditional kilta, in manufacturing whereof rather bamboo straw, is, used as a raw material. In addition, the last part, of the statutory definition, ascribed, vis-a-vis, "inventive step", qua, the purported invention, not, on its appearance, before a person skilled, in, the art, rearing any impression, in his mind, of, its obviously, holding alikeness, vis-a-vis, the traditional kilta, (i) except the user nowat therein, of, plastic as a raw material, instead of bamboo, previously used in the manufacturing, of, traditional kilta, (j) thereupon, alone, it being construable to be an "inventive step", whereas, with the aforesaid acquiescence(s), occurring, in the cross-examination of PW-3, does prima facie, make a display, of PW-3 also concomitantly, hence acquiescing, that save and apart, from user in the patented produce, a contradistinct, raw material, as, used, nowat, in the manufacture of a traditional Kilta, rather upon visual appearance of the patented product, it being obvious, qua their occurring similitude(s), and, resemblance(s), in both, the patented product, and, the traditional Kilta, (k) thereupon, the surfacing, of imperative evident non-obviousness, upon, the physical appearance, of, the patented product, before a person skilled in the art, especially, vis-a-vis, its not bearing any similitude, and, utmost resemblance, vis-a-vis, the traditional Kilta, except user therein, of, a contradistinct, raw material, rather was, indispensable, (l) imperatively for thereupon rather rendering the patented product, to be construable to be a "inventive step" whereas, evidence thereof, is, grossly amiss. Thereupon, contrarily, with, the evident imperative obviousness, of its similitude, vis-a-vis, the traditional kilta, it cannot be deemed, to be an "inventive step", qua, the traditionally manufactured Kilta. Even though, PW-3, is, not a person skilled in the art, nor hence he can make any deposition, vis-a-vis, the patented product, being an "inventive step", given, upon its obvious physical appearance before him, its not displaying any features, of, similitude or visible resemblanceness, with, the traditional kilta, save and except, the user therein, of, plastic, as a raw material, (m) yet, may tentatively render his aforesaid deposition, to be rather not rendering the patented product to be, not, hence an "inventive step". However, with the plaintiffs when hence were also enjoined, to lead into the witness box, a person skilled in the art, for enabling him, to depose, that, upon, its being visually presented before him, it being not obviously, decipherable therefrom, qua it not bearing any similitude or resemblance, with the traditional Kilta, except user therein of plastic, as, a raw material. Nonetheless, the aforesaid person skilled, in the art, omitted to be examined by the plaintiffs, hence, an adverse inference is drawable, against, the plaintiffs qua theirs acquiescing, to the factum of the patented product not being an "inventive step", given, reiteratedly, it obviously, to a person skilled in the art, upon its visual display before him, garnering an inference in his mind, qua it, rather bearing similitude, and, resemblance, with, the traditional Kilta, (l) especially when PW-3 in his deposition, borne in his cross-examination, does make a display, of upon, its physical appearance before him, its, obviously displaying similitude, and, resemblance with the traditional kilta, apart from, user therein, of, plastic as a raw material. The sequel of the

aforesaid discussion, is, that the patented product, being not construable, to be a "inventive step" nor the defendant can be construed, to infringe the apposite patent, as, granted, qua the plaintiffs.

17. With, the evidence on record, hence, making a clear lucid earmarked, display, qua except for apt contradistinct user hence in the patented product, of, plastic as a raw material, the latter yet bearing similitude and resemblance, vis-a-vis, the traditional Kilta, rather hence also carries the further effect, qua, hence the mandate of clause (a) of Section 3 of the Act, rather being attracted, (i) imperatively, when the patented product, within, its ambit, is hence construable, to be, merely a discovery, of a new form, of, a known substance, inasmuch, as traditional Kilta, and,also its user within its ambit, is, further not proven to result in enhancement of the known efficacies, of, the traditional kilta, even with its possessing, any, purported orthopedic superiority, as, deposed by PW-3, vis-a-vis, the traditional kilta, deposition whereof, is, oustable, given, no orthopedic surgeon, making any apt testification. Furthermore, the deposition, existing, in the cross-examination, of, PW-3 qua Kilta being in user in the countryside, of, Himachal Pradesh, since times immemorial, and, except the user, of, plastic as a raw material, in the manufacture, of the patented product, in replacement, of, bamboo, (i) thereupon, with, there being no earmarked contradistinctivity, inter se, both qua their similitude, and, mode, of, user by the agriculturists, more so, when, for, reasons aforesaid, it is bereft, of, any technical advance, rather enjoins this Court, to, therefrom, gauge qua, hence it bearing concurrence, with, the provisions, borne in clause (p) of Section 3 of the Act, (ii) wherewithin, stands engrafted, a, mandate qua, upon cogent evidence being adduced, in satiation, of, all ingredients thereof, thereupon, the benefit, of, apt exclusionary mandate thereof, being visitable, vis-a-vis, the counter-claimant. Since, the apposite exclusion(s), vis-a-vis, the patented product, embody therein, apt exceptions, vis-a-vis, invention, (I) and, are comprised, in the purported invention, being per se traditional knowledge, (ii) or, upon the patented product, being merely a aggregation, or, a duplication, of the known component or components, (iii) thereupon, also, hence it being not construable to be an invention. Upon apt therewith voicings standing borne, in the cross-examination, of, PW-3, hence renders the patented product, to, rather fall within the opening coinage, of clause (p), borne in Section 3 of the Act, (iv) inasmuch, as, it being per se traditional knowledge, conspicuously, vis-a-vis, the known properties, of, the traditionally known component or components thereof, thereupon, the factum, of, it being an "inventive step", is negated, (v) and also thereupon, the factum of, or it being construable to be an invention, is, negated, (vi) besides when the patented product, hence merely upon user therein, of plastice, as a raw material, is, rather an aggregation or specifically, a, duplication, of, known properties of traditionally known component or components, inasmuch as, of, the known properties, of, the traditional kilta, (vii) comprised, in its alike therewith only facilitating, the hitherto also rather manual hauling of agricultural produce, (viii) and, reiteratedly when the known properties thereof, are, apparently duplicated, merely, by contradistinct user therein, of, plastic, than, of bamboo, as a raw material, (ix) hence, the replacement or substitution, of, the hitherto raw material, inasmuch, as of bamboo, by, plastic in the manufacture, of, the patented product, reinforcingly, does not either add or enhance,, the traditional knowledge, with, respect to the manufacturing, of, a Kilta.

18. Be that as it may, the aforesaid negation, of claim, of patent, vis-a-vis, the patented product, hence constrains this Court, to, attract the mandate, of sub-section 64 of the Act, and, also the compatible therewith mandate, borne in sub-section (4) of Section 13, of the Act, wherewithin, jurisdiction, is bestowed upon this Court, to test validity of grant of patent, (I) corollary whereof, is that the grant, of, patent vis-a-vis the patented product, in favour of the patentee, not, being an inventive step nor its purported infringement, if any,

hence empowering the plaintiffs to claim any pecuniary damages, from, the defendant/counter-claimant.

19. In view of the above, issues No.1 to 6 are decided in favour of the defendants/counter claimants and against the plaintiffs/non-counter-claimants.

**Issue No.7 and 8.**

20. No evidence exists on record to show qua how the suit of the plaintiffs is not maintainable, and, qua as to how the plaintiffs' suit is not properly valued for the purposes of Court fee. Moreover, a persual of the record that the plaintiff's suit is properly valued for the purpose of court fee and jurisdiction, hence, both the aforesaid issues are decided in favour of the plaintiff and against the defendant.

**Relief.**

21. In sequel to findings on issues aforesaid, the plaintiffs' suit is dismissed, whereas, the counter claim instituted by the counter-claimant/defendant is decreed and the patent No.195917, titled as "A Device for Manually Hauling of Agricultural Produce" granted in favour of the plaintiff by the Statutory Authority is cancelled. Decree sheet be prepared accordingly. All pending applications also stand disposed of.

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

Oriental Insurance Company Ltd. .....Appellant.

Versus

Smt. Rita Sharma & others .....Respondents.

FAO No. 4228 of 2013 along with
Cross objections No. 10 of 2014.
Reserved on : 13th November, 2018.
Decided on : 20th November, 2018.

**Motor Vehicles Act, 1988 –** Sections 149 & 166 – Motor accident – Claim application – Defences – Validity of driving licence – Duty of owner of vehicle - Claims Tribunal allowing application of legal representatives of deceased and fastening liability on insurer - Appeal against – Insurer relying upon entries of Parivar Register showing age of deceased driver 14 years and contending that he was not entitled to hold driving licence (DL) - And DL issued in his favour was invalid - DL of deceased, however, found valid - Deceased authorised to drive offending vehicle under it – His post mortem report indicating age 38 years - Held, owner of vehicle was not bound to verify age of driver by going through entries recorded in Parivar Register once DL was prima facie valid in all respects. (Para 5).

***Cases referred:***

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700
National Insurance Company Ltd. vs. Swaran Singh, (2004)3 SCC 297
PEPSU Road Transport Corporation vs. National Insurance Company, (2013)10 SCC 217.

For the Appellant: Mr. Ashwani K. Sharma, Sr. Advocate with
Mr. Jeevan Kumar, Advocate.

For Respondents No.1 to 4/Cross-objectors: Mr. Y. P. Sood, Advocate.
For Respondent No.5: Mr. D.S. Kainthla, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed by the aggrieved respondent/appellant herein, against the award pronounced, upon, Claim Petition No. 39-S/2 of 2010, (i) whereunder, vis-a-vis, the compensation amount, as stood determined qua the claimants/respondents No.1 to 4 herein, the, apt indemnificatory liability thereof hence stood fastened, upon, it, (ii) whereas the claimants/respondents No.1 to 4 herein/cross-objectors, also prefer cross-objections, vis-a-vis, the impugned award, whereunder, they seek enhancement, of, compensation amount.

2. The liability, for, liquidating the compensation amount, as, assessed under the impugned award, stands fastened, upon, the insurer of the offending vehicle. The learned counsel appearing for the insurer/appellat herein has contended with much vigour, before, this Court that (i) with the apposite driving licence borne in Mark-C, being testified, by the clerk concerned, of, the licencing authority located at Agra, while his rendering his deposition, in, Workmen Compensation petition bearing Case No.RBT 14/2 of 11/2010, qua the afore driving licence not standing issued from the afore licencing authority concerned, (ii) thereupon, the fastening of the apposite indemnificatory liability, upon, the insurer rather being both infirm, and, frail. He strengthens his afore submission, by contending with vigour, (iii) that, with RW-2, while proving the abstract of pariwar register, embodied in Ex.RW2/A, (iv) and, with the latter exhibit hence making clear voicings qua at the time of issuance, of, the afore licence, the driver concerned being aged lesser, than, the age whereat he could be issued any driving licence, (v) and, hence thereupon, Mark-C, being wholly ridden with falsity, and, the further concomitant effect thereof being qua the owner of the offending vehicle, who, executed a contract of insurance, vis-a-vis, the insurer, per se hence not exercising reasonable care, and, diligence, dehors, the fakeness, and, unauthenticity of the driving licence, of the driver concerned, (vi) and, its, further, apt effect thereof being qua the owner of the offending vehicle, not, standing entitled to derive any benefit from decisions, of, the Hon'ble Apex Court, rendered in a case titled as ***National Insurance Company Ltd. v. Swaran Singh,*** reported in ***(2004)3 SCC 297***, and, from a verdict rendered in a case titled as ***PEPSU Road Transport Corporation vs. National Insurance Company***, reported in ***(2013)10 SCC 217***. In nutshell, he contends that the apposite indemnificatory liability, vis-a-vis, the apt compensation amount, being enjoined to be fastened, upon, the owner of the offending vehicle.

3. Apparently, there is no wrangle, qua, Mark-C, being unauthentic or fake. However, the effect, of, its unauthenticity, and, fakeness, rather stands propounded in Swaran Singh's case (supra) {(2004)3 SCC 297} in para 110 thereof, para whereof stands extracted hereinafter:-

> "110. The summary of our findings to the various issues as raised in these petitions are as follows:
>
> (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this

paramount object and the provisions of the Act have to be so interpreted as toeffectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' onthe part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and

executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

Conspicuously, in clauses (i), (iii), (iv), (v), (vi), (vii), and, in clause (x) thereof, (a) to not constitute any valid ground for the insurer, to hence exculpate its liability rather it being permissible, for the MACT concerned, to initially direct the insurer, to deposit the compensation amount, and, thereafter liberty being reserved, vis-a-vis, the insurer to recover it, under, the statutory contemplated mode enshrined in Section 174, of, the Motor Vehicles Act.

4. Nowat, the learned counsel appearing, for the insurer, depends upon the testification of RW-2, who, has proven the abstract of pariwar register embodied, in Ex.RW2/A. On a perusal thereof, it is apparent, that, the driver concerned was at the time of issuance of Mark-C, merely 14 years old, and, when, his apparent minority was ex-facie discoverable by the owner, who employed him, as, a driver upon the offending vehicle, (i) thereupon, per se, there being apparent lack of exercise, of due care and diligence by the owner, of, the offending vehicle, in engaging him as a driver thereon, (ii) hence, the apposite indemnificatory liability being fastenable, upon, the owner concerned. Since, the afore espousal, is, wholly anchored upon the afore exhibit, borne in Ex.RW2/A, thereupon, sanctity thereof, is to be gauged. However, a reading of the deposition of RW-2, comprised in his cross-examination unfolds qua the entries in the abstract, of Pariwar Register, being made in consonance, with, the apt reflections, occurring in the birth register. He has also further echoed in his cross-examination, that, at the time of recording of his deposition, his, not carrying with him the apposite birth register, given it not standing summoned. Despite RW-2, making the afore echoings, in his cross-examination, yet, the counsel for the insurer rather omitted to summon the birth register, for, ensuring qua the reflection(s) occurring in Ex.RW2/A, standing sequeled, by deference being meted, to the apposite birth register, (ii) and, wherefrom rather it was garnerable, whether the reflections, occurring in the pariwar register, stood hence borrowed therefrom, and, concomitantly, theirs hence acquiring sanctity, (iii) omission whereof, contrarily erodes, the efficacy of the submission, of the

learned counsel for the insurer, that, the owner of the offending vehicle, at the time of his engaging the driver concerned, upon, the offending vehicle, his despite noticing the ex-facie minority, of, his employee, his yet engaging him thereon, (iv) and hence, his breaching the standards of due care, and, caution nor hence he can contend that the benefits, of the judgment rendered by the Hon'ble Apex Court in Swaran Singh's case (supra), being not recourseable by him or meted qua him.

5. Further more, the expostulation of law occurring, in a judgment rendered by the Hon'ble Apex Court in ***PEPSU Road Transport Corporation vs. National Insurance Company***, reported in ***(2013)10 SCC 217*** (i) qua it being sufficient, dehors, fakeness of the driving licence, qua, the owner per se hence being inferable, to, evidently exercise reasonable care and diligence, in engaging a person as a driver, upon the offending vehicle, inference, of, exercise, of, diligence by him being firmly drawable, upon, mere engagement thereon, as obviously he would not beget endanger to his life, upon, engaging an improficient driver, unless contra therewith best evidence, stands adduced, (ii) and, hence it not being incumbent upon the owner concerned, to, verify the genuineness, of, the driving licence, issued from the licencing authority concerned, (iii) unless, at the time of execution of contract of insurance, the insurer insists, upon, the owner to verify, the, genuineness of the apposite driving licence, issued from the licencing authority concerned. Since, the insurer has not adduced evidence, that, at the time of execution of contract of insurance, it hence insisting, upon, the owner of the offending vehicle, to verify the genuineness of the Mark-C, (iv) thereupon, when apt evidence also remains unadduced, that, at the time of engagement, by the owner of the offending vehicle, of deceased, as, a driver thereon, he was unskilled or improficient in driving the category of the vehicle, whereon he was engaged as driver, hence, it is aptly concludable, that, the fastening of the indemnificatory liability, vis-a-vis, compensation amount, by the MACT concerned, upon, the insurer of the offending vehicle, is, neither erroneous nor is ingrained with any legal fallacy, rather falls within the ambit, of, verdicts supra.

6. The claimants/respondents No.1 to 4, through, the cross-objections bearing No. 10 of 2014, strived, to seek enhancement of compensation, as, assessed qua them. The learned tribunal had assessed, the, per mensem income, of, the deceased, to, stand borne, in, a sum of Rs.3300/-, and, obviously aptly discarded, the, testification rendered by PW-4 Smt. Rita Shrma, wherein, she had voiced qua her deceased husband hence earning horticulture and agricultural income, borne in a sum of Rs.45,000/- per mensem. However, in support of the afore oral testification, as, rendered, by the claimant, vis-a-vis, the per mensem income reared by the deceased, no documentary evidence stood adduced, hence, in absence of any documentary evidence qua the rearing, of any income by the deceased, from, his horticulture and agriculture crops, rather the learned tribunal aptly concluded qua the deceased, drawing an income of Rs.3300/- per mensem.

7. Be that as it may, the learned counsel appearing for the claimants, has canvassed with much vigour, before this Court, that, the non meteing of incremental hikes, vis-a-vis, the afore income, rather being ridden, with, a gross fallacy, (i) and when he anchors, the aforesaid submission, upon, the apt mandate of the Hon'ble Apex Court, as, borne in the judgement rendered by the Hon'ble Apex Court, in, a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700,*** given, it rather vindicating, monetary hikes towards future incremental prospects, vis-a-vis, any income reared, by, the self employed deceased or qua income reared from rendering services with a non governmental organization or entity, (ii) whereas, with the deceased, being self employed or being aged more than 28 years, it being incumbent, to mete 40% hikes towards, future incremental prospects. The afore submission, rather finds strength, given, the

Hon'ble Apex Court in ***Pranay Sethi's case (supra)*** rather validating the meteing of hikes, vis-a-vis, future incremental prospects, even qua a self-employed deceased, being aged more than 38 years, as, the deceased hereat evidently, is. The relevant paragraphs whereof stand extracted hereinafter:-

> "57. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and non- violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the apposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma (supra) and it has been approved in Reshma Kumari (supra). The age and income, as stated earlier, have to be established by adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.
>
> 58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.
>
> 59.Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual

increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life,etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self-employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts."

***(p.2721-2722)***

8. Since the postmortem report reflects, qua the deceased being aged 38 years, at the relevant time, hence with the afore extracted paragraph, mandating, qua, accretions towards future prospects, vis-a-vis, the per mensem income of the the deceased, being pegged upto 40% thereof. Consequently, after meteing 40% increase(s), vis-a-vis, the apposite per mensem income of the deceased, (i) thereupon, the relevant per mensem income of the deceased is recoknable at Rs.4620/-, [Rs.3300/-(per mensem income of the deceased)+Rs.1320/-(40% of the per mensem income of the deceased). Significantly, the number of dependents, of, the deceased, are, two, hence, 1/3rd deduction is to be visited, upon, a sum of Rs.4620/-. Consequently, the monthly dependency, including the future hikes towards incremental prospects, is, worked out, now at Rs.3080/- (Rs.4620-Rs.1540/- (1/3rd of the income of the deceased). In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is, computed, at Rs.3080/- x 12=Rs.36,960/-. After applying thereon the apposite multiplier of 15, the, total compensation amount, is assessed in a sum of Rs.36,960 x 15=Rs.5,54,400/- (Rs. Five lacs, fifty four thousands and four hundred only).

9. Furthermore the learned tribunal concerned, in conflict with the verdict of the Hon'ble Apex Court rendered in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, assessed a sum of Rs. 10,000/-, under, the head "Loss of estate" a sum of Rs. 10,000/- under the head of "Funeral charges", a sum of Rs.5,000/-, under the head "Transportation Charges" and a sum of Rs. Rs.10,000/- under the head "loss of consortium, to, petitioner No.1". Consequently, the assessment of compensation, under, the head "Transportation charges" borne, in a sum of Rs. Five thousand, vis-a-vis, the claimants is set aside, whereas, quantification of compensation, under, the head "funeral expenses" in a sum of Rs.10,000/-, vis-a-vis, the claimants, is, increased to Rs.15,000/-, as also, the quantification of compensation, under, the head "loss of consortium to petitioner No.1" borne in a sum of Rs.10,000/-, is increased to Rs.40,000/-, and, further quantification of compensation under the head "Loss of Estate" borne in a sum of Rs.10,000/-, is, increased to Rs.15,000/-.

10. For the foregoing reasons, the appeal filed by the insurer is dismissed, and, the cross-objections instituted by the cross-objectors/claimants are partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.6,24,400/- (Rs. Six lacs, twenty four thousands and four hundred only), along with pending and future interest @7.5 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants as ordered by the learned tribunal. The share of the minor petitioner No.2 (respondents No. 2 herein), shall remain invested, in FDRs, upto, the stage of his attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis his mother, only when she explains, of, its being required, for, the upkeep and benefit of the minor child. All pending applications also stand disposed of. Records be sent back forthwith.

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

Future General India Insurance Company Ltd. .....Appellant.

Versus

Sheetal and others ....Respondents/Cross-objector.

FAO No. 85 of 2017 along with
Cross objections No. 48 of 2017.
Reserved on : 22nd November, 2018.
Decided on : 30th November, 2018.

**Motor Vehicles Act, 1988 -** Sections 149 & 166 **-** Motor accident - Claim application – Defences - Fitness of vehicle - Claims Tribunal awarding compensation and fastening liability on insurer - Appeal against - Insurer contending owner of vehicle not having furnished in evidence certificate of fitness of offending vehicle for plying – And no liability can be fastened on it - Insurer not found having taken this plea in its pleadings nor raised it before Claims Tribunal - Held, plea regarding fitness of vehicle cannot be taken in first appeal.(Para 6)

For the Appellant: Mr. Chandan Goel, Advocate.
For Respondent No.1/Cross-objector: Mr. P.S. Goverdhan, Advocate.
For Respondent No.2: Mr. Anirudh Sharma, Advocate.
Respondent No.3 to 5 already ex-parte.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed by the aggrieved insurer/appellant herein, against the award pronounced, upon, Claim Petition No. 16-S/2 of 2011, (i) whereunder, vis-a-vis, the compensation amount, as stood determined qua the claimant/respondent No.1 herein, the, apt indemnificatory liability thereof, hence stood fastened, upon, it, (ii) whereas the claimant/respondents No.1 herein/cross-objector, also prefer cross-objections, vis-a-vis, the impugned award, whereunder, she seeks enhancement, of, compensation amount.

2. The liability, for, liquidating the compensation amount, as, assessed under the impugned award, stands fastened, upon, the insurer of the offending vehicle. The learned counsel appearing for the insurer/appellant herein has contended with much vigour, before, this Court, that, (i) the affirmative findings recorded by the learned Tribunal, upon, the issue appertaining to the relevant mishap, being a sequel of rash and negligent manner of driving of the offending truck, by respondent No.3, rather suffering from, a, gross infirmity, (ii) given the learned tribunal concerned, mis-appraising the apposite evidence in respect thereof, as, existing on record. However, the afore submission, cannot be accepted, as in consonance with the pleadings appertaining to the afore issue, and, in pleading whereof, a graphic and pointed averment is reared, vis-a-vis (a) qua the injured occupying, the, pillion of the motor cycle bearing No. HP-14-A-4320, (b) and, also qua upon the afore motorcycle being stopped, on the katcha portion of the road, whereat one Bharati, sister of the claimant/petitioner was standing, and, awaiting, the, handingover, to, her of a medical prescription slip, (c) and, thereat, the, offending truck bearing No. HP-68-1116, rather coming from the front side, and, striking against the motor cycle, driven by one Rakesh Thakur. Since, the claimant during the course of her examination-in-chief, has, tendered her affidavit, borne in Ex. PW2/A, affidavit whereof, carries averments, bearing, consonance, with, the afore averments, cast in the apposite petition, (d) and, during the course her cross-examination, hers remaining unscathed, (e) besides when other ocular witnesses to the occurrence, PW-3, PW-4, and, PW-5 also supporting the testification rendered qua the ill

fated occurrence, by PW-2, (f) significantly also when during the course of their respective cross-examination(s), their testimonies comprised in their respective examination(s)-in-chief, rather remained unshattered, (g) thereupon, with, evident inter se corroboration rather erupting inter se, the, testifications rendered by PW-1, and, by PW3 to PW-5, thereupon, it is to be concluded, that, the ill-fated mishap, was a sequel, of rash and negligent manner of driving, of, the offending vehicle by its driver, (h) conspicuously, when, the, FIR lodged qua the occurrence, and, borne in Ex.PW1/A, firmly echoes therein qua an incriminatory role, being fastened upon the driver of the offending truck, hence, the affirmative findings hence recorded by the learned tribunal, vis-a-vis, the afore factum, do not suffer, from any infirmity.

3. Be that as it may, the learned counsel appearing for the insurer has proceed to contend with much vigour before this Court (i) that with, the, permit issued, vis-a-vis the offending truck, and, embodied in Ex.RW1/A, and, it remaining alive w.e.f. 25.8.2008 to 24.08.2009, hence, apparently, though, the ill-fated mishap, occurred prior thereto, and, though hence the afore permit was alive, in contemporaneity therewith, (ii) yet the mere factum of its being in vogue, in contemporaneity, vis-a-vis, the ill-fated occurrence, rather not befittingly rendering it, to also, engender a further inference qua the offending truck, in contemporaneity, vis-a-vis, the ill fated mishap also carrying, the relevant fitness certificate, (iii) whereupon, alone it was rendered both, roadworthy, and, also fit to ply on the road. He submits that hence there was a dire necessity cast, upon, the owner of the offending truck, to, place on record, the apt fitness certificate. He submits that the necessity, of, the offending truck, throughout and all times hence possessing a valid fitness certificate, to, hence render fully efficacious the apposite permit, and, the registration certificate, is, a sequel, of, the mandatory statutory provisions, borne in Section 56, of, the Motor Vehicles Act, provisions whereof stand extracted hereinafter:-

> "**56. Certificate of fitness of transport vehicles.—**
>
> (1) Subject to the provisions of sections 59 and 60, a transport vehicle shall not be deemed to be validly registered for the purposes of section 39, unless it carries a certificate of fitness in such form containing such particulars and information as may be prescribed by the Central Government, issued by the prescribed authority, or by an authorized testing station mentioned in sub-section (2), to the effect that the vehicle complies for the time being with all the requirements of this Act and the rules made thereunder:
>
> Provided that where the prescribed authority or the "authorized testing station" refuses to issue such certificate, it shall supply the owner of the vehicle with its reasons in writing for such refusal.
>
> (2) The "authorized testing station" referred to in sub-section (1) means a vehicle service station or public or private garage which the State Government, having regard to the experience, training and ability of the operator of such station or garage and the testing equipment and the testing personnel therein, may specify in accordance with the rules made by the Central Government for regulation and control of such stations or garages.
>
> (3) Subject to the provisions of sub-section (4), certificate of fitness shall remain effective for such period as may be prescribed by the Central Government having regard to the objects of this Act.
>
> (4) The prescribed authority may for reasons to be recorded in writing cancel a certificate of fitness at any time, if satisfied that the vehicle to which it relates no longer complies with all the requirements of this Act and the rules made thereunder; and on such cancellation the certificate of registration of the vehicle

and any permit granted in respect of the vehicle under Chapter V shall be deemed to be suspended until a new certificate of fitness has been obtained:

1[Provided that no such cancellation shall be made by the prescribed authority unless such prescribed authority holds such technical qualification as may be prescribed or where the prescribed authority does not hold such technical qualification on the basis of the report of an officer having such qualifications.]

(5) A certificate of fitness issued under this Act shall, while it remains effective be valid throughout India."

The afore submission addressed before this Court, has vigour, and, is supported by a judgement rendered, by the Full Bench of Kerala High Court, in ***MACA No.2030 of 2015, and, other connected cases***, the relevant paragraphs Nos. 16 and 17, whereof stand extracted hereinafter:-

"16. Importance of the fitness/road worthiness of a vehicle, right from the time of registration of the vehicle, is further discernible from Rule 47 of the Central Motor Vehicles Rules 1989 [referred to as Central Rules]. The said Rule deals with application for registration of motor vehicles, which, among other things, stipulates that it shall be accompanied by various documents. Under sub-rule (1) (g), it is mandatory to produce road worthiness certificate in Form 22 from the manufacturers [Form 22A from the body builders]. On completing the formalities/procedures, 'Certificate of Registration' is to be issued in terms of Rule 48 of the Central Rules in Form 23/23A, as the case may be. The said Rule contains a proviso, insisting that, when Certificate of Registration pertains to a transport vehicle, it shall be handed over to the registered owner only after recording the Certificate of Fitness in Form 38. Validity of the Certificate of Fitness is only to the extent as envisaged under Rule 62 of the Central Rules, which mandates, as per the proviso, that the renewal of a Fitness Certificate shall be made only after the Inspecting Officer or authorised Testing Station as referred to in sub Section 1 of Section 56 MACA No. 2030 of 2015 and connected cases of the Act has carried out the test specified in the table given therein.

17. The stipulations under the above provisions clearly substantiate the importance and necessity to have a valid Fitness Certificate to the transport vehicle at all times. The above prescription converges on the point that Certificate of Registration, existence of valid Permit and availability of Fitness Certificate, all throughout, are closely interlinked in the case of a transport vehicle and one requirement cannot be segregated from the other. The transport vehicle should be completely fit and road worthy, to be plied on the road, which otherwise may cause threat to the lives and limbs of passengers and the general public, apart from damage to property. Only if the transport vehicle is having valid Fitness Certificate, would the necessary Permit be issued in terms of Section 66 of the Act and by virtue of the mandate under Section 56 of the Act, no transport vehicle without Fitness Certificate will be deemed as a validly registered vehicle for the purpose of Section 39 of the Act, which stipulates that nobody shall drive or cause the motor vehicle to be driven without valid registration in public place or such other place, as the case may be. These requirements are quite 'fundamental' in nature; unlike a case where a transport vehicle carrying more passengers than the permitted capacity or a goods carriage carrying MACA No. 2030 of 2015 and connected cases excess quantity of goods than the permitted extent or a case where a transport vehicle was

> plying through a deviated route than the one shown in the route permit which instances could rather be branded as 'technical violations'. In other words, when a transport vehicle is not having a Fitness Certificate, it will be deemed as having no Certificate of Registration and when such vehicle is not having Permit or Fitness Certificate, nobody can drive such vehicle and no owner can permit the use of any such vehicle compromising with the lives, limbs, properties of the passengers/general public. Obviously, since the safety of passengers and general public was of serious concern and consideration for the law makers, appropriate and adequate measures were taken by incorporating relevant provisions in the Statute, also pointing out the circumstances which would constitute offence; providing adequate penalty. This being the position, such lapse, if any, can only be regarded as a fundamental breach and not a technical breach and any interpretation to the contrary, will only negate the intention of the law makers."

(I) and when the afore purported want of fitness certificate, vis-a-vis, the offending vehicle, imperatively in contemporaneity, to, the accident, dehors its possessing, a, valid route permit or, a, valid registration certificate, rather stands pronounced therein hence to constitute, a, fundamental breach of the insurance policy, thereupon, the counsel, for the the insurer espouses that, on afore anvil, he is facilitated to rear a valid and tangible exculpatory plea.

4. Even though, the afore submission has immense vigour. However, despite, the owner not placing on record, the apt fitness certificate, vis-a-vis, the offending vehicle, (i) conspicuously, the, one issued in contemporaneity, vis-a-vis, the issuance of the afore permit, (ii) yet the counsel appearing for the insurance before the tribunal, who intended to therefrom, hence, derive, the apt exculpatory benefit, was rather enjoined, to, seek adduction from the records, of, the RLA concerned, the apt fitness certificate, issued in contemporaneity, vis-a-vis, the issuance, of the afore permit, qua the offending vehicle. However, the learned counsel appearing for the insurer, before the learned tribunal, omitted to make the aforesaid endeavour, hence, for wants thereof, an adverse inference, is drawable against the insurer, (iii) whereupon, the insurer is estopped to rear the aforesaid contention before this Court, nor the insurer can escape, from, the apt indemnificatory liability, as, stands hence fastened, upon, it.

5. The driving licence of the driver of the offending vehicle, is, borne in Ex.R-1, and, upon its perusal, it is evident qua its being valid, from 14.08.2007 to 10.05.2010, hence, the validity of the driving licence also visibly covered the period, whereat, the relevant mishap occurred. The learned counsel appearing fo the insurer has contended (i) that with RW-2, the clerk concerned of the RLA concerned, werefrom the afore driving licence stood hence issued, rather during, the course of his cross-examination hence making an admission, that, the endorsement made thereon, vis-a-vis, the holder thereof, being authorised to drive HTV, hence not existing in the apt register maintained, in, the RLA concerned, (ii) thereupon, the afore endorsement occurring in Ex. R-1, being belied, (iii) and, thereupon, the driver concerned was not authorised, to, drive the offending vehicle. However, the afore submission cannot be accepted, (iv) as no further evidence stands adduced qua Ex.R-1, not carrying, the authentic seal(s), and, signatures of the RLA concerned, nor evidence stand adduced qua it not standing issued from the RLA concerned, (v) rather with RW-2 making a clear testification qua Ex.R-1 standing issued, from, their office. In aftermath, for want of adduction, of, the aforesaid evidence, thereupon, merely upon, the apposite endorsement, made in EX.R-1, whereunder, its holder stood hence authorised to drive a HTV, hence not occurring, in the register maintained with the RLA concerned, (vi) yet, cannot render the aforesaid endorsement hence being construable to be

false. (vii) Contrarily, the afore want of, any, compatible entry therewith being borne in the apt register, can be construable to be merely a ministerial omission, wherefrom, no capital hence can be derived by the insurer.

6. The claimant/respondents No.1 herein, through, cross-objections bearing No. 48 of 2017, strived, to seek enhancement of compensation, as, assessed qua her. A incisive perusal of the impugned award, reveals, that the learned Tribunal concerned, after going through material placed before it, had assessed adequate compensation, borne in a sum of Rs.7,70,000/-, vis-a-vis, the claimant/respondent No.1 herein. Moreover, when the claimant/respondent No.1 in her apposite petition, has claimed compensation, borne in a sum of Rs.8 lacs only. Consequently, the assessment of compensation, vis-a-vis, the claimant/respondent No.1 herein, by the learned tribunal concerned, in the sum aforesaid, does not suffer, from any infirmity. Consequently, there is no merit in the cross-objections.

7. For the foregoing reasons, the appeal filed by the insurer, as also, the cross-objections instituted by the cross-objector/claimant, are dismissed, and, the impugned award, is, maintained and affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Rattani .....Appellant.
Versus
Amrit Lal .....Respondent.

RSA No. 201 of 2007
Reserved on : 8.8.2018
Decided on : 23.8.2018.

**Specific Relief Act, 1963** -Sections 38 and 39- Permanent prohibitory and mandatory injunctions-G rant of-Plaintiff filing suit for permanent prohibitory injunction for restraining defendant from raising construction over joint land-Also seeking mandatory injunction for removal of "Dhara" constructed by him without his consent-Trial Court decreeing suit in toto-First Appellate Court partly allowing defendant's appeal and denying mandatory injunction qua removal of "Dhara"-RSA by plaintiff-Facts disclosing suit land to be joint between co-sharers including defendant-Plea of private partition raised by defendant not proved-Partition proceedings pending before revenue officer- "Dhara" raised by defendant over portion in his exclusive hissadari possession- "Dhara" not raised on best portion of land and beyond his share by defendant-Held -First Appellate Court was justified in declining mandatory injunction to plaintiff- RSA dismissed. (Paras-7 to 10)

For the appellant: Mr. Adarsh Vashisht, Advocate.
For the respondent: Mr. Bhender Kumar, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge**

The instant appeal stands directed, against, the verdict pronounced, by, the learned First Appellate Court, whereunder, it, after partly allowing the defendant's appeal, as reared therebefore, rather hence affirmed, the decree, rendered, by the learned Civil Judge (Junior Division), Sarkaghat, District Mandi, vis-a-vis, the decree of permanent prohibitory injunction, whereas it reversed, the relief of mandatory injunction, recorded, vis-a-vis, the suit property, by the learned trial Judge. The aggrieved therefrom, has, hence preferred the instant appeal, before this Court.

2. Briefly stated the facts of the case are that the parties to the suit along with other co-sharers were joint owners in possession of land comprising khewat No. 145, khatauni No. 241, khasra No. 2188, 2194 and measuring 0-06-89 hectares, situated in village Jamsai/226, Tehsil Sarkaghat, District Mandi. The defendant had purchased 9/135 share of Smt. Satya Devi of the suit land and thus he had become joint owner of the same along with the plaintiff and other co-sharers. On 12.6.1999, the defendant constructed a Dhara towards front side of khasra No. 2195/1 with a motive to occupy the best and valuable portion of the suit land. Despite fact that partition case was pending before the Assistant Collector 1st Grade, Sarkaghat. The plaintiff prayed for a decree of permanent prohibitory injunction for restraining the defendant from raising construction over the suit land till partition and for mandatory injunction directing the defendant to demolish the Dhara constructed by him.

3. The defendant contested the suit. He filed written statement, wherein he alleged that the joint land was partitioned among the co-sharers in a private partition, all the co-sharers had been coming in separate possession of their respective share since the time of private partition. The defendant had purchased share of Smt. Satya Devi and thus he become joint owner in possession of the suit land. The defendant had raised construction on a portion, which was in possession of Smt. Satya Devi. Thus, the construction was within his own share. The defendant also contested the suit on preliminary objection such as cause of action, non-joinder of necessary parties and estoppel. In nut shell the defendant refuted the case of the plaintiff and he prayed for dismissal of the suit.

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

1. Whether the suit land is joint interse the parties? OPP.
2. Whether the defendant has raised construction over the part of suit land i.e. of plaintiff and other co-sharers to the prejudice of plaintiff? OPP.
3. Whether the construction in the form of Dhara raised in khasra No. 1995/1 and 2195/1 is liable to be demolished? OPP.
4. Whether there is no cause of action for the plaintiff to file the present suit? OPD.
5. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD.
6. Whether the suit is bad for non-joinder of necessary party? OPD.
7. If issue No.1 is not proved whether suit has already been privately partitioned? OPD.
8. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, hence decreed the plaintiff"s suit. In an appeal, preferred therefrom, by

the defendant, before the learned First Appellate Court, the latter Court partly allowed the appeal, and, partly affirmed the findings recorded by the learned trial Court.

6. Now the plaintiff 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 7.9.2007, this Court, admitted the appeal, on, the hereinafter extracted substantial questions, of, law:-

i) Whether the learned lower appellate Court being last court of facts is right in not discussing the entire oral as well as documentary evidence as required of it in view of the law laid down by the Hon'ble Apex Court reported in 2000 (5) SCC page 652?

ii) Whether the impugned judgment and decree is result of complete misreading, mis-interpretation as well as mis-appreciation of statements of PW-1, PW-3 and of document exhibit PW-3/A?

iii) Whether the impugned judgment and decree is the result of non-consideration of law laid down with respect to raising of construction by co-sharers over a best portion of land until it is legally partitioned?.

**Substantial questions of law No. 1 to 3**.

7. Uncontrovertedly, the apt proceedings, for subjecting, the, undivided suit property, for dismemberment by metes and bounds, are, yet pending before the revenue officer concerned. However, prior thereto, the defendant, one Amrit Lal, purchased an area measuring 46 square meters, from, one of the co-sharers, in, the undivided suit property, namely one Smt. Satya Devi. The aforesaid purchase, of, land hence, holding an area measuring 46 square meters, and, as borne in the undivided suit property, rather occurred in the year 1997. Consequently, the defendant Amrit Lal became a co-sharer, in, the suit property. However, subsequent thereto, and, prior to the institution of the suit, he raised a Dhara, upon, the apt area in respect whereof, his alienor, had exclusive possession, (a) and, as a sequel thereof, the exclusive possession, of a part, of the undivided suit property, appears to stand capitalized, by one Amrit Lal, for, his hence proceeding to raise a Dhara thereon. It is a trite canon of law, (b) qua, till dismemberment(s), of, the undivided suit khasra number hence occurs, (c) no co-owner being empowered to make any exclusive use of any part, of, the undivided suit property, except with the consent, of, other recorded co-sharers. Moreover, till dismemberment, of, the undivided suit property hence occurs, thereupon any exclusivity of possession, qua any part of the undivided property, as held by any co-owner, is, rather unamenable, for, rearing any interpretation, (d) qua, it hence rather enabling the apt co-owner to subject, it, to his exclusive use, (e) imperatively, when the trite canon, rather underlying, the jurisprudential concept of joint property, is, qua community of possession and unity of title, hence, inhereing in all the recorded co-owners, vis-a-vis, the apt undivided suit property, (i) thereupon any holding, of, any exclusivity of possession, of, any part of the undivided suit property, by any co-sharer(s) being rather construable, qua his holding constructive possession thereof, even, for other co-owners. However, the aforesaid principle may suffer some dilution, upon, existence of direct evidence, and, its hence displaying qua, under a valid private partition, the apt possession of the contested parcel of land, rather being delivered, to the co-owner concerned. However, the aforesaid evidence, does not, exist on record, thereupon the aforesaid jurisprudential principle rather inhereing, the, concept of co-ownership, hence, continues to hold its sway.

8. Be that as it may, the defendant could well proceed to raise a Dhara, on, a portion of the undivided suit property, (i) upon, his establishing, qua the area thereunderneath hence falling to his share, in, the undivided suit property, (ii) besides his also establishing, qua the Dhara as raised, also falling within his share in the undivided suit property, (iii) it not occupying the best valuable portion, of, the undivided suit land. However, for determining whether apparently, the raising of a Dhara, on the undivided suit khasra number, hence standing borne in an area, falling beyond his apt share, and, also for further determining, qua the Dhara, as raised by him, upon, a part of the undivided suit property, hence comprising, the best valuable portion, of the undivided suit property, (iv) it is imperative to bear in mind, the, statement of PW-3, wherein he has echoed, qua the portion, of the undivided suit property, whereon the defendant, has raised the apt Dhara, rather not comprising, the, best valuable portion of the undivided suit khasra number, (v) besides with firm evidence existing on record, qua, the Dhara occupying an area of 12 square meters, of, the undivided suit property, (vi) whereas with defendant Amrit Lal being apparently, a, share holder, to, the extent of 46 square meters, (vii) thereupon the Dhara as raised, may hence be concluded, to, rather occur, not, upon the best valuable portion, of, the undivided suit property, besides also a conclusion is reared qua the Dhara rather occupying an area, hence falling within the share of Amrit Lal, in, the undivided suit property.

9. In aftermath, with partition proceedings, still pending, before the revenue officer concerned, and, merely a Dhara standing raised, on, the undivided suit property, thereupon the revenue officer concerned, is, directed, to, within three months, conclude the partition proceedings. Furthermore the above discussion also brings to the fore qua hence it being not appropriate, to invalidate the declining, by the learned first appellate Court, of, a decree, of, mandatory injunction, (a) yet, given, the pendency of the partition proceedings, before the revenue officer concerned, (b) thereupon for his ensuring qua the equities, inter-se, the, co-sharers concerned, vis-a-vis, the joint suit property being not disturbed, it is also deemed fit qua, hence, the decree of permanent prohibitory injunction, as rendered, against, the defendant, rather warranting validation. The substantial questions of law are answered accordingly.

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

11. Consequently, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgment, is, affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith. No order as to costs.

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

Kunj Lal & others .....Appellants/Plaintiffs.

Versus

Ram Swaroop .....Respondent/defendant.

RSA No. 262 of 2005.
Reserved on : 17th April, 2018.

Decided on : 26th April, 2018.

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Section 104**- Specific Relief Act, 1963**- Sections 34 and 38- Conferment of proprietary rights- Whether automatic ?- Plaintiffs filing suit for declaration of their title and injunction on basis of sale deed executed by 'D' in 1981 in their favour- Also challenging revenue entries showing 'RS' as Kabiz in suit land as wrong- Defendant though disputing entries of Kabiz but claiming himself to have been non occupancy tenant in it under D -Trial court dismissing plaintiffs suit- First appellate court dismissing their appeal also- RSA- Held- 'RS' recorded as non occupancy tenant in suit land since before 1974 under D - He became its owner by way of conferment of proprietary rights- Conferment is automatic from appointed day- 'D' had no title in suit land which he could transfer to plaintiffs in 1981- RSA dismissed- Judgments and decrees of lower courts upheld. (Paras 8, 10 & 11)

***Case referred:***
Tarsem Lal and others vs. Ram Sarop and others, AIR 2014 SC 2087

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| For the Appellants: | Mr. Ramakant Sharma, Sr. Advocate with Dinesh Kumar, Advocate. |
| For Respondent: | Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for declaration, as well as for, rendition of a decree for permanent prohibitory injunction qua the suit khasra number(s), was, hence dismissed.

2. Briefly stated the facts of the case are that the plaintiffs have filed a suit for declaration against the defendant to the effect that the plaintiffs are the owners in possession of land comprised in Khata No.47 min, Khatauni No.71, Khasra No.232, measuring 0-04-27 HM, as per jamabandi for the year 1995-96, situated in Mohal Lodwan, Mauza Bassa, Gudialan, Tehsil Nurpur, District Kangra, H.P., and that the defendant has no right, title or interest over the suit land and the revenue entries showing the defendant as Kabaz are illegal, null and void. The plaintiffs further prayed for consequential relief for permanent injunction and in the alternative, they have prayed for the vacant possession. It is alleged that the plaintiffs purchased the suit land from Sh. Dina Nath as per registered sale deed and they are at present owners in possession of the same. It is pleaded that the defendant is a clever person and in the absence and at the back and without the knowledge of the plaintiffs, illegally got the entry in Khata Kasht recorded his name inspite of the fact that he was never in possession of the suit land. It is alleged that revenue entries were changed without following any procedure. It is further pleaded that the defendant is a forceful person and on the basis of wrong revenue entries, threatening to interfere in the ownership and possession of the plaintiffs. It is alleged that the impugned revenue entries were not in their knowledge earlier, which came in their notice in the month of April, 1998, when the defendant started threatening the plaintiffs to dispossess them and the cause of action arose to them against the respondent. Hence the suit.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections inter alia maintainability, locus standi, cause of action etc. On merits, the case of the plaintiffs has been denied. It is pleaded that the defendant was a tenant of original owner Dina Nath. It is pleaded that defendant is coming in possession of the suit land and on coming into force the H.P. Tenancy and Land Reforms Act, he became owner of the suit land on the prescribed day. It is pleaded that the sale deed is null and void as the possession of the defendant is continuous and was never transferred to the plaintiffs. It is pleaded that the entry of the defendant as Kabaz by the settlement officials, is not correct as the entry of the defendant as Gair Maurusi has wrongly been converted into Kabaz. The other allegations of the plaintiffs have been denied.

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 the owners in possession of the suit land, as alleged?OPP.
2. Whether the revenue entries depicting the defendant to be the Kabaz over the suit land, is wrong, null and void?OPP.
3. Whether the suit is not maintainable? OPD.
4. Whether the defendant has become the owner of the suit land, under the H.P. Tenancy and Land Reforms Act? OPD.
5. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom, by the plaintiffs/appellant herein, before the learned First Appellate Court, the latter Court dismissed the appeal, and, affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 19.12.2005 admitted the appeal instituted by the plaintiffs/appellants, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the impugned judgment and decree is the result of complete misreading, misinterpretation as well as misappreciation of mutation dated 21.8.1980 Ex. P4?

b) Whether the courts below are right in granting a relief to the defendant-respondent, who neither filed any counter claim nor had challenged the entry showing him to be kabiz with respect to the suit land?

c) Whether the impugned judgment and decree is the result of non-consideration of the provisions of Section 104 of H.P. Tenancy and Land Reforms Act, 1972?

d) Whether the impugned judgment and decree is the result of complete misreading, mis-appreciation of Ext. P-1 to P-5 and Ex. PW3/A the sale dated 19.10.1981?

e) Whether the learned Courts below are right in not taking into consideration the law laid down by the Hon'ble Apex Court reported in 1969 PLJ, page 105?

f) Whether the learned courts below are right in holding the respondent-defendant to be tenant with respect to the suit land and having become owner after coming into force of H.P. Tenancy and Land Reforms Act, 1972, more particularly when the entries showing him only kabiz having not been assailed by the respondent-defendant nor any counter claim was filed by the respondent?

g) Whether the impugned judgment and decree is the result of complete misreading, misinterpretation as wel as mis-appreciation of Ex.P-4 mutation No.259 and Ext. P-5, jamabandi for the year 1966-67?

**Substantial questions of Law No.1 to7:**

7. The plaintiffs, are, under a registered deed of conveyance, hence vendees, of the suit khasra numbers. The declaratory relief claimed by the plaintiffs, the vendees, under a registered deed of conveyance, executed with them by one Dina Nath, registered deed of conveyance whereof, is borne in Ex.PW3/A, is, for deletion of any entry of "Kabaz" made vis-a-vis the defendants, in the jambandi, apposite vis-a-vis some of the suit khasra numbers. The sale deed executed with respect to khasra numbers, 238, 241, 243 and 247, on anvil whereof, the plaintiffs asserted acquisition of title thereon, would acquire, an aura of validity, only upon, the contention of the defendant/respondent, one Ram Swaroop, (i) that one Dina Nath, who had executed, it, as vendor, and, whereunder whom, he was a tenant, being defacilitated to execute it, (ii) given existence of an order of mutation borne in Ex.P-4, whereby, proprietary rights were conferred upon him, rather being declared to be null and void, and, besides being invalidated by this Court. The plaintiffs, however, did not contest the legality of the recording, of the order of mutation, borne in Ex.P-4, whereby proprietary rights qua khasra Nos. 235, 236, 388 and 390, were, thereunder bestowed, upon, one Ram Swaroop. Consequently, also when a perusal of Ex.P-4, discloses that the suit khasra numbers are not borne therein, thereupon, prima facie hence the plaintiffs, may succeed in de-establishing the contention of the defendant, of his, on anvil of Ex.P-4, rather scuttling the concert of the plaintiffs, of theirs, thereupon, acquiring a valid title vis-a-vis the khasra numbers, depicted in Ex.PW3/A.

8. Be that as it may, the revenue entries borne in the relevant records, especially, in the ones, immediately prior to the execution of Ex.PW3/A, on 19.10.1981, also enjoin an allusion thereto. Allusion thereto, is imperative, for making apt discernment(s) qua whether therein, the defendant/respondent, is reflected to be a tenant vis-a-vis those khasra numbers, in respect whereof Ex.PW3/A, hence stood executed, by his landlord with the plaintiffs. Ex.D-5, is the copy of jamabandi appertaining to the year 1973-74, the inference of its appertaining vis-a-vis the aforesaid years, is apparent, from, the apposite figure(s) being scribed in red ink, and, scribings thereof, being initialed by the official concerned. Since, the scribings, in red ink, of figures 1973/74 is visibly initialed, and, also when initialing thereof, is not concerted to be belied, by any efficacious evidence being concerted to be adduced, by the plaintiffs/appellants, (i) thereupon, it is to be firmly concluded that, Ex.D-5 appertains to the year 1973-74. Nowat with the H.P. Tenancy Land Reforms Act, coming into force w.e.f. 21st February, 1974, and, with the apt statutory provisions borne therein, prescribing automatic bestowments, in contemporaneity(ies) of its coming into force, of proprietary rights, vis-a-vis any recorded tenant, under the latters' landowner, (ii) and, also with paragraph No.13 of a judgment rendered by the Hon'ble Apex Court in a case titled as ***Tarsem Lal and others vs. Ram Sarop and others*** reported in ***AIR 2014, S.C., 2087***, making candid and loud echoings in consonance with the aforesaid factum, paragraph No.13 whereof stands extracted hereinafter:-

> "13. as per the aforesaid provision, all right, title and interest including a contingent interest of a land owner other than the land owner entitled to resume land under sub-section (1) shall be extinguished and all such rights, title and interest in respect of the land in question vest in the tenant, i.e. original plaintiff, free from all encumbrances from the date the Act came into force. The Act was published in the Office Gazettee on 21st February, 1974 vide Act NO.8 of 1974. What is not in dispute is that the original plaintiff became owner of the suit land by operation of law ans continued to enjoy all the rights including the right of irrigation from the common source which was in possession of the original landlord". (p.2089)

(i) thereupon, when a perusal of Ex. D-5, makes a clear, candid reflection, of one Ram Swaroop, being recorded as a tenant under Dina Nath, the vendor of Ex.PW3/A, (ii) thereupon with attraction hereat of the mandate, of the aforesaid judgement rendered by the Hon'ble Apex Court in Tarsem Lal's case (supra), (iii) mandate whereof, is, qua in contemporaneity vis-a-vis 1974, and, upon evident unfoldments occurring in the apt thereat revenue records (iv) of one Ram Swaroop, rather being prior thereto, hence evidently being validly recorded as tenant under one Dina Nath, thereupon, the sale deed borne in Ex.PW3/A, and, executed on 19.10.1981, would be vitiated. (v) For fathoming, any, piercing applicability hereat, of, the aforesaid verdict, a close studied perusal of Ex.D-5, rather makes clear revelations qua vis-a-vis khasra numbers, borne in Ex.PW3/A, one Ram Swaroop, defendant/respondent being depicted as a tenant, under Dina Nath, the vendor of Ex.PW3/A. Since, Ex. D-5, appertains to the year(s), immediately prior to the coming into force, of the H.P. Tenancy and Land Reforms Act, hence with the mandate supra, expostulated, in a judgment pronounced by the Hon'ble Apex Court in Tarsem Lal's case (supra), (vi) qua in the year 1974, dehors, any order of mutation being recorded vis-a-vis conferment of proprietary rights, upon one Ram Swaroop, his rather being entitled, to automatic conferment, of proprietary rights vis-a-vis the suit khasra number(s), (viii) hence, even if, Ex. P-4 omits to detail the suit khasra number(s), yet apt omissions of delineation(s) thereof, hence neither eroding or affecting the applicability hereat, of the mandate pronounced, by the Hon'ble Apex Court, in Tarsem Lal's case (supra). In sequel, when all the depictions occurring in Ex. D-5, rather enjoy a presumption of truth, and, with no efforts being made by the plaintiffs/appellants herein, for, eroding the presumption of truth, enjoyed by reflections occurring therein, signficantly, of Ram Swaroop, being a tenant, under one Dina Nath, (ix) hence, with conclusivity standing acquired by the entries borne in Ex.D-5, reiteratedly, thereupon, the defendant/respondent, one Ram Swaroop, did, immediately on coming into force of the H.P. Tenancy and Land Reforms Act, in the year 1974, hence became clothed, with automatic vestment of statutory proprietary rights, vis-a-vis all khasra numbers borne in Ex.PW3/A. Concomitant sequel thereof, being of the landowner, whereunderwhom, he was reflected to be a tenant, being subsequent to 1974, standing debarred, to execute the registered deed of conveyance, vis-a-vis khasra number(s), borne in Ex.PW3/A, and, conspicuously with Ex.PW3/A, being executed belatedly from 1974, inasmuch as, on 19.10.1981, (x) hence, with one Dina Nath, for reasons aforestated, being divested of title vis-a-vis khasra numbers, in respect whereof, he executed a registered deed of conveyance, qua the plaintiffs, (xi) thereupon, the concurrently recorded pronouncements, by both the learned Courts below of Ex.PW3/A, hence, suffering from a pervasive, vice(s) of vitiation, and, its also standing pronounced to be invalid, is not, anvilled upon any mis-appreciation or non appreciation of the relevant material on record, and, also are within the ambit of the verdict of the Hon'ble Apex Court, recorded, in Tarsem Lal's case (supra).

9. Further more, the reflections, if any, in the jamabandis, of any suit khasra number(s), being reflected to be possessed by defendant/respondent, and, the said entry

being amenable to be scored off, (i) on anvil of its being purportedly not preceded by any valid order, rendered by the revenue officers, (ii) also does not hold any tenacity, as any simplictor entry of one Ram Swaroop, being depicted, as, Kabaj, and, made subsequent to the making(s) of Exts.D-4, D-5, and, of D-6, is per invalid (iii) and conspicuously, evidently given his therein, being, reflected in the apposite column of rent, of, all jamabandis preceding therewith, to be defraying rent to the owner, rather being unamenable to effacement, unless the making vis-a-vis him, an entry of Kabaz, is, evidently preceded by a valid apposite order, (iv) whereupon, alone the entries borne in Exts.D-4, D-5, and D-6 rather would be annulled, whereas, evidence of apposite making(s) thereof, rather is grossly amiss hereat, (v) thereupon the entries borne in Exts. D-4, D-5, and, in Ext. D-6 hence enjoy conclusivity, given no potent evidence, being adduced for hence, , eroding their probative worth. In aftermath, when all the entries borne in Exts. D-4 to D-6 also appertain, to the khasra numbers reflected in Ex. PW3/A, thereupon, all the entries borne in Exts. D4 to D-6, and, as borne in preceding therewith jamabandis, rather are to be construable to enjoy an aura of conclusivity, (vi) contrarily, any subsequent thereto entry(ies), if any, made in respect of any suit khasra numbers, wherein, the respondent/defendant, is contrarily depicted to be kabaj, hence, cannot be conferred with any aura of legality.

10. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondent/defendant and against the appellants/plaintiffs.

11. In view of the above discussion, there is no merit in the instant Regular Second Appeal and it is dismissed accordingly. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

State of H.P. .....Appellant/defendant.

Versus

Ishwar Dass (since deceased) through his legal heirs & another

....Respondents/Plaintiffs.

RSA No. 487 of 2007.
Reserved on : 20th June, 2018.
Decided on : 29th June, 2018.

**Specific Relief Act, 1963**- Sections 34 and 38- Suit for declaration and permanent prohibitory injunction -Plaintiff filing suit for declaration and claiming its ownership by way of adverse possession-Trial court dismissing his suit but First Appellate Court allowing his appeal and decreeing suit - RSA -In previous suit, predecessor of plaintiff declared to have become owner of suit land by adverse possession- Earlier suit was against Panchayat – Judgment attaining finality -Land devolved upon State from Panchayat under legislation- Held- State of H.P just being successor to erstwhile panchayat is bound by decree passed

between parties in earlier litigation – State cannot take plea that it was not party in earlier suit - First appellate court rightly appreciated evidence on record and there is no infirmity in judgment and decree passed by it- Appeal dismissed- Decree of First Appellate Court upheld. (Paras 7 & 8).

For the Appellant: Mr. Yudhvir Singh Thakur, Deputy Advocate General.

For the Respondents: Mr. Rajneesh K. Lal, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the impugned verdict recorded by the learned Additional District Judge (1), Kangra at Dharamshala, H.P., upon, Civil Appeal No. 46-D/03, whereby, he reversed the verdict of the learned trial Court, whereunder, the latter hence dismissed the plaintiffs' suit, for, rendition of a declaratory decree for quashing the apposite mutation, and, consequent therewith reflections, as, carried in the revenue record apposite to the suit land.

2. Briefly stated the facts of the case are that the plaintiffs have filed a suit for declaration to the effect that they are owners in possession of the land comprised in Khewat No. 245, Khatauni No.559, Khasra Nos. 7, 35, 36, 43, 44, 45, 46, 47, 48, 59, 50, 51, 53 to 62, 64, 65, 66, 67, 68, 74, 668, 1039 (30 lots), measuring 2-13-46 hects. Of Mohal Bagani Mauza Sidhbari, Tehsil Dharamsala, District Kangra, H.P. and the defendant has no right, title or interest in the above mentioned land and with a consequential relief of permanent injunction restraining the defendant from interfering with the suit land in any manner whatsoever. It is submitted that the plaintiffs entered in possession of the suit land as per the jamabandi for the year 1995-96. Rukmani widow of Sukh Ram had died and only the plaintiffs are her legal representatives. The aforesaid suit land, earlier was entered in the ownership of Shamlat deh in accordance with the share of the proprietors in Shamlat, i.e., entry was Hasab Rasad Malguzari and the land was recorded in possession of Smt. Radho and Smt. Isho as tenants and one Ganesha was shown as their sub-tenant. Thereafter, Sh. Sudama and others, 170 co-sharers (proprietors) executed a gift deed of 29.8.1912 in favour of Mr. Stanley Duntze Turner was entered in the possession of this land. Mr. Turner was also a co-sharer in the Shamlat area being an owner of Sidhbari Tea-Estate. Mr. Turner filed a suit for partition of Shamlat area land and in order to compromise that suit, the Zamindars of the Village Sidhbari agreed to relinquish their rights, title and interest in the suit land in favour of Mr. Turner. After the death of Mr. Turner his brother Mr. Stephon Davis Rilly Duntze Turner, became the owner and in possession of the suit land and then sold the land to Sh. Sukh Ram, the predecessor-in-interest of the plaintiffs for a valid consideration of Rs.27,000/-. Thereafter, the land mentioned above was entered in the ownership of Shamlat-deh- Hasab-Rasad-Malguzari and in possession of Sukh Ram Dass, predecessor-in-interest of the plaintiffs, as a tenant. It is significant to mention here that Sh. Sukh Ram Dass or Mr. Turner, never paid any rent etc., to the proprietory body or any other person with respect to the suit land. The land subsequently recorded in the ownership of Gram Panchayat an thereafter in the ownership of State of H.P., due to promulgations of various Acts of the State, but actually the plaintiffs or their predecessors-in-interest remained in possession of the suit land in assertion of their ownership rights. The plaintiffs or their predecessor-in-interest never accepted the rights of Gram Panchayat or State of H.P. The Gram Panchayat filed a suit title as Gram Panchayat Sidhbari vs. Sukh

Ram in the Court of Senior Sub Judge, Kangra at Dharamsala with respect to the suit land and this civil suit was dismissed by the learned Senior Sub Judge, Kangra at Dharamsala on 20.2.1957 and it was held that Sh. Sukh Ram Dass or his successors-in-interest had become owner of the suit land by way of adverse possession. In an appeal preferred therefrom by the Gram Panchayat Sidhbari before the High Court of Punjab State at Chandigarh, the latter Curt dismissed the appeal and it was held that Sh. Sukh Ram Dass or his successors-in-interests have become the owners of the suit land. It is submitted that the judgment of the High Court is binding upon the defendant, and the defendants/s name have wrongly been entered in the ownership column of the latest records after the passing of judgment of Hon'ble High Court. Sukh Ram died during the pendency of the earlier litigation and the plaintiffs are now the only legal heirs of Sh. Sukh Ram and Smt. Rukmani, widow of Sukh Ram had also died and the plaintiff are her only legal representatives. Hence the suit.

3. The defendants contested the suit and filed written statements, wherein, they have taken preliminary objections qua locus standi, cause of action, maintainability, non joinder of necessary parties, time barred, valuation, estoppel etc.. On merits, it is submitted that the suit land belongs to the State of H.P. and as such plaintiffs have no right, title or interest over the same. The land in dispute was recorded in the ownership of Panchayat Deh prior to the settlement and that was vested in the State of H.P. under the H.P. Village Common Land Vesting and Utilization Act, 1974 and accordingly the land was mutated in the name of the State of H.P. The mutation in favour of the State was never challenged before the competent authority within the prescribed period. The plaintiffs have filed this uit to take advantage of wrong revenue entries and as such is required to be put to the strict proof as no presumption of truth can be attached to wrong entries. The suit land is in exclusive ownership and possession of the State of H.P. It is denied that the plaintiffs and their predecessors-in-interest ever remained in possession of the suit land. The suit land is exclusively owned and possessed by the State of H.P. The State of H.P. was never a party to the suit decided by the learned Senior Sub Judge, Kangra on 20.2.1957. Moreover, the land in suit was vested to the State of H.P. , free from all encumbrances under the H.P. Village Common Land Vesting and Utilization Act, 1974. It is submitted that the State of H.P., was never a party to first appeal No.194/57 decided by the Hon'ble Division Bench of Punjab High Court on dated 6.4.1963. Moreover, the decree, if any, passed by the Civil Court is not executable against the State being not a party to the decree.

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 owner in possession of the suit land as per jamabandi 1995-96, as alleged? OPP
2. Whether the plaintiffs are entitled for the relief of permanent injunction against the defendant on the suit land as alleged ?OPP.
3. Whether the plaintiff has no cause of action to file the present suit? OPD.
4. Whether the plaintiffs' suit is not maintainable? OPD.
5. Whether the suit of plaintiff is bad for nonjoinder of necessary parties? OPD.
6. Whether the suit is time barred? OPD.
7. Whether this Court has no jurisdiction to entertain the present suit? OPD.

8. Whether no legal notice U/s. 80 CPC was served to defendants? OPD.

9. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD.

10. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court hence dismissed the plaintiffs' suit. In an appeal, preferred therefrom, by the plaintiffs/respondents herein, before the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded by the learned trial Court.

6. Now the defendant/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, this Court, on 16.05.2008, admitted the appeal instituted by the defendant/appellant, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the civil court can exercise the jurisdiction when there is specific bar under the H.P. Village Common Land Act, 1975 and the said act has provided the provision of appeal, revision, review etc.

2. Whether the first appellate Court and the trial Court can entertain the suit after the period of limitation.

**Substantial questions of Law No.1 and 2:**

7. Mr. Yudhvir Singh Thakur, learned Deputy Advocate General appearing on behalf, of, the appellant/State, has, contended with much vigour (a) that the judgment, and, decree rendered, by, the Hon'ble High Court of Punjab at Chandigarh, verdict whereof, is, comprised in Ex.PW1/D, whereunder, the predecessor-in-interest of the plaintiffs was hence declared, to, by prescription, arising, from his establishing qua his, with, an animus possedendi, rather holding open, continuous and hostile possession thereof, and, to knowledge, of, the plaintiff therein, namely Gram Panchayat Sidhbari, (b) rather to hence acquire title, vis-a-vis, the suit land, except qua two khasra number i.e. Kh. Nos. 74 and 1039, (c) has been fallaciously placed reliance, by, the learned First Appellate Court, qua its also holding the apposite binding effect even, upon, the State, despite, the State of Himachal Pradesh, remaining not arrayed therein, as, a litigant, in the apposite array, of, litigating parties. Since, the binding and conclusive effect of Ex.PW1/B, is, strived to be eroded, merely, for non impleadment of the State of H.P., as a litigant, in the array of litigating parties, in the judgement, borne in Ex.PW1/D, (d) thereupon apart from the aforesaid, it is not deemed imperative, to, either dwell into or mete any adjudication, vis-a-vis, the trite factum, of, the predecessor-in-interest, of the plaintiffs, one Sukh Ram, who, is, arrayed therein, as, defendant/respondent, being or being not validly declared, to, by adverse possession hence become owner thereof, (e) invalidity whereof may arise, from, the verdict borne in Ex.PW1/D, being evidently obtained, by the predecessor-in-interest of the plaintiffs, by his, practising *suppressio veri or suggestio falsi,* factum whereof remains neither pleaded nor any evidence in consonance therewith, stands adduced. Nowat, in making, a determination, in respect, of, the conclusive, and, binding effect, of Ex.PW1/D, upon, the appellant/State of H.P., on anvil, of, it being not therein arrayed as a litigant, in, the array of litigating parties, (f) the imperative factum probandum, of, a statutory contemplation, being, borne in Section 4, of the Punjab Village Common Lands (Regulation) Act, 1961, and, its, squarely envisaging, the, vestment in the Panchayat deh concerned, of land(s) classified in the revenue Record, as, Shamlat deh, (g) hence with the Gram Panchayat Sidhbari, whereonwhom, the apposite statutory vestment, of, lands classified as Shamlat deh, was,

rather to be made, (h) thereupon, when hence, the appropriate entity whereonwhom, the, apposite statutory vestment, of land classified, as, Shamlat deh, in the apt revenue record, was to be hence made, rather obviously stood arrayed, as, plaintiff/appellant, in, the verdict borne in Ex.PW1/D, (I) In aftermath, the imperative corollary thereof, being qua with the Panchayat Deh concerned, when visibly was pursuing, its, statutory cause, in, the earlier lis, especially, vis-a-vis, the statutory vestment, upon it, of, the suit kahsra numbers borne therein, all whereof, except khasra numbers 74 and 1039, hold analogity, vis-a-vis, the suit khasra numbers hereat, (i) thereupon, the mere non impleadment of the State of H.P., as, a litigant in the apposite array of litigants, in the previous lis, whereon verdict borne in Ex.PW1/D, was pronounced, would not either denude nor dwindle either the efficacy thereof, nor belittle its conclusive, and, binding effect, even upon, the State of H.P., dehors it remaining unimpleaded, as a litigant in the apposite array, of, litigants in Ex.PW1/D. Provisions of Section 4 of the Punjab Village Common Lands (Regulation) Act, 1961 stand extracted hereinafter:-

> 4. Vesting of rights in Panchayats and non-proprietors. - (1) Notwithstanding anything to the contrary contained in any other law for the time being in force or in any agreement, instrument, custom or usage or any decree or order of any court or other authority, all rights, title and interests whatever in the land:-
>
> > (a) which is included in the shamilat deh of any village and which has not vested in a panchayat under the shamilat law shall, at the commencement of this Act, vest in a panchayat constituted for, such,village, and, where no such panchayat, has been constituted for such village; vest in the panchayat on such date, as a panchayat having jurisdiction over that village is constituted;
> >
> > (b) which is situated within or outside the abadi deh of a village and which is under the house owned by a non-proprietor, shall on the commencement of the shamilat law, be deemed to have been vested in such non-proprietor.
>
> (2) Any land which is vested in a panchayat under the shamilat law shall be deemed to have been vested in the panchayat under this Act.
>
> (3) Nothing contained in clause (a) of sub-section (1)and in sub-section (2) shall affect or sholl' be deemed ever to hove
>
> affected the-
>
> > (I) existing rights, title or interest of persons who though not entered as occupancy tenants in the revenue records are accorded a similar status by custom or otherwise, such as Dholidars, Bhondedars, Butimars, Bosikhuopahus, Saunjidars, Muqararidars;
> >
> > (ii) rights of persons in cultivating possession of shamilat deh for more than twelve years without payment of rent or by payment of charges not exceeding the land revenue and cesses payable thereon;
> >
> > (iii) rights of a mortagee to whom such land is mortgaged with possession before, the 26th January, 1950."

8. Mr. Y.S. Thakur, learned Deputy Advocate General also submits (i) that with a statutory bar, standing encapsulated, in Section 10 of the H.P. Village Common Land Vesting and Utilization Act, 1975, against, any order made within the ambit of the aforesaid Act, by any revenue officer, exercising jurisdiction thereunder, being unamenable, for redressal, through a civil suit, being instituted, before the Civil Court concerned, (ii) thereupon, the exercise of jurisdiction, by both the learned courts below, upon, the extant

suit, being, in open transgression, of, the mandate, of the apt statutory bar engrafted, in apt statutory provisions borne, in Section 10 of the H.P. Village Common Land Vesting, and, Utilization Act, 1975, (iii) besides the verdict pronounced by the learned First Appellate Court, being vitiated, for want of jurisdictional empowerment. However, the aforesaid contention addressed, before, this Court by the learned Deputy Advocate General, is, rudderless, (iv) especially when the apposite order, hence, vesting the suit land, in the panchayat deh concerned, is, for the trite reason, of, its making, rather arising from apt gross derogation(s), from, the conclusive, and, binding verdict, as, rendered in a previous lis, inter se the Panchayat deh concerned, and, the predecessor-in-interest of the plaintiffs, (v) thereupon, it acquired, an, entrenched vigour of nonest, besides voidness, (vi) hence dehors any statutory bar standing engrafted, in Section 10 of the H.P. Village Common Land Vesting, and, Utilization Act, provisions whereof are extracted hereinafter, it remained yet challengeable, by the plaintiffs, through, theirs casting hence a civil suit before the civil court concerned, (vii) conspicuously, when, the apposite bar is attractable only, vis-a-vis, orders made under apt exercise, of statutory jurisdiction, and, theirs being only afflicted, with, the vices of the imperative principle of audi alterm partem, being infringed or with vices, of, mis-appreciation or non appreciation, of admissible and relevant evidence, or qua orders which do not digress or depart, from, the apt statutory mandate nor depart or transgress, the, mandate, of, previously recorded verdicts, by any civil Court, vis-a-vis, suit khasra numbers, borne in the previous lis, and, khasra numbers whereof, hold, commonality, vis-a-vis, the suit khasra numbers hereat. Provisions of Section 10 of the H.P. Village Common Land Vesting and Utilization Act, read as under:-

> **"10. Bar of jurisdiction**.-Save as otherwise expressly provided in this Act, no order made by the Collector or the State Government or any officer authorised by it, as the case may be, shall be called in question by any court or before any officer or authority."

In other words, the statutory bar constituted, in, the apt provisions, borne in Section 10 of the H.P. Village Common Land Vesting and Utilization Act, against, the apt availment, of, a civil remedy, by the aggrieved, against any order made under the aforesaid Act, (a) is, neither attractable, vis-a-vis, any invalidly made orders, or orders made, in gross transgression, of, verdicts, pronounced by civil court, in an earlier lis, inter se, litigants, all of whom alike therewith also hold apparent commonality hereat, (b) also, when the suit khasra numbers borne therein, hold, the requisite apparent commonality, vis-a-vis, the suit khasra numbers hereat, (c) whereupon, hence with the principle of res judicata being attracted, application thereof, being enjoined, to, be made, only, by the civil courts concerned.

9. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court, has not, excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondents/plaintiffs, and, against the appellant/defendant.

10. In view of the above discussion, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the judgment and decree rendered by the learned Additional District Judge (I), Kangra at Dharamshala, H.P. in Civil Appeal No. 46-D/03 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

New India Assurance Company Ltd. .....Appellant.
Versus
Smt. Sarla Devi and others ....Respondents.

FAO No. 120 of 2017.
Reserved on : 21.08.2018.
Decided on : 31st August, 2018.

**Motor Vehicles Act, 1988 –** Section 2(13) and 149 **–** Motor accident – Claim application – Defences – Gratuitous passenger – Claims Tribunal allowing application of legal representatives of deceased and imposing liability on insurance company – Appeal by insurer – Insurance company contending that deceased was not travelling as owner of goods in vehicle at time of accident -He was gratuitous passenger and it has no liability – Facts indicating deceased having carried livestock for sale in it and after sale thereof he was returning back in same vehicle – Accident taking place on return journey – Held, deceased was not gratuitous passenger in offending vehicle till he reached destination from where he hired vehicle aforesaid – Claims Tribunal justified in imposing liability on insurer. (Paras 2, 3, 4, 5 & 6)

**Motor Vehicles Act, 1988 –** Sections 3 and 149 – Motor accident – Claim application – Defences – Driving license – Validity – Held, person holding LMV driving license entitled to drive goods vehicle of same category – No separate endorsement authorising to drive goods vehicle of same category required. (Paras 4 and 5)

***Cases referred:***

National Insurance Company vs. Maghi Ram and others, Latest HLJ 2009 (HP) 532
National Insurance Co. Ltd. vs. Kamla and others, 2011 ACJ 1550
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

| | |
|---|---|
| For the Appellant: | Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate. |
| For Respondents No. 1 to 4: | Mr. Kishore Pundeer, Advocate. |
| For Respondents No.5(a) to 5(c): | Mr. Jagan Nath, Advocate. |
| For Respondent No.6: | Mr. Ajay Sharma, Advocate. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal, Hamirpur, H.P., upon, MAC Petition No. 86 of 2015, whereunder, compensation amount comprised, in, a sum of Rs.12,33,000/- along with interest accrued thereon, at the rate of 6% per annum, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer. The compensation amount was ordered to equally apportioned amongst the claimants, and, the amount falling to the

share of minor respondents No.2, and 3, was ordered to invested in a fixed deposit, drawn in their names, in any nationalized bank, till theirs attaining majority.

2. The learned counsel appearing, for the insurance company, does not contest the affirmative findings rendered, upon, the issue appertaining to the demise of the deceased, being a sequel, of, the offending vehicle being driven in, a, rash and negligent manner by its driver, one Anil Kumar. However, the learned counsel appearing for the insurance company, has, made a serious challenge, vis-a-vis, the fastening of the apposite indemnificatory liability, upon it, and, its challenge is hinged, upon, (a) apt reading, of, the definition of "goods", borne in Section 2 (13) of the Motor Vehicles Act, definition whereof stands extracted hereinafter:

> "(13) "goods" includes livestock, and any thing (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers traveling in the vehicle;"

besides, is, hinged, upon, the provisions borne, in Section 147(1)(b) (i) of the Motor Vehicles Act, the apt provisions whereof, stand extracted hereinafter:-

> "147. Requirements of policies and limits of liability. - (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-
>
> (a).....
>
> (b) insurer the person or classes of persons specified in the policy to the extent specified in sub-section (2)-
>
> (i) against any liability which may be incurred by him in respect of death of or bodily (injury to any person, including owner of the goods or his authorised representative carried in the vehicle) or damage to any property of third party caused by or arising out of the use of the vehicle in a public peace;"

(a) wherefrom he submits, qua the befitting connotation(s), as, acquired thereof, is, qua the necessity of the deceased, at the relevant time, not only owning the goods, as, thereat borne in the vehicle concerned, but also it being imperatively enjoined, to be, established, by cogent evidence qua at the relevant time, the relevant goods, being borne thereon, and, the mere carrying, in, the apt vehicle, of, luggage, or, personal effects, of, the deceased, being insufficient, to make any construction qua his, at, the relevant time, rather traveling in the apt vehicle, as owner thereof. Consequently, he contends that bearing in mind, the aforesaid signification, as, acquired by the statutory phrase "owner of goods", thereupon, the factum of the deceased after selling his livestock(s), his rather returning in the offending vehicle, upto the place, wherefrom, he commenced his journey, hence not rendering him amenable to be construable, to be the owner, of, goods, emphatically during the course of his performing therein, the apt return journey, (a) given no goods thereat being carried thereon, nor obviously his being construed to be owner thereof, rather his being construed to be a gratuitous passenger, whereupon, the fastening of the apt indemnificatory liability, upon, the insurer, was grossly inapt.

3. The learned counsel appearing, for, the insurer for strengthening the aforesaid espousal, has placed reliance, upon, a verdict of this Court rendered in a case titled as ***National Insurance Company v/s Maghi Ram and others***, reported in ***Latest HLJ 2009 (HP) 532***. The aforesaid submission, does prima facie, on, its facade, does hold some gravity, yet the vigour, of, the aforesaid espousal, is, waned by the factum (a) in the aforesaid judgment relied, upon, by the counsel for the insurer, though secure apt findings

rather occur, wherethrough, this court, had, negatived the apposite owner's espousal, qua his hiring, the, offending vehicle, for enabling him to load therein, empty wooden crates, upon, the vehicle travelling upto Kalka. The aforesaid stand projected by the owner concerned, stood negatived, for reasons ascribed therein, reasons whereof, are hinged, upon, want of evidence in support thereto, thereupon, the judgment relied upon by the learned counsel, for the insurer hence cannot be capitalized by him, to make any valid projection, vis-a-vis, it propagating any binding *ratio decidendi*, qua, the imperative necessity, of, emphatic proof emerging qua, at, the relevant time, the apt owner being borne in the offending vehicle, as, owner of goods, or also qua in contemporaneity thereto, the, apt goods also being loaded therein. Furthermore, the effect of the aforesaid espousal, is omnibusly, negatived by a judgment of this Court, rendered in a case titled as ***National Insurance Co. Ltd. vs. Kamla and others***, reported in ***2011 ACJ 1550***, wherein, this Court while meteing deference, to, the verdict rendered by Hon'ble Apex Court, in a case tilted as National Insurance Co. Ltd. Versus Cholleti Bharatamma, reported in 2008 ACJ 268 (SC), had in paragraphs No. 8 to 11 in Kamla's case (supra), paragraphs whereof stands extracted hereinafter:-

> "8. Coming to the second plea taken by the learned counsel for the appellant that the deceased was a gratuitous passenger, a perusal of the reply filed by respondent No. 2, insurance company shows that they had only pleaded that the deceased was admittedly not employee of the insured and was traveling in the truck as a gratuitous passenger. Thus, it was submitted that the Insurance Company was not liable. Reliance was also placed upon the decision in National Insurance Co. Ltd. v. Cholleti Bharatamma, 2008 ACJ 268 (SC) wherein the plea was taken that the owner himself travel in the cabin of the vehicle and not with the goods so as to be covered under Section 147. However, in case the driver permits a passenger to travel in the tool box, he cannot escape from the liability that he was negligent in driving the vehicle and moreover, in a petition under Section 163-A of the Motor Vehicles Act, rash or negligent driving is not to be proved and, therefore, this decision does not help the appellant.
>
> 9. Learned counsel for the appellant had also relied upon the decision in National Insurance Co. Ltd. v. Maghi Ram, 2010 ACJ 2096 (HP), wherein a learned Judge of this Court has considered the question and had observed that the Insurance Company is liable in respect of death or bodily injury to any person including the owner of goods or his authorized representative carried in the vehicle. It was observed that it is apparent that the goods must normally be carried in the vehicle at the time of accident.
>
> 10. The allegations made by the petitioners in the petition as well as in the evidence were that the deceased had gone after hiring the truck with his vegetable and was coming in the same vehicle when the accident took place.The learned counsel for the claimants/respondents No. 1 to 4 had relied upon the decision of Hon'ble Punjab & Haryana High Court in National Insurance Co. Ltd. v. Urmila, 2008 ACJ 1381 (P&H) , wherein it was observed that a passenger was returning after selling his goods when the vehicle turned turtle due to rash and negligent driving. Insurance Company seeks to avoid its liability on the ground that the deceased was no longer owner of the goods as he had sold them off. It was observed that the deceased had hired the vehicle for transporting his animals for selling and was returning in the same vehicle. It was held that the deceased was not an unauthorized/gratuitous passenger in the vehicle till he reached the place from where he had hired the vehicle.

> 11. The above decision clearly applies to the present facts, which are similar to the facts of the case and accordingly, I am inclined to hold that the deceased was not an unauthorized/gratuitous passenger. No conditions of the insurance policy have been proved that the risk of the owner of goods was not covered in the insurance policy and as such, there is no substance in the plea raised by the learned counsel for the appellant, which is rejected accordingly."

(a) recorded firm findings qua, upon it, being cogently proven qua the deceased hence hiring, the, vehicle for loading therein, his livestock, for hence his selling them, and, after his effecting their sale, his returning in the same vehicle, upto the place, wherefrom, he had hired it, thereupon, the deceased, not being construable to be travelling in the apt vehicle, as a gratuitous passenger. More so, it also stands propounded therein qua, upon, there being no apt forbidding recitals, in, the apt insurance policy against the personal risk, of, the owner of the apt goods, being also insured, whereupon, would rather render tenable, the fastening, of, the apt indemnificatory liability, upon, the insurer, (b) and, whereas recitals whereof, being amiss in the apt policy, besides rather with evidence in consonance therewith, standing adduced hereat, (c) thereupon, this Court is enjoined to mete deference, to the verdict aforesaid pronounced, by this Court in Kamla's case (supra), and, hence, obviously, this Court proceeds to disconcur, with, the espousal reared, by the learned counsel appearing for the insurer.

4. The learned counsel, appearing for the insurance company, has, contended with much vigour before this Court, that, with the driving licence, of respondent No.1 Anil Kumar, as, borne in Ex. R-2, carrying recitals, vis-a-vis, its authorising, its holder to drive, Transport vehicle, LMV and MCWG, whereas, the apt R.C., borne in Ex. R-3, depicting the offending vehicle, to stand categorised, as a "Light Goods Vehicle", (a) and, when hence *ipso facto,* the apt driving licence, borne in Ex. R-2, authorised its holder to drive a vehicle, rather bearing the apt category of, a, transport vehicle, (b) thereupon, it was an imperative necessity, for, the apt driving licence, to hold therein the apt endorsement, vis-a-vis, its authorising, its holder, to drive the "light goods vehicle", (c) whereas, the apt endorsement, being amiss therein, (d) thereupon, with evident breaches of the terms and conditions of the insurance policy, rather surging forth, whereupon, hence the fastening of the apt indemnificatory liability, upon, the insurer, rather warranting interference.

5. However, the aforesaid submission, addressed before this Court by the learned Counsel, appearing for the insurance company, is, extremely fragile, given, various pronouncements, occurring, in Kulwant Singh and others vs. Oriental Insurance Company Ltd., 214(4) TAC 676 (SC), United India Insurance Company Ltd. vs. Madan Lal and others, 2015(2) TAC 243 (HP), Smt. Inder Kaur & Others vs. Smt. Shanti Devi & Others, Latest HLJ 2016 (H.P.) 1457 and Oriental Insurance Co. Ltd. vs. Man Kumari and others, 216 ACJ 2632, and, all whereof, echo a firm view qua with the apt driving licence hence carrying reflections qua its holder being authorized to drive a "light motor vehicle", thereupon, there being no necessity, of, any PSV endorsement also being borne therein.

6. The learned counsel appearing for the insurer has not contested, the, computation of compensation made by the learned tribunal, upon, the dependents of the deceased, except, the learned tribunal concerned, in conflict with the verdict of the Hon'ble Apex Court rendered in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, assessing a sum of Rs. One lacs, under, the head " Loss of love and affection", a sum of Rs.one lac under the head of "loss of consortium, to, petitioner No.1" and Rs.25000/- under the head "Funeral Expenses". Consequently, the assessment of compensation, under, the head "Loss of love and affection" borne, in a sum of Rs. One lac, vis-a-vis, the petitioners is set aside, whereas, quantification of compensation,

under, the head "funeral expenses" in a sum of Rs.25,000/-, vis-a-vis, the petitioner, is, reduced to Rs.15,000/-, as also the quantification of compensation, under, the head "loss of consortium to petitioner No.1" borne in a sum of Rs.one lac, is, reduced to Rs.40,000/-.

7. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.10,63,000/-, along with pending and future interest @7.5 %, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants in equal proportion. The shares of the minor petitioners No.2 and 3 (respondents No. 2 and 3 herein), shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis their mother, only when she explains, of, its being required, for, the upkeep and benefit of the minor children. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of H.P. ....Appellant.

Versus

Madho Ram and others .....Respondents.

Cr. Appeal No. 546 of 2008.
Reserved on: 5th July, 2018.
Date of Decision: 6th July, 2018.

**Indian Penal Code, 1860** - Sections 323, 324, 341 read with Section 34 – Assault and wrongful restraint – Proof - Trial court convicting accused of assaulting complainant and causing injuries to him with sharp edged weapon etc. - Appellate court allowing appeal and acquitting accused – Appeal by state – State submitting before high court that acquittal recorded by Appellate Court being result of wrong appreciation of evidence – (i) Facts revealing improvements and departures in statement of complainant on oath from statement given in FIR (ii) Independent witness resiling from his previous statement implicating accused – (iii) Recovery of weapon not being at instance of accused diminishing probative values of recovery of incriminatory article – (iv) FIR concerning said occurrence also filed by accused but not investigated by same officer – Held – Acquittal by Appellate Court based on proper appreciation of evidence on record – Acquittal upheld - Appeal dismissed. (Paras 2, 10, 11, 12 & 13)

For the Petitioners: Mr. Hemant Vaid, Addl. Advocate General with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. A.Gs.

For the Respondents: Mr. Kishore Pundir, Advocate vice to Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal stands directed by the State of H.P., against, the judgment rendered on 23.04.2008, by the learned Presiding Officer, Fast Track Court, Hamirpur, H.P., in Criminal Appeal No. 11 of 2007, whereby, he set aside the judgement of conviction, and, sentence recorded, upon, the accused/respondents herein, by the learned trial Court.

2. The facts relevant to decide the instant case are that complainant Sh. Subhash Chand, who is running a shop at Kuthera, reported the matter to the Police Station, Sadar, Hamirpur, that on 2.1.2005, at about 9.15, p.m. when he was present in his house, he heard some noise towards the house of accused Madho Ram. On hearing this noise, he started towards the house of Madho Ram, but accused Manjeet Singh met him on the way and stopped him from proceeding further and he saw accused Madho Ram and Saina Devi were beating his brother Sunil Kumar. When he questioned the accused why they were beating his brother, in the meantime, accused Manjeet Singh, who was having a darat in his hand, inflicted darat blow on the left side of his forehead. Thereafter, he raised hue and cry and other persons from the village gather there, who also witnessed the beatings by the accused. However, none of them, came to the rescue of the complainant and his brother. It was further reported that when the complainant was coming back home from the place of occurrence, he was again restrained by accused Manjeet Singh and also gave fist blows to him and threatened him to do away with his life. It was also reported that when accused Manjeet Singh stopped the complainant, again accused Madho Ram and Saina Devi gave fist blows to him. Upon this information, FIR Ex.PW1/A was registered against the accused. Thereafter, the police police completed all the codal formalities.

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

4. The accused/respondents herein stood charged by the learned trial Court for theirs committing offences punishable under Sections 323, 324, 341, 504, 506 read with Section 34, IPC. In proof of the prosecution case, the prosecution examined six witnesses. On conclusion of recording of the prosecution evidence, the respective statement(s) of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court, wherein, each of the accused claimed innocence and pleaded false implication in the case. They also examined two witnesses in their defence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/respondents herein, for theirs committing offences punishable under Sections 323, 324, 341 read with Section 34 of the IPC. In an appeal preferred therefrom, by the accused/respondents herein, before, the learned Appellate Court concerned, the latter reversed the apposite findings of conviction, and, sentence recorded in the judgment pronounced by the learned trial Court.

6. The State of H.P. stands aggrieved by the findings recorded by the learned Presiding Officer, Fast Track Court concerned, findings whereof, are, in dis-concurrence vis-a-vis the judgment, of conviction recorded against them, by the learned trial Court. The learned Addl. Advocate General appearing for the appellant herein, has concertedly and vigorously contended qua the findings of acquittal, recorded by the learned Presiding Officer, Fast Track Court concerned, standing not based on a proper appreciation by him, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by him, of the material on record. Hence, he contends qua the findings of acquittal rather warranting

reversal by this Court in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Presiding Officer, Fast Track Court concerned standing based on a mature and balanced appreciation, by him, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The learned Additional Advocate General has contended with vigour (a) that with the testifications rendered by the ocular witnesses qua the genesis, of, the occurrence, not, carrying, any, gross improvements, and, embellishments, vis-a-vis, their previously recorded statements in writing, hence, it was inappropriate, for the learned Appellate Court, to not, mete credence thereto, (b) and, he also placed reliance, upon, the testification rendered by PW-6, who, during the course of his examination-in-chief, has, tendered and proven, Ex.PW6/A, exhibit whereof comprises the MLC issued, vis-a-vis, injured Subhash Chand, especially, when therein he has also, with, utmost candour rather echoed of the injuries noticed by him, upon, the person of the injured, being causable, by user of "Darat", Ex.P-4. (c) he has further placed reliance, upon, apposite recovery memo borne in Ex.PW2/A, to, therefrom contend, that the findings of acquittal, recorded by the learned Appellate Court, vis-a-vis, the respondents herein, hence, warranting interference.

10. However, all the aforesaid espousal(s) addressed, before this Court by the learned Additional Advocate General, do not carry any vigour, (i) given, upon, a, close scanning of the deposition of PW-1, hence, emerging, qua his, while rendering his testification on oath, his making gross departure(s), from, his previously recorded statement in writing, apposite digressions, whereof, are comprised in (a) of, though his, in, the FIR making a echoing qua, upon, his hearing outcries emerging from, the house of accused Madho Ram, his proceeding towards the house of the accused, and, enroute his being stopped, by accused Manjeet Singh, and, thereafter his noticing, qua accused Madho Ram and accused Saina Devi, hence belabouring PW-2, one Sunil Kumar, (b) yet in open digression therefrom, he in his testification also added the name of accused Manjeet Singh, and, further ascribed qua him the incriminatory role, of his belabouring PW-2. The effect of PW-1, though omitting, to, in the FIR hence ascribe any incriminatory role, vis-a-vis, accused Manjeet Singh, qua, his being seen by him, to belabour PW-2, whereas, in blatant improvement therefrom, his, in his testification, rather attributing qua him, an incriminatory role, qua, his delivering, a darat blow on the left side of his forehead, obviously does comprise a blatant visible gross improvement, and, embellishment vis-a-vis his previous statement recorded in writing, (c) and, also hence the factum of the narrative, borne in FIR qua his noticing Madho Ram and Saina Devi, belabouring PW-2, being also concomitantly belied. Consequently, the effects thereof, being, of the embodiments, occurring in the apposite MLC being also belied. Furthermore, PW-2, has also rendered, the prosecution case to stand ingrained with a pervasive falsity, comprised in PW-2, in his testification, articulating qua his being also delivered 2-3 blows of darat, by the accused, hence, when for lending succor thereto, it was imperative, for his being subjected to medical examination, and, yet his remaining not medically examined, reiteratedly, hence, renders the aforesaid testification, to be ridden, with, a gross pervasive falsity.

11. Be that as it may, both PW-1 and PW-2 are real brothers, and, they are also evidently holding inimicality, vis-a-vis, the accused, (i) even then their purportedly interested

version qua the occurrence may have carried some aura of truth, yet, with, theirs while testifying on oath, hence making the aforesaid rife contradictions, and, embellishments, vis-a-vis, their previous statements recorded in writing, does imminently surge forth, an inference qua, hence, their testifications, qua the genesis of the prosecution case, being rendered unamenable, for, meteing, of, any credence thereto, (ii) and, also with the independent ocular witness to the occurrence, reneging, from, his previous statement recorded, in writing, besides on his being declared hostile, and, hence his coming to be held, to, cross-examination by the learned APP, his not making any echoings, in, support, of, the genesis of the prosecution case, thereupon, the entire substratum, of, the genesis of the prosecution case, is capsized.

12. Nowat, the efficacy, if any, of preparation, of, recovery memo, borne in Ex.PW2/A, whereunder, darat Ex.P-4, stands recovered, not, at the instance of the accused, rather it being handed over tot he Investigating officer, by PW-1 Subhash Chand, is ipso facto, hence, for non effectuation of recovery thereof, at the instance of the accused, rather is construable, to stand eroded, of, its probative vigour. Assumingly, if veracity is to be imputed, qua the factum of Ex.P-4, being handed over by PW-1, to the police, and, also assumingly, if, all recitals apposite thereto, as, borne in Ex.PW2/A, also carry any aura of veracity, yet all the recitals in respect thereto, borne in Ex.PW2/A, are, shred of their vigour and veracity, (i) given, PW-1 making a disclosure of the darat, being taken into possession, from the spot by the police, and, thereat one Baldev, and, three other aged women,being present. The aforesaid apparent contradictions, inter se, the manner of taking into possession of Ex.P-4, as embodied in Ex.PW2/A, vis-a-vis, the one disclosed by PW-1, also renders, the recovery of Ex.P-4, to be neither efficacious nor it constitutes any evidence, of, any probative vigour.

13. Even otherwise, as deposed by DW-1, with respect to the same occurrence, an FIR borne in Ex.DW-1/A, embodying therein, commission of offences constituted under Sections 451, 323, 506, 336, of the IPC, stood, lodged with the police station concerned, by the accused herein. Hence, when investigations thereinto, were, enjoined to be carried conjointly along with investigations into the extant FIR, whereas, both remaining not conjointly investigated, thereupon, it is also concluded, qua the Investigating Officer holding skewed, and, slanted investigations, vis-a-vis, the extant FIR, whereupon, it is not deemed fit to impute sanctity, to the prosecution case.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned Appellate 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 Appellate Court, does not suffer from any gross perversity or absurdity of mis-appreciation, and, non appreciation of germane evidence on record.

15. Consequently, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the judgment rendered by the learned Presiding Officer, Fast Track Court, Hamirpur, in Criminal Appeal No. 11 of 2007, on 23.04.2008 is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Vinay Kumar Sharma & others .....Appellants/defendants.
Versus
Yoginder Pal Verma and others .....Respondent/Plaintiff.

RSA No. 385 of 2006 and
CMP No. 8758 of 2016.
Reserved on : 28th June, 2018.
Decided on : 6th July, 2018.

**Specific Relief Act, 1963** – Sections 34 & 38 – Suit for declaration and permanent prohibitory injunction – Grant of - Plaintiff filing suit for declaration and claiming exclusive ownership over suit land by way of purchase from its owners– Also seeking permanent prohibitory injunction against defendants for restraining them from interfering in land – Defendants contesting suit on ground of suit property jointly owned by plaintiff, defendants and other co-sharers – Trial court dismissing suit – Appeal of plaintiff dismissed by first Appellate Court – RSA – Evidence revealing plaintiff having purchased undivided share from co-sharer – Defendants also recorded as co-sharer in suit land – Partition proceeding already pending before revenue officer – Held – In circumstances, plaintiff cannot declared to be exclusive owner of suit land - RSA dismissed – Judgments and decrees of lower courts upheld . (Paras 10 to 12)

For the Appellants: Mr. Mukul Sood, Advocate.
For Respondent No.1: Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.
None for respondents No. 3 to 5, 6(a) to 6(d) & 8 to 13.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for declaration, as well as for, rendition of a decree for permanent prohibitory injunction qua the suit khasra number(s), was, hence dismissed.

2. Briefly stated the facts of the case are that the originally, the suit was instituted by one Shri Ranjan Sharma. During the pendency of the suit, he sold the property in question to the present plaintiffs. It is pleaded that original plaintiff was owner in exclusive possession of the Khasra No 262, 264, 267, 268 and 269, measuring 211 sq. meters and Khasra No.263 measuring 195 Sq. Meters, situated in mauja Thodo. He was in joint possession alongwith proforma defendants in respect of Khasra Nos. 261 and 266, measuring 179 sq. meters situated in mauja Thodo, Tehsil Solan. Defendant Yoginder Pal purchased Khasra No.244, 245, 246 and 265 measuring 412 sq. meters in mauja Thodo. He had also purchased ¼ share out of Khasra No.263 through sale deed of 20.04.1997 from Smt. Asha Devi by fraudulent means. It was wrongly recited in the sale deed that Smt. Asha Devi was owner in possession of said land to the extent of 1/4th share. In fact, Smt. Asha Devi did not possess any portion of Khasra No.263. The legal heirs of deceased Rai Bahadur Bishamber Nath, owner of property in question, had separated their shares by way of registered document of 4.8.1936. The said document was registered with the Registrar of Bhagat Princely State. The said document was also accompanied by detailed site plan vide

which the properties were divided specifically inter se the legal representatives of deceased Rai Bahadur Bishamber Nath. The allotment of properties was shown in the map specifically with the aid of different inks. Different portions of the property were allotted separately sharewise to S/Sh. Ram Nath, Amar Nath, Shyam Nath and Dr. Prem Nath, who happended to be the sons of Rai Bahadur Bishamber Nath. There was severance of joint character of the property in question inter se the sons of Rai Bahadur Bishamber Nath. Each portion came to the possession of each owner in exclusive manner and said arrangement was also executed on the spot. The aforesaid arrangement vide which the joint character of property in question was severed inter se the parties could not be reflected in the revenue record for want of Khasra numbers. Thus, the recital in the sale deed in question to the effect that Smt. Asha Devi was having ¼th share in Khasra No.263 is wrong and illegal. Taking the undue undue advantage of the wrong recital in sale deed, defendant Yoginder Pal moved an application before the Assistant Collector 1st Grade, Solan seeking the partition of property in question. On 10.09.1992 Assistant Collector 1st Grade, Solan transferred the case to the Assistant Collector 2nd Grade, Solan in order to prepare the map of partition. The summons were issued to the parties. It was reported by Process-serving Agency that two persons namely Prem Nath and Shayam Nath had died. The dead persons were sought to be served by way of publication in the newspaper. No attempts were made to implead the legal representatives of deceased respondents. Rather, the proceedings were continued against dead persons. The entire partition proceedings were carried in an illegal manner. On the basis of illegal partition, defendant Yoginder Pal staked his claim over khasra No.263/1, measuring 48 sq. meters. Defendant has tried to encroach upon the said land in an illegal manner. Defendant has tried to occupy Khasra No.263/1 measuring 48 sq. meters in mauja Thodo in an illegal manner. The partition proceedings are not tenable in the eyes of law. Hence the suit.

3. The defendants contested the suit and filed written statement, wherein, they have taken prelimkinary objections qua locus standi, estoppel, maintainability etc. On merits, it is denied that plaintiffs are owners in exlcusive possession of Khasra No. 262, 264, 267, 268 and 269 measuring 211 sq. meters and Khasra No.263, measuring 195 sq. meters. It is also disputed that they are in joint possession with proforma defendants in respect of Khasra Nos. 261 and 266, situated in mauja Thodo. The property in question is joint inter se the parties. Suit land is a part of entire joint land. Replying defendant purchased Khasra Nos. 244, 245, 246 and 265, measuring 412 sq. meters. He also purchased share in Khasra No.263. It is denied that he purchased ¼ share in Khasra No. 263 vid sale deed of 20.04.1987 from Smt. Asha Devi by fraudulent means. The sale deed has been executed by deceased Asha Devi in favour of replying defendant in legal manner and recitals therein are true and correct. It is also disputed that Smt. Asha Devi was not possessing Khasra No.263. It is denied that legal heirs of deceased Rai Bahadur Bishamber Nath separated their shares and came to possession each share as owner in an exclusive manner. The document of 4.8.1936 is alleged to be false and fabricated and is the result of fraud. The document in question was not brought to the notice of any revenue officer nor its contents were made available to the revenue officer to correct the revenue record. It is denied that each co-owner came to possess his share in an exclusive manner on the spot. The property in question is jointly owned and possessed by the parties and the same is liable to be partitioned legally. Defendant preferred an application before the Assistant Collector Solan to seek its partition. The parties proceedings were conducted before the Assistant Collector 1st Grade, Solan, which the defendant came to know about certain illegalities having crept in the partition proceedings, he admitted that appeal against partition order be accepted and parties be heard in the matter afresh before the Assistant Collector 1st Grade, Solan. It is denied that any fraud was practised by replying defendant during the course of partition proceedings nor he connived with revenue officer in any manner. Smt. Asha Devi was

possessing Khasra No.263 to the extent of her share and as such, she was competent to sell the same and no fraud was being payed in order to execute the sale deed. It is alleged that the property in question is joint, and partition proceedings are in progress.

4. The plaintiffs filed replication to the written statement of the defendant(s), wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is owner in possession of the suit land, as alleged? OPP.
2. Whether the parties to the suit have become owner in possession over the suit property by way of adverse possession in pursuance of document dated 4.8.1936, as alleged? OPP
3. Whether the sale deed dated 20.04.1987 executed by Smt. Asha Devi in favour of defendant No.1 is wrong and illegal, as alleged? OPP
4. Whether the partition order of A.C. 1st Grade dated 4.9.1992, of the suit land is wrong and illegal, as alleged? OPP
5. Whether the defendants interfere in the suit land, as alleged? OPD.
6. Whether the plaintiffs are estopped to file the present suit, as alleged? OPD.
7. Whether the plaintiffs have 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 suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom, by, the plaintiffs/appellants herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the findings recorded by the learned trial Court.

7. Now the plaintiffs/appellants herein, 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 hearing, this Court, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the ld. District Judge acted with illegality in not disposing of the application and not allowing the application for additional evidence and holding that the property had vested in the State Government when the order passed under Section 118 of the H.P. Tenancy and Land Reforms Act had been set aside by the Com missioner, Himachal Pradesh on 16.2.2000 and affirmed by the Financial Commissioner in his judgment dated 29.4.2005 and when the matter was pending adjudication which evidence was material and relevant and necessary for determining the controversy between the parties?

b) Whether the findings of the court below that the property had vested in the State Government and transfer was hit by the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act is vitiated for want of

adjudication by the authorities in the Act and Civil Court had the jurisdiction to adjudicate the said point?

**Substantial questions of Law No.1 and 2:**

8. The learned first Appellate Court, had concluded, that the statutory bar, encapsulated in Section 118 of the H.P. Tenancy and Land Reforms Act, against, any evidently proven non agriculturist, without evident prior valid statutory permission being granted, hence, not acquiring title, vis-a-vis, the suit land, even through registered deeds of conveyance, rather being attracted against the plaintiffs, and, the conclusion stood rested upon the reasons, (i) the operation of the apposite order recorded by the Collector borne in Ex.D-5, remaining not stayed. Be that as it may, during, the pendency of the instant appeal before this Court, the learned counsel appearing for the appellant, has cast an application under Order 41, Rule 27 of the CPC, application whereof, bears CMP No. 8758 of 2016, wherein, he seeks the leave of the Court to place on record, (a) Annexure A-2, carrying therein an order rendered by the Divisional Commissioner, Shimla, whereunder, he remanded, vis-a-vis, the District Collector, Solan, to, decide afresh, the apposite lis appertaining, to infraction being visited, vis-a-vis, the mandate of Section 118 of the H.P. Tenancy and Land Reforms Act, (b) besides he has appended therewith Annexure A-3, annexure whereof, comprises a verdict recorded by the District Collector, Solan, whereunder, he ordered for vestment, of the suit property in the State of Himachal Pradesh, on anvils of sale deed Nos. 268 to 271, being evidently visited with gross infraction(s), vis-a-vis, the apposite mandate, borne in Section 118 of the H.P. Tenancy and Land Reforms Act, (c) given prior to execution(s) thereof, no apposite statutory permission, being accorded, vis-a-vis, the alienees. Furthermore, he has appended therewith Annexures A-4 and A-5, whereunder, the operation of the order borne, in Annexure A-3, stands stayed. On anvil of the aforestated annexures, appended with the application, cast under the provisions of Order 41, Rule 27 of the CPC, the learned counsel appearing, for the appellant, has contended, (d) qua the reasons, assigned by the learned First Appellate Court, for, concluding, qua the order borne in Ex. D-5, for want of its operation being stayed, hence, its holding force and validity at the time of rendering, of, a verdict upon the apt civil appeal, per se, hence wanting, in, legal strength and vigour. Nowat, with the aforesaid disclosures, borne in Annexure A-4 and A-5, whereunder, the operation of the order recorded on 20.04.2009, was stayed, under latter orders whereof, hence, the vestment of the suit land, was ordered to be made, vis-a-vis, the State of Himachal Pradesh, given visible infraction being begotten, with, the statutory mandate, of, Section 118 of the H.P. Tenancy and Land Reforms Act, (a) does constrain this Court to conclude, that the, leave for theirs being adduced into evidence, being both just and essential, for hence making a firm conclusion, qua whether the impugned verdict, rested upon, Ex.D-5, for want of operation thereof, being stayed, hence acquiring any valid conclusivity, and, whereunder the suit land, stood, ordered to vest, in, the State of Himachal Pradesh, hence imperatively garnering any legal strength and vigour. Reiteratedly, hence, the trite factum displayed, in, Annexure A-5, and, in Annexure A-4 qua thereunder, rather the operation of the apt order of vestment of suit land, recorded on 20.04.2009, being stayed, does strip, and, erase, the strength of the reasoning, assigned by the learned first Appellate Court, (b) for, its, concluding that with Ex. D-5, acquiring conclusivity, hence, the sequel thereto, being, of, the apt alienees of the relevant sale deeds, not thereunder, acquiring any right, title or interest vis-a-vis the suit land. Consequently, this Court does think it befitting, to, accord the apposite leave to the appellant.

9. Be that as it may, the aforesaid annexures appended with the application, bearing CMP No.8758 of 2016, as, cast before this Court, under the provisions of Order 41, Rule 27 of the CPC, are judicial verdicts, (i) obviously hence no evidence in rebuttal thereto,

is, enjoined to be adduced, nor hence any opportunity is enjoined, to be accorded, for adducing any apt rebuttal evidence thereto, (ii) rather they are per se admissible in evidence, even without theirs, in adherence with the apposite mandate, hence, being tendered, into evidence, besides being exhibited, (iii) thereupon, they are permitted to be taken on record, and, are also amenable, for, theirs being read, by this Court. In other words, this Courts deems it fit, to read the aforesaid apposite verdicts, without, ordering, for the apt judicial verdicts, being, after remand of the lis vis-a-vis, the learned First Appellate Court, being permitted to be therebefore hence tendered and exhibited, thereupon, also hence, the aforesaid application is allowed, and, the apt judicial verdicts, are taken on record.

10. The effect of the hereinabove inference(s) and conclusion(s), (a) is that with the appropriate competent authority, after staying the operation, of, the order, of, vestment hence recorded on 20.4.2009, also being obviously hence seized with the apposite lis, squarely appertaining tot he necessity, of vestment, of the suit land, in, the State of Himachal Pradesh, given prior to the execution of the apposite sale deeds, purportedly no valid permission being granted, by the competent authority, to the alienees of the suit land, (b) thereupon, it has to be gauged qua whether this Court holding jurisdiction, to, proceed to pronounce, an adjudication, upon, the merits of the controversy, engaging, the parties at contest, (ii) controversy whereof, is squarely rested, upon, the suit land, for purported want of the apt alienees, prior to the execution, of the apposite sale deeds, seeking the statutory permission, rather hence warranting theirs being quashed and set aside, and, also concomitantly hence the suit land, thereupon, being ordered, to, be vested in the State of H.P. The aforesaid conundrum, can be easily settled, by alluding to the provisions, borne in Section 121-A of the H.P. Tenancy Land Reforms Act, wherein, a statutory bar, is, created against, the civil courts, exercising jurisdiction, vis-a-vis, any orders or proceedings, drawn under Chapter-11, especially by the narrated herein, statutorily contemplated authorities. Provisions of Section 121-A of the H.P. Tenancy and Land Reforms Act, read as under:-

> "**121-A. Bar of Jurisdiction**.- Save as otherwise expressly provided in this Chapter, the validity of any proceedings or orders taken or made under this Chapter shall not be called in question in any civil court or before any other authority."

The aforestated, bar, created in the hereinabove extracted provisions, of, Section 121-A of the H.P. Tenancy and Land Reforms Act, is, unamenable to any dilution nor is amenable, to any other conclusion, than, of the statutorily contemplated authorties, who stand vested, with, the apt jurisdiction, to make conclusive orders, qua vestment, of, lands borne in the sale deeds, when evidently prior thereto, no apposite statutory permission, is, either sought nor is granted by the competent authorities, (i) and, who reiteratedly alone rather solitarily stand vested with the apposite jurisdiction, under, an explicit apt statutory mandate, for, hence, testing the validities, of, all the orders drawn under Chapter-11, (ii) thereupon, rather the apt remedy, vis-a-vis, the aggrieved, after, a, conclusive order, being recorded by the highest echelons, in the hierarchy, of, the statutorily contemplated authorities, being the one comprised in his through, a CWP, hence casting a challenge thereto. All the aforesaid substantial question of law are answered accordingly.

11. Dehors, this Court meteing, in, the aforesaid manner hence answers to the apt formulated substantial questions of law, nonetheless, the appellants would yet be de-faciliated to claim pronouncement, of, an affirmative decree, of permanent prohibitory injunction, (i) given the suit land, provenly, at this stage remaining unpartitioned and when hence the plaintiffs/appellants being co-owners in the undivided suit property, are, thereupon prohibited to claim rendition, of, a decree of permanent prohibitory injunction,

vis-a-vis, the joint suit khasra number(s), whereon, they along with the defendant(s), are, co-owners, (ii) and, with a further corollary qua each co-owner, till dismemberment of the joint estate, being estopped to exclude other co-owners, from, enjoying the suit property, (iii) salient abovesaid principle rather suffering derogation, in case relief, of, injunction, is, granted. Moreover, in conjunction therewith, dehors meteings, of, hereinabove apt answers, to the substantial questions of law, also would not at all affect the efficacy of the apt concurrent findings recorded, by both the learned courts below, whereunder, each discountenance the appellants' propagation, of, the suit property being partitioned in the year 1936.

12. The above discussion, unfolds, that all the conclusions, as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Substantial questions of law are answered accordingly.

13. Consequently, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgments and decrees are maintained and affirmed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Ajmer Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 12 of 2009.
Reserved on : 26th April, 2018.
Date of Decision: 7th May, 2018.

**Indian Penal Code, 1860** - Sections 279, 304-A and 337 – Rash and negligent driving – Proof - Accused allegedly driving truck in an inebriated condition, hitting against scooter from behind and killing one of its occupants and injuring two others – Prosecution filing chargesheet for offences under Sections 279 , 304-II and 337 etc., of Code before Court of Session – Trial court acquitting accused of offence under Section 304 Part II but convicting for offences under Sections 279, 304-A, and 337 of Code – Appeal against conviction – Accused submitting before High Court of conviction being based on mis-appreciation of material on record by Trial Court – Facts on record proving (i) accused driving truck in high-speed and in zig-zag manner - (ii) accused hitting scooter from behind – (iii) identity of accused as driver of offending truck also proved – (iii) his blood and urine samples found carrying percentum of alcohol beyond permissible limits –( v) statements of witnesses consistent and without contradictions - Held - No mis-appreciation and non appreciation of evidence on record by Trial Court - Conviction rightly recorded - Appeal dismissed – Conviction upheld. (Paras 10 to 14)

For the Appellant: Mr. Ramakant Sharma, Sr. Advocate with Mr. Dinesh Kumar, Advocate.

For the Respondent: Mr. Hemant Vaid, Addl. A.G., with Mr. Y.S. Thakur, Dy. A.G.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal stands directed against the conviction and sentence, pronounced, upon the appellant/convict/accused, by the learned trial Court vis-a-vis the charge framed against him, for commission of offences punishable under Sections 304-A, 279, and, Section 337 of the IPC.

2. The facts relevant to decide the instant case are that on 9.8.2006 at about 5.30 p.m., when Trilochan Singh, PW-1 was returning back to his house at Rampur along with his wife Pawna and his son on his scooter bearing No. HP-31-0387 and had reached near Jhalera, a truck had come from behind rashly incoherently in a zig-zag manner and hit him from behind. He was thrown on the unmettled portion of the road while wife had also sustained grievous injuries and she had immediately died at the spot. Is son had also received multiple injuries because of the accident. As per the prosecution story the accused had fled from the spot and had been later apprehended by the people near the petrol pump on the Amb road after some time of the occurrence. When the accused was apprehended, he was thoroughly drunk. On the statement of PW-1, FIR Ex.PW1/A was registered with the police station. Thereafter police completed all the codel formalities.

3. On conclusion of investigation(s), into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure, was prepared, and, filed before the competent Court.

4. The accused stood charged by the learned trial Court, for, his committing offence(s) punishable under Sections 304-II, 279, 337 and Section 201 of the IPC. In proof of the prosecution case, the prosecution examined 9 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313, of, the Code of Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication.

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 not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court in the exercise of its appellate jurisdiction, and, theirs standing replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. One Pawna Kumari, who was aboard the scooter, driven by PW-1 Trilochan Singh besides her son, who was also aboard thereon, and, also PW-1, who was driving the scooter, respectively, in sequel to the injuries suffered upon their persons, in a collision occurred inter se the relevant scooter vis-a-vis the truck driven at the relevant time, by the accused hence suffered demise besides, injuries stood entailed on their persons. PW-3 has proven the MLCs, respectively borne, in Ex.PW3/b AND in Ex.PW3/C, MLCs whereof stood prepared in sequel to his examining, the injured/victims, PW-1, and, his son. PW-3 has also proven the apposite postmortem report, borne in Ex.PW3/J, wherein he ascribes, the cause of demise of deceased Pawna Kumari vis-a-vis the antemortem injuries delineated therein.

10. Furthermore, the prosecution, for proving the genesis of the occurrence, embodied in FIR, borne in Ex.PW7/A, depended upon the testifications, of ocular witnesses. The prime ocular witness vis-a-vis the relevant occurrence is PW-1, the husband of the deceased, and, who at the relevant time, was astride the scooter, as its driver. In his deposition, he has with pin pointed clarity ascribed negligence, to the accused/convict, negligence whereof is voiced by him, to be embodied, in his driving the relevant truck, in a high speed, and, in a zig zag manner, whereupon, hence, despite, the scooter being driven on the appropriate site of the road, rather the offending truck striking the scooter from behind. The testification of PW-1, embodied in his examination-in-chief, though, was concerted to be shred of its efficacy, by the defence counsel, by the latter subjecting him to an ordeal, of a rigorous cross-examination, yet, during course whereof, no elicitation occurs, (a) for hence belying the involvement, of the accused/convict in the relevant accident (b) nor also for belying the factum of the scooter being driven on the appropriate side of the road, (c) and, of the truck being driven on the inappropriate side of the road, and, it hence striking the scooter, from the rear (d) in sequel, the testification of PW-1 is to be imputed absolute credence. The testification of PW-1 is also lent corroboration, by the testification rendered by PW-2 Darshan Singh, another ocular witness to the occurrence. He in absolute tandem with the testification of PW-1, has voiced a version, wherein, he ascribes, an incriminatory role, to the accused/convict. Another ocular witness to the occurrence, PW-4, has alike PW-1, and, PW-2 lent corroboration to the genesis of the occurrence, embodied in Ex.PW7/A. Since, the tensifications of all aforesaid prosecution witnesses, is bereft of any taint or blemish of any intra se or inter se contradictions, thereupon, absolute sanctity besides credence is to be imputed, to their respectively rendered testifications.

11. Be that as it may, the aforesaid witnesses also proceeded to identify the accused, in Court. The identification of the accused in Court, by the aforesaid witnesses, is a sequel of the accused/convict hence uncontrovertedly, subsequent to the accident, rather standing apprehended near the petrol pump on the Amb road. The factum of the accused/convict being apprehended thereat, remained unbelied by the defence, nor the accused, in his statement recorded under Section 313 Cr.P.C., proceeded to therein hence espouse of his not driving the offending truck, rather with his in the proceedings, drawn, under Section 313 Cr.P.C., hence, meteing an answer, of his not fleeing from the spot, rather his throughout remaining present near the site of the apt collision(s), in sequel thereto, an inference is garnered qua the identification of the accused/convict in Court by PW-2, remaining unbelied besides, of, the accused acquiescing, of his, at the relevant, driving the offending truck.

12. Since, as aforestated, with the aforesaid PWs categorically voicing vis-a-vis the incriminatory role, of the accused/convict in the relevant occurrence, and, when their

respectively rendered testifications, are, unblemished besides when the doctor, who conducted, the medical examination of the accused/convict, and, prepared his report, borne in Ex.PW3/G, and, with clear voicing(s) occurring therein, of the blood, and, urine samples of convict/accused, carrying therein percentum of alcohol, beyond, the permissible limit, thereupon, the testifications of ocular witnesses, wherein, they ascribe vis-a-vis the accused, an incriminatory role of his driving, the offending truck in a rash and negligent manner, obviously hence garners therefrom, an immense formidable strength.

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

14. Consequently, the instant appeal is dismissed and the judgment of conviction is affirmed and maintained. However, keeping in view the facts and circumstances of the case and fact that the accused/convict/appellant is the sole bread earner of his family, hence, the sentence imposed upon the accused/appellant by the learned trial Court is modified, and, the convict/accused/appellant herein is sentenced to undergo rigorous imprisonment, for one year, for his committing an offence punishable under Section 304-A of the IPC, and, he shall pay a fine of Rs.2,000/- and in default of payment of fine amount, he shall further undergo simple imprisonment for three months. He further sentenced to undergo rigorous imprisonment for three months, for his committing an offence punishable under Section 279 of the IPC, and, he shall pay a fine of Rs.1000/- and in default of payment of fine amount, he shall further undergo simple imprisonment for one month. The convict/appellant herein further sentenced to under rigorous imprisonment for three months for his committing an offence punishable under Section 337 of the IPC and to pay a fine of Rs.1,000/- and in default of payment of fine amount, he shall further undergo simple imprisonment for one month. All the sentences shall run concurrently. The period already undergone by the accused/convict/appellant herein either in police or in judicial custody is ordered to be set off, from, the sentences awarded against him. The learned trial Court is directed to henceforth promptly execute the sentence. All pending applications also stand disposed of. Records be sent back forthwith.

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

Bir Singh .....Appellant/defendant No.1.

Versus

Dharam Singh & others. .....Respondents.

RSA No. 447 of 2005.
Reserved on : 4th May, 2018.
Decided on :7th May, 2018.

**Specific Relief Act, 1963** – Sections 34 and 38 –Suit for declaration and injunction – Plaintiff filing suit and seeking declaration of his half share in suit land and challenging revenue entries showing defendant No. 1 as owner of suit land – Defendant No.1 denying plaintiff's share and alleging his father having purchased said land from plaintiff's father – Trial Court decreeing suit – First Appellate Court dismissing appeal of defendant No.1 – RSA

– Defendant No.1 relying exclusively on basis of Roznamcha entries regarding oral sale – Mutation however attested in favour of 'M' father of defendant no.1 on disclosures unilaterally made by him - Other sale deeds relied upon by him not relatable to plaintiff's predecessor – Held, conclusions derived by Lower Courts based on proper and mature appreciation of evidence on record – RSA dismissed- Judgments and decrees of lower courts upheld. (Paras 8 to 12)

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| For the Appellant: | Mr. Ajay Sharma, Advocate. |
| For Respondent No.1: | Mr. Ramakant Shrma, Sr. Advocate with Mr. Basant Thakur, Advocate. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for declaration, qua the suit khasra number(s), was, hence decreed.

2. Briefly stated the facts of the case are that the plaintiff had filed a suit for declaration and injunction claiming therein that the plaintiff is owner to the extent of half of the suit land comprised in Khata No.74, Khatauni No.172 to 177, Khasra Nos. 54, 56, 8, 10/1, 20, 61, 65, 22, 6, 7, 9, 10, 19, 21, 23, 63, 64, 31, 32, 36, 53, 55, 30, 57, 24, 25, 29, measuring 1-83-28 HM, which comes to 0-91.64 HM, situated in Mohal and Mauza Nadholi, Tehsil Nurpor, District Kangra, H.P. (hereinafter referred to as the suit land), as the land was earlier owned by his father who was in its possession. However, no final partition so far had taken place. It has been pleaded that his father never effect sale in favour of Mirchu and Moti and remained in possession of the suit land to the extent of ½ share as co-owner. When the consolidation proceedings were being conducted in the year 1982 in the area, he came to know that on the basis of mutation on 20.02.19432, his share had been mutated in the name of Mirchu and Moti, whereas, no such sale was ever effected by his father. On coming to know, of these wrong entries, he enquired about the matter and when his plea was accepted by the revenue agency the present suit was filed claiming that the entries in the record of rights are wrong and is entitled for half of the suit land and the defendants be restrained from interfering in his possession.

3. The defendant contested the suit and filed written statement, wherein, it is averred that the father of the plaintiff Nanku and his co-sharer Sant Ram had sold their shares which was mutated in the name of Mirchu and Mali on 20.02.1943 vide mutation No.161. The sale on behalf of Sant Ram and Hira who were not heard of for the last more than 15 years were excluded at the time of mutation, since the sale and mutation and suit land is coming in possession of the defendants and the share of the plaintiff has been reduced to 162/972 share out of the total suit land. It has also been averred that the suit is hopelessly time barred since it has been filed after more than 50 years from date of the attestation of mutation.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement, and, re-affirmed, and, re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is joint owner in possession of the suit land to the extent of half share as alleged? OPP.
2. Whether the name of defendant No.1 is wrongly recorded as co-sharer in the suit land, as alleged? OPP.
3. Whether the plaintiff is entitled to the relief of permanent inunction, as prayed for? OPP.
4. Whether the suit is time barred? OPD.
5. Whether the plaintiff is estopped from filing this suit? OPD.
6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the latter Court, hence, decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom by the defendant No.1/appellant herein before the learned First Appellate Court, the latter Court, dismissed, the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendant No.1/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 12.07.2006, admitted, the appeal instituted by the defendant/appellant, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the findings of the two Courts below that Nanku had not sold any part of his one half share in te suit land in favour of Mirchu and Mali is not based on correct appreciation of evidence and is perverse?

**Substantial question of Law No.:**

8. The learned counsel, appearing for the appellant, has vehemently argued before this Court, by placing reliance, (a) upon, Ex. D-1, exhibit whereof is a copy of the abstract, of, rojnamacha prepared, by the patwari concerned, wherein echoings, occur of one Mirchu purchasing a portion of the suit land, from, one Mali; (b) also by his placing reliance, upon, Ex. D-2, exhibit whereof, is, a copy of rojnamacha rapat prepared, by the Patwari concerned, with a revelation occurring therein, of, a portion of the suit property being alienated by Sant, Sadhu, Hiru and Nanku vis-a-vis one Mirchu, (c) qua hence when in consonance therewith, there ex facie rather occurred, an accretion in the apt shareholdings, of, the defendant/appellant concerned, and, also a concomitant diminution, in the shareholdings, of, the plaintiff, vis-a-vis the undivided suit property, (d) thereupon, the concurrent judgments and decrees pronounced, by the learned Courts below, qua the plaintiff being entitled, to, ½ share in the undivided suit property, hence, wanting in legal strength.

9. The aforesaid submission addressed, before this Court, by the learned counsel appearing, for the appellant is repelled by (i) an admission occurring in the cross-examination of DW-2, with an echoing therein, of, one Nanku holding ½ share, as, owner vis-a-vis the undivided suit property; (ii) any sanctity, as, concerted by the learned counsel appearing for the appellant, to be imputed to Ex. D-1, and, to D-2, is apparently, shred of its efficacy, upon, a conjoint reading of aforesaid exhibits with Ex.P-4, latter exhibit whereof is an apposite order, whereunder, the apt mutation stood attested. The apposite order attesting the apt mutation, as, borne in Ex.P-4 was recorded on 20.2.1943, whereas, Ex.D-1, and, Ex. D-2, stood recorded prior thereto, inasmuch as, respectively, on 12.11.1942,

and, on 9.11.1942. Since, the recitals, borne in Ex.D-1, and, in Ex. D-2 were recorded, prior to the recording, of, the apposite mutation, borne in Ex.P-4, (iii) thereupon, with the apposite order of mutation, borne in Ex.P-4, hence, enjoying a higher degree of solemnity besides evidentiary vigour vis-a-vis any apposite purported evidentiary worth enjoyed respectively, by EX.D-1, and, by Ex.D-2, (iv) and its hence also constituting the apposite order, whereto a presumption of truth, is attractable, besides whereunder, the apt vestment of title vis-a-vis the suit land upon Mirchu, is rather construable to be hence purportedly validly made, (v) whereas, apparently, its making a disclosure, of, it being recorded in the absence of one Sadhu, and, of one Hiru, whereto whose estate, one Mirchu staked a claim, given the formers' hence alienating vis-a-vis him, their share in the undivided suit property, (vi) thereupon, upon a reading, of, Ex.P-4, it evidently rather surging forth, of it, being rather rendered ex-parte, thereupon, it is per se rendered inefficacious, (vii) and, hence, also a concomitant inference is spurred of any disclosure(s), as, unilaterally, made before the Patwari concerned, by one Mirchu, disclosure(s) whereof respectively, are, borne in Ex.D-1, and, in Ex. D-2 qua, hence, any oral sale being made vis-a-vis Mirchu, by, one Sadhu, and, by one Hiru, rather, lacking, both in tenacity and probative vigour, (viii) rather it being, reiteratedly inferable, of both Ex.D-1, and, Ex. D-2, being inefficaciously prepared, and, fortifyingly no reliance being imputable thereon. (ix) Conspicuously, with the relevant aforesaid echoings, borne in Ex.P-4, remaining unshred of their efficacy (ies), by adduction, of, cogent material, in, displacement thereof, thereupon, rendering them, to enjoy conclusivity(ies). Consequently, any espousal, on anvil thereof qua hence, of, any addition in the share(s), of, Mirchu vis-a-vis the undivided suit property hence occurring, and, concomitantly, rather the share of the plaintiff, in, the undivided suit property, being hence diminished, is not, acceptable nor it can be said that the plaintiff is not entitled, to, ½ share in the undivided suit property.

10. Even though, the learned counsel appearing for the appellant, has placed reliance, upon, certain sale deeds, to contend that owing to sale(s) thereunder, of, part, of, the suit land, thereupon, the apposite accretion(s), and, concomitant diminution(s) vis-a-vis the suit property, in the respective shareholding(s) of the plaintiff, and, of, the defendant, rather obviously occurring. However, the aforesaid submission is rendered rudderless, in the apparent face, of, the vendor(s) therein, not, being either Hiru or Sadhu, rather, vendors thereof, being person(s), other than Hiru and Sadhu.

11. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the plaintiff/respondent and against the appellant/defendant.

12. In view of the above discussion, there is no merit in the present Regular Second Appeal and it is dismissed accordingly. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Yoginder Singh .....Petitioner/Plaintiff.

Versus

Neelam Kumari .....Respondent/defendant.

Civil Revision No. 40 of 2017
Reserved on : 27th April, 2018.
Date of Decision: 7th May, 2018.

**Code Of Civil Procedure, 1908** - Order VI Rule 17 – Amendment of pleadings – Held, Causes of action which are interconnected can be joined in one suit- Therefore, when cause of action has accrued during trial and the cause of action so accrued is interlinked and inseparable from cause of action originally pleaded in plaint , amendment may be allowed in order to avoid multiplicity of litigation - Party can be asked to file separate suit on new cause of action accrued during suit.( Para 3 )

For the Petitioner: Mr. R.K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate.
For the Respondent : Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vashisht, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The plaintiff instituted a suit, wherein, he sought rendition of a declaratory decree, for setting aside the testamentary disposition executed by one Prithi Singh vis-a-vis one Dev Kanya, also, sought a declaratory decree, of, sale deed executed, on 8.10.2009, by defendant No.2 vis-a-vis defendant No.1 also being set aside. However, during the pendency of the suit, an application cast, under the provisions of Order 6, Rule 17 of the CPC, was preferred before the learned trial Court, by the plaintiff, wherein, he sought leave of the court, to incorporate in the plaint, the hereinafter reproduced paragraph No.7-A:-

> "7A That the defendant No.1 on 27.07.2015 got the mutation of succession attested in her favour of the suit alnd on the basis of an illegal & fraudulent Will dated 28.10.1994, whereas, the deceased Dev Kanya neither executed any will nor she was competent to execute the Will of the suit land in favour of any person and at the most she could only dispose off her 1/7th share by way of Will which she disposed of by her last valid Will of 10.07.2007. The AC IInd Grade, Paonta Sahib in connivance with defendant No.1 attested the mutation behind the back of the plaintiff and other legal heirs of deceased Dev Kanya without any notice to them. And, the plaintiff only came to know hen he approached the patwari in the last week of September, 2016, for procuring the latest jamabandi of the suit land. Hence, a cause of action has arisen to the plaintiff to challenge the said succession of the suit land in favour of defendant No.1, during the pendency of this suit, the last week of September, 2016, when he came to know about the said fact and is still continuing.
>
> B) in the prayer clause after the words "ale deed dated 8/10/09" and before the words "executed" the words and the will dated 28.10.1994 and revenue entry/mutation on the basis of said will are to be inserted."

wherewithin, he cast averments, for setting aside, the mutation attested on 27.07.2015 vis-a-vis defendant No.1, in sequel to a Will executed qua him, on 28.10.1994, by one Dev Kanya, given Dev Kanya being incompetent to execute the apposite Will.

2. The learned trial Court, declined the apposite leave to the plaintiff, on the trite ground, (a) of, given the occurrence of demise of co-defendant No.2, one Dev Kanya, during the pendency of the apposite lis, and, her estate thereat, opening to succession, (b)

thereupon, causes of action being both segregable, and, independent vis-a-vis all cause(s) of action, embodied, in the extant suit, and, (c) also assigned the further reason of the aforesaid causes of action rather being espousable, through, a separate suit. The aforesaid reasons assigned by the learned trial Court, for declining the apposite leave, upon, the apt application, are, flimsy, and, devoid of any legal strength, for the reasons (a) with the plaintiff, casting, a piercing challenge, to the succession, by co-defendant Dev Kanya, to the estate of one Prithi Singh, under, a purported testamentary disposition made in her favour; (b) with Dev Kanya, expiring ,during the pendency of the suit, whereafter, defendant No.1 vis-a-vis whom, she executed a testamentary disposition, hence, proceeding to produce it, before, the revenue officer concerned, for ensuring an apposite order, of attestation of mutation vis-a-vis her estate hence being recorded qua him, (c) thereupon, with the apposite investing, of, title vis-a-vis the suit land, upon, Dev Kanya, rather occurring under a will purportedly executed vis-a-vis her, by one Prithi Singh, and, with the aforesaid Will, being, cast a challenge through an apposite averment borne in the plaint, (d) hence, with the aforesaid challenge being made, during, the life time of Dev Kanya, and, after her demise, defendant No.1, producing, the latter's Will, for ensuring attestation of mutation vis-a-vis her estate hence being recorded in his favour, (e) hence, beget a sequel of their being no indiligence, on the part of the plaintiff, to initially, in the plaint, embodying, the aforesaid factum, conspicuously when Dev Kanya was alive thereat, and, was impleaded as co-defendant No.2 in the suit. Rather the apposite causes, of, action for a challenge being thrown, to the testamentary disposition, made by Dev Kanya vis-a-vis defendant No.1, arose only, upon, the former's demise, also, arose when it was produced, before, the Revenue Officer concerned, for attestation, of, mutation in consonance therewith.

3. The aforesaid discussion, unfolds, the trite factum of there, being the closest entwinement(s) inter se the relief canvassed initially in the plaint, pointedly, vis-a-vis the valid and due execution, of a testamentary disposition vis-a-vis Dev Kanya, by one Prithi Singh, and, also vis-a-vis the further concomitant purported disability, of Dev Kanya, to further execute a Will, vis-a-vis the estate acquired by her, from, one Priti Singh, upon co-defendant No.1. The close entwinement(s), inter se the aforesaid trite factum(s), was, hence insegregable, and, thereupon, all were concomitantly espousable, through, the plaintiff concerting to seek leave of the Court, to beget averments, in consonance therewith, in the extant suit, rather than the learned trial Court, proceeding to assign untenable and specious reasons, for theirs being segregable, from, the initially cast averments, and, reliefs in the plaint, and, hence, theirs constituting causes of action, independent, from, the ones, initially canvassed in the plaint. More so, when the aforesaid reasons, would beget the ill sequel, of promoting multiplicity(ies) of litigation, whereas, it being an underlined trite principle of law, that causes of action holding interconnectivity rather being enjoined to be joined in the same suit, rather, than the litigants concerned being driven to file separate suits, on purported untenably segregable cause(s) of action.

4. For the foregoing reasons, the instant petition is allowed and the impugned orders are set aside. Consequently, the plaintiff's/petitioner's application, cast under the provisions of Order 6, Rules 17 of the CPC, is allowed, and, he is directed to within four weeks, from today institute the amended plaint, before the learned trial Court. The parties are directed to appear, before, the learned trial Court on 23rd May, 2018. However, it is made clear that the observations made hereinabove shall have no bearings on the merits of the case. No order as to costs. All pending applications also stand disposed of . Records be sent back forthwith.

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

Jai Ram Sharma & others .....Petitioners/Defendants.

Versus

Rajender Pal and others .....Respondents/Plaintiffs.

Civil Revision No. 13 of 2016.
Reserved on : 1st August, 2018.
Date of Decision: 8th August, 2018.

**Code of Civil Procedure,1908** – Section 91, Order I R 8 - Order XXII Rules 3 and 4- Suit in representative capacity regarding mismanagement of temple by Mahant – Co- plaintiff and defendant dying during pendency of suit and Trial Court ordering substitution of applicants in place of co-plaintiff dying issueless and legal representatives of deceased defendant– Challenge thereto – Held, suit filed by two plaintiffs against mismanagement of Public Trust (Temple) by its Mahant – Leave of Court was duly taken by plaintiffs – Suit validly instituted in representative capacity – Trial Court justified in ordering substitution of legal representatives of deceased plaintiff and defendant – Order of Trial Court upheld – Petition dismissed - (Paras 2 & 3)

For the Petitioners : Mr. Rajiv Jiwan, Advocate.
For the Respondents: Mr. Adarsh K. Vashishta, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge**

One Shankar Singh, and, one Rajender Pal, instituted a suit under Section 91 of the Code of Civil Procedure, espousing therein, relief for removal of one Mahant Nand Lal, alias, Ganga Ram, from, the office of Vahetman/ Manager, of, Mandir Thakurdawara Sita Ramji situated at Village Bari Majherwan, Prgana Tiun, Tehsil Ghumarwin, District Bilaspur, H.P., and, his removal was espoused for hence ensuring, the, proper management, of, the temple, and, its funds. However, the mandate, of, clause (b) of subsection (1) of Section 91 of the CPC, provisions whereof stand extracted hereinafter:-

> **"91. Public nuisances and other wrongful acts affecting the public**.---[(1) In the case of a public nuisance or other wrongful act affecting or likely to affect the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,—
>
> (a) By the Advocate-General, or
>
> (b) With the leave of the court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.
>
> (2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions."

rather rendered the suit to be maintainable, only, upon an apt leave being accorded by the civil court, and, also enjoined, its, being instituted, by two or more persons. A perusal of the order sheet, recorded by the learned trial Court, on 22.02.2005, unfolds qua the apposite application preferred therebefore, by the co-plaintiffs, being allowed, and, a reading thereof, also brings forth the factum of the trial Court also concluding qua the suit property being

public property, and, the suit being instituted, by the co-plaintiffs, in a representative capacity, obviously, for the betterment, and, protection of the charitable endowment. A further reading of the order of 22.02.2005, unfolds, qua the statutory leave hence standing granted by the learned trial Court, vis-a-vis, the co-plaintiffs, also does hence underscore the factum, of, the co-plaintiffs, rather, instituting the suit, in, an apt representative capacity.

2. Further, during the pendency of the aforesaid civil suit instituted, apparently, in an apt representative capacity by the co-plaintiffs, one of the co-plaintiffs, namely one Shankar Singh hence died issueless, and, also defendant No.1 Mahant Nand Lal, hence expired, (a) thereupon, hence a prayer was made for the deletion, of, the name of co-plaintiff No.1 Shankar Singh, and, for the substitution in his place, of, the applicants, in, the array, of, co-plaintiffs, besides the applicants sought relief, for substitution, in the array, of, defendants, of, deceased co-defendant No.1 Mahant Nand Lal, by his legal heirs. Even though, the aforesaid application, was contested by the defendants, yet the learned trial Court, pronounced affirmative orders thereon. The defendants being aggrieved therefrom, hence, institute the instant petition before this Court.

3. As aforestated, the suit being instituted, in, an apt representative capacity, thereupon, for ensuring qua the holistic purpose, embodied therein, rather being not defeated nor frustrated, (i) whereas, the apt ill events qua hence its standing abated, rather would inevitably ensue, upon, the apposite motion standing declined, thereupon, it would not be sagacious for this Court, to reverse the impugned order. Consequently, the impugned order does not suffer from any illegality or impropriety. In sequel, the instant petition is dismissed, and, the order impugned before this Court is maintained and affirmed. The parties are directed to appear before the learned trial Court on 29th August, 2018. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

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

Versus

Vikrama Devi & another .....Respondents.

FAO No. 549 of 2017.
Reserved on : 26th July, 2018.
Decided on : 8th August, 2018.

**Motor Vehicles Act, 1988 –** Section 166- Motor accident – Bodily Injuries – Compensation- Determination- Claimant suffering bodily injuries in road accident and remaining hospitalized – Claims Tribunal granting compensation in sum of Rs. 2 lacs towards pain and suffering– Appeal against by insurer - Hospital stay only for 6 days – Held, grant of compensation of Rs. 2 lacs under head of pain and suffering excessive – Compensation reduced to Rs. 50,000/- Award modified. ( Para 4 )

**Motor Vehicles Act, 1988 – Section 166-** Motor accident – Permanent disability - Compensation- Determination- Claimant suffering permanent disability of 15% - Claims Tribunal awarding Rs 3 Lacs as compensation by relying upon *Mallikarjun v. Divisional Manager, reported in AIR 2014, S.C., 736,* -Appeal against by insurer – Held, Assessment of

compensation of Rs.3,00,000/- under head of permanent disability is erroneous – *Mallikarjun case* is applicable in cases involving children -In view of age of claimant (50 years) and applying multiplier of 13, compensation under this head reassessed at Rs.84244/ - Appeal partly allowed and award modified. ( Para 7 )

***Cases referred:***
Khem Chand vs. Smt. Uma Devi & Ors, Latest HLJ 2010 (HP)1
Mallikarjun vs. Divisional Manager, AIR 2014 SC 736

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|---|---|
| For the Appellant: | Mr. Jagdish Thakur, Advocate. |
| For Respondent No. 1: | Mr. Devender K. Sharma, Advocate. |
| For Respondent No. 2: | Mr. Naveen K. Bhardwaj, Advocate. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal(I), Kangra at Dharamshala, H.P., upon, MACP(RBT) No. 58-D/II/2011, whereunder, compensation amount comprised, in, a sum of Rs.8,94,580/- along with costs, and, interest accrued thereon, at the rate of 7.5% per annum, from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimant, and, the apposite intemnificatory liability thereof, was, fastened upon the insurer.

2. The claimant/respondent No.1, in sequel, to the rash and negligent manner, of, driving of the offending vehicle by respondent No.2 herein, sustained injuries upon her person, and, in consequence thereof, she, was entailed with 15% permanent disability, disability whereof is pronounced in the apposite disability certificate, borne in Ex.PW1/A. The counsel for the insurer, has, contended with much vehemence before this Court (a) that with the apt insurance policy, borne in Ex.RW3/B, hence, casting an interdiction against respondent No.2 herein, driving the insured vehicle, in, an inebriated condition, and, with apt therewith affirmative evidence standing comprised, in, the report of the FSL concerned, borne in Ex. RW3/C, and, it rather making bespeakings qua respondent No.1, being, at the relevant time, in, an inebriated condition, (b) thereupon, with the apt interdiction borne in Ex.RW3/B, being visibly infringed, thereupon, even if, hence valid affirmative findings, stand, recorded, upon, the issue appertaining to the claimant sustaining injuries on her person, in sequel, to the rash and negligent manner of driving, of, the offending vehicle by the respondent, (c) yet the aforesaid valid espousal, rather rendered unamenable, for, fastening, upon it, the apposite indemnificatory liability. However, the aforesaid contention is rudderless, given this Court in a decision rendered in a case titled as ***Khem Chand vs. Smt. Uma Devi & Ors,*** reported in ***Latest HLJ 2010 (HP)1,*** mandating, qua the inebriated condition, of, the driver of the offending vehicle, especially, at the relevant time, being statutorily unespousable, by, the Insurance company, as, an apt exculpatory ground.

3. The learned counsel appearing for the insurer has also contended with much vigour, that, with respondent No.2 herein, holding, at the relevant time only a learner's licence, (i) hence, he was, in contemporaneity thereto, rather enjoined to be accompanied, by a licenced driver, (ii) whereas, in contemporaneity, of, occurrence, of, the relevant mishap, his remaining unaccompanied, by a trained licenced driver, (iii) thereupon, it was unbefitting, for, the learned Tribunal, to, fasten the apposite indemnificatory liability, upon,

the insurer. However, it appears that the aforesaid contention is also surmisally made by the learned counsel appearing for the insurer, (iv) given there existing ample evidence on record, qua, in contemporaneity, of, the occurrence, rather respondent No.2 herein, being accompanied by his father Chattar Singh, who, at the relevant time evidently held the apt driving licence. Since, the efficacy of the aforesaid evidence, remained unconcerted to be undermined, hence the apt corollary thereof, (iv) is qua the purported infringement made by respondent No.1, comprised in his, despite only holding a learner's licence, and, his not, purportedly at the relevant time being accompanied, by a well trained licenced driver, and, hence purported apt breaches being committed by him, vis-a-vis, the insurance policy, rather being unamenable to a construction qua their being any evident transgression or breaches of the apposite insurance policy, hence, the apt fastening(s), of, the apt indemnificatory liability, upon, the insurer is construable, to be both valid and befitting.

4. The learned counsel, appearing for the insurer, has proceeded to contend (a) that the quantification of compensation made, vis-a-vis, the claimant, under the apposite heads of pain or sufferings, and, medical expenses both being excessive and exorbitant, given there existing no evidence on record, in support thereto. A sum of Rs.2 lacs, stands, awarded, under, the head “pain and suffering”, and, in making the aforesaid assessment, the learned tribunal, has, borne in mind, the factum of the claimant, remaining hospitalized w.e.f. 6.11.2010 to 12.12.2010. Consequently, the prime reason, for, assessing compensation, vis-a-vis, the claimant, under, the head “pain and sufferings”, rather ensues from hers remaining hospitalized for the aforesaid period, (b) thereupon, it was hence inappropriate for the learned tribunal to deduce therefrom, given, the aforesaid minimal period of hospitalization of the claimant, hers being entitled, to compensation in a sum of Rs.two lacs under the head “pain and sufferings”. Consequently, the aforesaid amount is reduced from Rs. Two lacs to Rs.50,000/-. The aforesaid reduction is strengthened by the fact, that, the learned tribunal, under, the head of “expenses towards conveyance and food nourishment”, rather proceeding to award a sum of Rs.50,000/-.

5. The assessment of compensation, comprised in a sum of Rs.53,380/- under the head “medical expenses” though, is in stark disconcurrence, with, the total of Exts. P-1 to P-23, yet the aforesaid factum would not constrain this Court, to reduce the compensation assessed, under the aforesaid head, (a) given the severity or gravity of the permanent disability entailed upon her, and, as stands pronounced, in, disability certificate, borne in Ex.PW1/A, (b) besides reiteratedly when the expenses incurred by the claimant, for, hers recuperating, from, the injuries suffered in the mishap, rather, are, concomitantly construable, to, borne in an amount higher, than, the one personified in Ex.P-1 to P-23, (c) hence, non adduction of bill towards medical expenses, are, construable to be a sequel of the claimant, not, maintaining all the bills, appertaining to the expenses incurred by her, towards, purchasing medicines, for treating the apt injuries. Consequently, the assessment of compensation in a sum of Rs.53,380/- under the head “medical expenses”, vis-a-vis, the claimant, is, not amenable to reduction.

6. The learned Tribunal had assessed a sum of Rs.one lakh as compensation, vis-a-vis, the claimant under the head “loss, of, future amenities, and, expectation of life”, and, the reason for making the aforesaid quantification, has arisen from Ex.PW1/A, making a clear pronouncement, of, 15% disability being entailed upon the claimant, and, it being permanent in nature besides the chances of reduction, of, the disability being bleak, (a) and, with PW-1 testifying qua the apt per centum, of disability rather perennially affecting, the capacity, of, the injured, to perform manual work, thereupon, in the learned tribunal hence assessing compensation towards loss of future amenities and expectation of life, vis-a-vis, claimant, has obviously borne in mind the aforesaid trite factum, (c) obviously,

therefrom the inevitable inference, is, qua the severity and gravity of the disability, when visibly perennially affects or precludes the claimant, to enjoy to the fullest her life, besides hence the apt disability rather hampering the facile movement, of, a vital member, of her body, (d) thereupon, with, the concomitant entailment, of, pain and suffering, upon, the claimant being also perennial, besides there being, also, a, concomitant perennial, trammeling, in, the claimant hence enjoying, her, life to the fullest, (e) hence, the assessment, as, done by the learned tribunal, of compensation, under, the head "loss of future amenities and expectation of life", vis-a-vis, claimant, does not suffer from any gross error.

7. However, the learned tribunal has committed gross error while assessing compensation, of Rs.3,00,000/- vis-a-vis the claimant/respondent herein under the head of disability, rather has erroneously applied, the mandate of the Hon'ble Apex Court in a case titled as ***Mallikarjun v. Divisional Manager, reported in AIR 2014, S.C., 736,*** mandate whereof is applicable only vis-a-vis the children hence suffering disability in a motor vehicle accident. Consequently, this court proceeds to assess compensation, vis-a-vis, the claimants under the aforesaid head i.e. compensation on account of disability, on anvil (a) of, with the per mensem salary, of, the petitioner/injured, standing comprised, in a sum of Rs.36,000/- per month, (b) and, with hers as depicted in the discharge slip, being aged about 50 years, at the time of the apt occurrence, consequenlty, an apt multiplier of 13 is applicable thereon. Keeping in view, that, the permanent disability is 15%, hence, compensation under this head, is, worked out at Rs.84,240/-

8. For the foregoing reasons, the instant appeal is partly allowed and in the aforesaid manner the award impugned before this Court is modified. Consequently, the claimant/respondent No.1 herein is entitled to compensation in a sum of Rs.4,28,820/- (Rs. Four lacs, twenty eight thousand and eight hundred twenty only) with costs and interest at the rate of 7.5% per annum from the date of petition till realization thereof. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The indemnificatory liability of the aforesaid compensation amount shall be of the insurer of the offending vehicle. All pending applications also stand disposed of. Records be sent back forthwith.

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

Reliance General Insurance Company Limited. .....Appellant.

Versus

Smt. Meena Devi & others ....Respondents.

FAO No. 227 of 2014.
Reserved on : 3rd August, 2018.
Decided on : 8th August, 2018.

**Motor Vehicles Act, 1988 –** Sections 166 and 173 – Motor accident – Claim application – Claims Tribunal allowing application of legal representatives of deceased and granting compensation in sum Rs 17,37,000 – Appeal by insurer – Deceased unskilled worker and aged 28 years at time of death – Held, Income of deceased to be computed on basis of Govt. Notification for unskilled workers - Last drawn salary of deceased to be taken as Rs. 7,000/-p.m. - Addition of 40% to be given towards future prospects and after deducting

1/4th thereof towards dependency, income of deceased assessed at Rs. 7350/ p.m. - Multiplier of 16 will apply- Compensation reassessed. (Para 4 )

**Motor Vehicles Act, 1988 –** Sections 166 and 173 – Motor accident – Claim application – Compensation under conventional heads – Claims Tribunal granting Rs. 1 lac to widow towards loss of consortium and R. 1 lac to children towards loss of love and guidance – Appeal against – Held, grant of compensation under conventional heads not in tune with National Insurance Co. Ltd. vs. Pranay Sethi and others, reported in 2017 ACJ 2700, – Compensation under conventional heads reduced – Appeal partly allowed – Award modified . (Para 5 )

***Cases referred:***

Govind Yadav vs. New India Assurance Co. Ltd., 2012 ACJ 28
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

| | |
|---|---|
| For the Appellant: | Mr. Jagdish Thakur, Advocate. |
| For Respondents No. 1 to 4 : | Ms. Megha Kapoor Gautam, Advocate. |
| For Respondents No.5 & 6: | Nemo. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal stands directed against the award pronounced by the Learned Motor Accident Claim Tribunal (I), Solan, H.P., whereby, the learned Tribunal adjudged compensation, vis-a-vis, the LRs of deceased Palat Sahani, who met his end, in an accident caused, by the rash negligent driving of the offending vehicle, by one Tikka Ram(respondent No.6 herein). The quantum, of, compensation amount adjudged thereunder vis-a-vis the legal heirs of deceased Palak Sahni, is, constituted in a sum of Rs.17,37,000/- and interest at the rate of 7 ½% per annum, is, levied thereon, commencing, from, the date of petition uptill its deposit. Out of the aforesaid compensation amount petitioner No.1, is, held entitled to 50%, and, the remaining 50% of the compensation amount, is, ordered to be apportioned inter se petitioner No.2 to 4 in equal shares, and, their shares, are, ordered to be invested in FDR in a nationalized bank, till they attain majority. Obviously indemnificatory liability thereof, has been fastened, upon the insurer/appellant herein. The Appellant/insurer is aggrieved therefrom, hence, has instituted the instant appeal before this Court.

2.In sequel to a collision, which occurred inter se motor cycle bearing No. HP-12-8143, whereon Palat Sahni was astride as a pillion rider, and, the offending vehicle bearing No. HP-12-3104, the aforesaid Palak Sahni, hence, suffered fatal injuries. The learned Tribunal had rendered affirmative findings, upon, the issue appertaining, to, the apt collision being, a, sequel of rash and negligent driving, of, the offending vehicle, by respondent No.6 herein. The learned counsel appearing for the insurer has contested the validity, of, the aforesaid findings rendered, upon, the aforesaid issue, and, contends that the findings are amenable for reversal, (a) given, the learned tribunal rather meteing credence only, vis-a-vis, the contents, borne in the apposite FIR, borne in Ex.PW1/A, whereas, it did not constitute, the, apt substantive piece of evidence. However, the aforesaid submission falters, (b) given apart from the apt FIR borne in Ex.PW1/A, the petitioners leading into the witness box, an ocular witness to the occurrence, one Dalip Sahni, PW-4, who in his examination-in-chief, has, supported the averments borne in the claim petition, qua, the ill fated collision being a sequel of rash and negligent manner of driving, of, the offending vehicle, by respondent No.6

herein. The aforesaid rendered echoings, borne in the examination-in-chief of PW-4, though were concerted to be ridden, with an aura of falsity, by the counsel for the insurer, by his subjecting him, to, a scathing cross-examination, (c) nonetheless, even during course thereof, he was unable to elicit from PW-4, any, echoing for eroding, the veracity of the echoings, borne in his examination-in-chief, wherein, he squarely attributed negligence to respondent No.6 herein, in, the latter driving the offending vehicle, (d) and, further with aplomb, rendered echoings qua hence the apt collision rather ensuing. In aftermath, the affirmative findings returned by the learned tribunal, upon, the issue appertaining, to, the apt collision being a sequel, of, rash and negligent manner, of, driving of the offending vehicle by respondent No.6 herein, do not warrant any interference.

3. Be that as it may, the learned counsel appearing for the insurer, has contended with much vigour, (a) that with there existing infirm evidence, vis-a-vis, the per mensem salary of the deceased, thereupon, it was unbefitting for the learned tribunal, to, compute the per mensem salary, of, deceased Palat Sahni, to be borne, in a sum of Rs.7000/-. Contrarily, he contends that the apt per mensem salary derivable by the deceased, from, his apt employment hence being computed in a figure equivalent to the one meteable, under, the apposite notification, vis-a-vis, the category appertaining, to unskilled workman, in category whereof, the deceased Palat Sahni, rather hence fell. In making the aforesaid submission, the learned counsel appearing for the insurer, has laid dependence, upon, the verdict of the Hon'ble Apex Court rendered in a case titled as ***Govind Yadav v. New India Assurance Co. Ltd.***, reported in ***2012 ACJ 28***, the relevant paragraph No.17 whereof stand extracted hereinafter:-

> "17. A brief recapitulation of the facts shows that in the petition filed by him for award of compensation, the appellant had pleaded that at the time of accident he was working as Helper and was getting salary of Rs.4,000/- per month. The Tribunal discarded his claim on the premise that no evidence was produced by him to prove the factum of employment and payment of salary by the employer. The Tribunal then proceeded to determine the amount of compensation in lieu of loss of earning by assuming the appellant's income to be Rs.15,000/- per annum. On his part, the learned Single Judge of the High Court assumed that while working as a Cleaner, the appellant may have been earning Rs.2,000/- per month and accordingly assessed the compensation under the first head. Unfortunately, both the Tribunal and the High Court overlooked that at the relevant time minimum wages payable to a worker were Rs.3,000/- per month. Therefore, in the absence of other cogent evidence, the Tribunal and the High Court should have determined the amount of compensation in lieu of loss of earning by taking the appellant's notional annual income as Rs.36,000/- and the loss of earning on account of 70% permanent disability as Rs.25,200/- per annum.
>
> The application of multiplier of 17 by the Tribunal, which was approved by the High Court will have to be treated as erroneous in view of the judgment in Sarla Verma v. Delhi Transport Corporation (2009) 6 SCC 121. In para 42 of that judgment, the Court has indicated that if the age of the victim of an accident is 24 years, then the appropriate multiplier would be 18. By applying that multiplier, we hold that the compensation payable to the appellant in lieu of the loss of earning would be Rs.4,53,600/-." (p...35)

However, the aforesaid submission is not amenable for acceptance by this Court, (a) given the judgment (supra) being anchored, upon, want of any cogent corroborative evidence in respect, of the claimant therein, excepting his self serving testimony, qua his hence drawing

per mensem salary, hence, borne in a sum of Rs.4000/-, (b) thereupon, the Hon'ble Apex Court being constrained to record, finding(s) qua the learned Tribunal, and, the High Court concerned, hence falling into error, in, computing the annual salary, of, the deceased therein, being borne in a sum of Rs.48,000/-, (c) rather contrarily hereat, the victim of the apt collision, suffered his demise, and, also apart from the testimony rendered, by one Meena Devi, qua the deceased Palat Sahni, drawing per mensem salary borne, in, a sum of Rs.5,000/-, the claimants also ensured the stepping into the witness box, of, the employer of deceased Palat Sahni, (c) who while stepping into the witness box has tendered into evidence his affidavit, borne in ex.PW5/A, wherein, he makes similar therewith echoings, vis-a-vis, the per mensem salary, of deceased Palat Sahni rather being Rs.5000/-, (d) and in addition to the aforesaid salary, his also paying to the deceased expenses of food, clothes and residence, (e) and, thereafter, upon, his being subjected to cross-examination, he has denied suggestions, as, put to him, by the counsel for the insurer qua his rendering, a false deposition, (f) rather only, upon, the mere factum, of, PW-5 making echoings, during, the course of his being cross-examined by the counsel for the insurer, qua his omitting to maintain records, in respect of his liquidating Rs.5,000/-, as, per mensem salary, to, the deceased. (g) Thereupon, the counsel for the insurer has contended, that, no credence is to be meted to the aforesaid testification, of, PW-5, as, occurring in his examination-in-chief. However, even the aforesaid submission is bereft of any vigour, (h) given the counsel for the insurer not thereafter contesting the factum of PW-5, holding land measuring 50 bighas, nor the counsel for the insurer, ensuring, the stepping into the witness box, of, the persons holding lands adjoining the land of PW-5, and, theirs making testification qua PW-5, not, engaging deceased Palat Sahni, as a farm labourer, (i) whereas, it constituted the best befitting evidence to erode the veracity, of the apt testification, borne, in the examination-in-chief of PW-5, the employer of Palat Sahni. Also the absence of PW-5 rather omitting to maintain the apt records qua his liquidating wages per mensem borne, in a sum of Rs.5000/- to the deceased, cannot coax any inference, holding leanings, vis-a-vis, the insurer, given non taxability of farm income, whereupon, hence no records were enjoined to be maintained by PW-5, in respect of his liquidating wages qua Palat Sahni, borne in a sum of Rs.5000/- per mensem. In aftermath, it is to be concluded that the computation made by the learned tribunal qua the deceased Palat Sahni hence drawing per mensem salary borne in a sum of Rs.7000/- inclusive of expenses of food, cloth and residence, not meriting any interference, (j) besides preeminently for all the aforesaid reasons, the reliance placed by the learned counsel appearing for the insurer upon Govind Yadav's case (supra), is, misfounded, given the mandate thereof being applicable, only, in the event, when, excepting the self serving statement of the claimants, no evidence in support thereof being adduced, whereas, reiteratedly, the apt best corroborative evidence, comprised in the testification of PW-5, the deceased's employer rather hereat visibly exists.

4. The deceased, is, in the postmortem report, is reflected to be aged 28 years, at the relevant time. With the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.59 extracted hereinafter:

> "59.Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as

> postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life,etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."
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> (p.2721-2722)

expostulating (i) that where the deceased concerned, is rendering employment, in non government organization(s), as is the apt employment, of, the deceased, (a) thereupon, hikes or accretions, on anvil of future incremental prospects vis-a-vis the salary drawn by him, at the time contemporaneous, to, the ill fated mishap, from his employer, being also meteable thereto. However, before applying the mandate of the aforesaid relevant paragraph, borne in the judgment supra, it is significant to also bear in mind, the age of the deceased, (ii) since the postmortem report reflects, the deceased being aged 28 years, at the relevant time, hence with the afore extracted paragraph, mandating, of, accretions towards future incremental prospects vis-a-vis the salary drawn by the deceased, being pegged upto 40% thereof, besides being tenably meteable vis-a-vis the apposite last drawn salary. Consequently, after meteing 40% increase(s) vis-a-vis the apposite last drawn salary, thereupon, the relevant last drawn salary of the deceased is recoknable to be Rs.9800/-,

[Rs.7000(last drawn salary of the deceased)+Rs.2800/-(40% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, four, hence, 1/4th deduction is to be visited upon a sum of Rs.9800/-, hence, after making apt aforesaid deduction vis-a-vis Rs.9800/-, the per mensem dependency comes to Rs.7350/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.7350x12=Rs.88,200/-. After applying the apposite multiplier of 16, the total compensation amount, is assessed in a sum of Rs.88,200 x16=Rs.14,11,200/- (Rs. Fourteen Lacs, eleven thousand and two hundred only.

5. However, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs vis-a-vis, the widow of deceased, (i) under the head, loss of consortium, (ii) and quantification, of compensation vis-a-vis, the off springs of the deceased, under the head, loss of care and guidance, is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium vis-a-vis the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively, (iii) and, with no expostulation occurring therein vis-a-vis the compensation amount(s), being awardable, to the off springs of the deceased, especially under the head, loss of care and guidance, hence reliefs in respect thereto being impermissibly granted. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis the widow of the deceased, as also, vis-a-vis the off springs. Accordingly, in addition to the aforesaid amount of Rs.14,11,200/-, the petitioners, are, entitled under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs.14,11,200 + Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.14,81,200/-(Rs. Fourteen lakhs, eleven thousand and two hundred only).

6. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.14,81,200/-, along with pending and future interest @7.5 %, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Out of the aforesaid compensation amount, claimant Meena Devi being the wife of the deceased shall be entitled to 50 % of the compensation amount, and, the remaining 50% of the compensation amount be apportioned in equal shares amongst the minor children of the deceased Palat Sahni. The shares of the minor children, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis their mother, only when she explains, of, its being required, for, the upkeep and benefit of her minor children. All pending applications also stand disposed of. Records be sent back forthwith.

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

Shayamu Yadav .....Appellant.

Versus

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

Cr. Appeal No. 662 of 2017 along
with Cr. Appeal Nos. 23 and 24 of 2018.
Reserved on: 27th July, 2018.
Date of Decision: 8th August, 2018.

**Indian Penal Code,1860-** Sections 307, 323, 392 read with 34- Attempt to murder and robbery - Proof of- Trial court convicting accused for offences of robbery and simple hurt but acquitting them for attempt to murder - Appeal against by accused – Accused contending wrong appreciation of evidence on part of trial court while convicting them for said offences – Facts revealing (a) accused hiring taxi of victim 'H' for going to Naina Devi ji (b) accused 'S' identifying place of offence during investigation , (c) mobile of victim recovered from accused 'A' (d) abandoned vehicle of complainant also recovered at instance of accused 'J' (e) injuries on person of complainant duly corroborated by medical evidence-(f) complainant duly identifying accused during trial - Held, judgment of conviction based on proper appreciation of evidence by trial court – No ground of interference made out – Appeal dismissed. (Paras 17 & 18)

For the Appellant(s): Mr. V.B. Verma and Ambika Kotwal, Advocates.
For the Respondent(s): Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. Advocate Generals.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

All the aforesaid appeals are being disposed of by a common judgment, as, all arise, from, a common verdict rendered, by the learned trial Court.

2. The learned trial Court convicted the accused/convicts, namely, Jagdev Singh, Anil Kumar, Gurjeet Singh and Shayamu Yadav, for the charges framed under Section 392, and, under Section 323 of the IPC read with Section 34 of the IPC, whereas, it pronounced an order of acquittal, upon the accused, vis-a-vis, offences punishable, under Section 307 of the IPC, and, under Section 24 of the Arms Act, 1959.

3. Amongst the convicts, only Jagdev Singh, Gurjeet Singh and Shayamu Yadav, have instituted rather separate appeals therefrom, whereas, accused Anil Kumar, has not, instituted any appeal, vis-a-vis, the aforesaid order, of, conviction hence recorded against him. The learned trial Court proceeded to impose sentences of imprisonment, upon, the convicts in the hereinafter extracted manner:-

| Sr. No. | Sections | Sentence |
|---|---|---|
| 1. | 392, IPC | Each of the convicts are sentenced to rigorous imprisonment for 7 years and also to pay fine of Rs.10,000/- each. In the event of non payment of fine, the defaulting convict shall further undergo rigorous imprisonment for one year. |
| 2. | 323, IPC | The convicts are sentenced to rigorous imprisonment for six months and to pay fine of Rs.2000/- each and in the event of non payment of fine, the defaulting convict shall further undergo rigorous imprisonment for one year. |

All the sentences ordered to run concurrently.

4. Even the State of Himachal Pradesh, has not preferred any appeal against the order of acquittal, as, pronounced upon the convicts, for the charges respectively framed against the convicts, for, theirs allegedly committing offences punishable under Section 307 of the IPC, and, under Section 25 of the Arms Act.

5. The facts relevant to decide the instant case that one Harvinder Singh, complainant reported the matter to the police stating that he was owner-cum-driver of a car bearing No. Hr-01u-3717, which was being used as taxi by him. On 16.06.2012, this car had been hired by four persons, from the taxi union at Gagan Chowk, Rajpur, for the purpose of paying a visit to Mata Naina Devi Temple The taxi fare was settled at Rs.1,700/-. ON the way, these persons had taken dinner at about 11.30 p.m., in a hotel, situated a some distance short of Kiratpur Sahib. Thereafter, the journey had been resumed and at a place about two kilometers short of Naina Devi Temple, the said passengers asked the complainant to to stop the car, since they want to vomit. The complainant stopped the vehicle. Further that upon getting down, one of the passengers pointed a revolver towards the complainant and asked him to sit on the rear seat of the vehicle and told him that thereafter, the vehicle would be driven by them. The complainant was made to sit on the rear seat and the vehicle was taken by one of the said persons on the Bhakara road. After going for about 5-6 kilometers, the complainant was made to alight from the vehicle, again pointing the gun towards him. The mobile phone of the complainant bearing SIM no. 09878220792 alongwith Rs.1,000/- were snatched by the said persons and the complainant was pushed down into a gorge. The accused simultaneously kept pelting stones on him, from the road, and thereafter, took away the vehicle of the complainant. The complainant was able to get up and reach the road with great difficulty and had somehow managed to reach on foot at police post, Shri Naina Devi Ji. On the basis of these averments, the FIR was lodged and initial investigation was under taken by Inspector/SHO Shyam Chand and thereafter, by Inspector SHO/Tilak Raj, who conducting partial investigations, handed over the file to ASI Harpal Singh, for further investigations. During investigation, the IO visited the spot along with the complainant and prepared the spot map. The statement of the complainant was recorded. Thereafter police completed all the investigating formalities and arrested the accused.

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

7. The accused/convicts stood charged, by the learned trial Court, for, theirs committing offences, punishable under Section 392, 307 read with Section 34 of the IPC and Section 25 of he Arms Act. In proof of the prosecution case, the prosecution examined 23 witnesses. On conclusion of recording, of, the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

8. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/convicts, for theirs hence committing, the, aforesaid offences hence punishable under Section 392 and Section 323 of the IPC, read, with Section 34 of the IPC, whereas, it ac1uitted the accused of the offences punishable under Section 307 of the IPC, and, under Section 25 of the Arms Act.

9. The appellants herein/accused, stands aggrieved, by the findings of conviction, recorded, by the learned trial Court. The learned counsel appearing, for, the appellants herein/accused, has concertedly and vigorously contended, qua the findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation, 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 being replaced by findings of acquittal.

10. On the other hand, the learned Addl. Advocate General has with considerable force and vigour, contended qua the findings of conviction, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

11. 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.

12. Primarily, the prime prosecution witness, PW-5 one Harviner Singh, upon whose complaint, comprised in Ex.PW5/A, the apposite FIR, borne in Ex.PW 13/A, was lodged with the Police station concerned, has therein made candid unfoldings, vis-a-vis, the apt penal misdemeanors being committed by the convicts/accused, (i) also, when he stepped into the witness box, he has in absolute tandem therewith rendered echoings qua the accused, whom he proceeded to identify in Court, forcibly fleeing with his vehicle, mobile phone, and, cash of Rs.1000/-, (ii) also in his testification, borne in his examination-in-chief, he has made clear articulations therein, qua the recovery, of, the vehicle, country made pistol, Ex.P-2, and, mobile phone Ex.P-4, standing effectuated at the instance of the accused. In his testification, borne in his cross-examination, he has not made any bespeakings therein, (iii) whereupon, it may be concluded qua his deposition, comprised, in his examination-in-chief, being eroded, thereupon, it is to be concluded qua his testifications, borne in his examination-in-chief, and, in his cross-examination both being apparently bereft of any rife contradictions, improvements, and, gross embellishments, vis-a-vis,his previous statement recorded in writing, (iv) and, hence, the apt probative vigour is enjoined to be imputed to his testification. In addition, when the convicts/accused omitted to repel the factum, of theirs, being identified by PW-5, in Court, also when, for reasons assigned hereafter, when the apt recoveries, stand efficaciously proven, thereupon, it is to be formidably concluded qua the prosecution, hence proving the charge(s) against the accused.

13. Be that as it may, the testification qua the genesis of the prosecution case, as, rendered by PW-5, also acquires corroboration, from, the testification rendered by PW-3, the Investigation Officer concerned, and, from the testification of PW-18, ASI Harpal Sigh, both whereof visibly hence render testifications, bereft of any gross embellishments or improvements, vis-a-vis, their respectively, recorded previous statements recorded in writing, hence, their testifications purvey the utmost corroboration to the testification, of, PW-4, thereupon an inference, is bolstered qua the prosecution, rather firmly nailing the charges against the accused.

14. Nowat, the factum of the prosecution also succeeding in proving the apt charges, acquires galvanized momentum, and, ensues from (i) co-convict Jagdev Singh making a disclosure statement, borne in Ex.PW1/A, whereon PW-1 Amarjeet Singh appended his signatures, as witness thereto, and, latter whereof rather in his testification, hence, lending candid proof qua all the recitals, borne therein, holding veracity, (ii) and, when thereafter under recovery memo, borne in Ex.PW1/B, the recovery of the apt stolen

vehicle, stood effectuated, whereon also the signatures of PW-1, stand appended, latter whereof, in his testification rendered on oath, also hence, proves the veracity, of all the recitals borne therein, (iii) thereupon, with tenacious evidence hence standing adduced, for, efficaciously proving the recovery, of, the apt vehicle, as, validly effectuated thereunder, concomitantly, hence the charge framed under Section 392 read with Section 34 of the IPC against the convicts, hence stands firmly proved, besides also lends an apt firm probative vigour, to, the uneroded testification of PW-5.

15. Co-convict Anil Kumar, rendered his disclosure statement, borne in Ex.PW2/A, and, thereon, PW-2 Jarnail Singh, has appended his signatures, as a witness thereto, and, thereafter under Ex.PW2/C, recovery, of, the items borne therein, hence, stood effectuated, at the instance of convict Anil Kumar, whereon also the signatures of PW-2, as, a witness thereto, rather stand appended, (i) and, with PW-2 Jarnail Singh, in his testification on oath, making echoings, in, proof, of, apt veracities, of, all the recitals borne therein, (ii) hence, the apt sequitur thereof, is, qua the aforesaid valid recovery(ies), of, all items borne in Ex.PW2/C, hence, being cogently proven, to, stand effectuated thereunder, and, also thereupon corroboration, standing meted, vis-a-vis, the uneroded testification qua the genesis of the prosecution case, as, rendered by PW-5.

16. Furthermore, the place of occurrence was identified, under a disclosure statement, rendered by co-convict Shayamu Yadav, and, as comprised in Ex.PW4/A. PW-4 Jasbir Singh, witness thereto, in his testification, proves all the recitals borne therein, thereupon, it is to be invincibly concluded, qua the prosecution also proving the place, whereat, the occurrence took place, besides formidably proves qua the participation therein, of all the convicts. The reason for forming the aforesaid conclusion, arises, from the factum of each of the witness(es) to the above stated memos, even during the course of theirs being subjected, to, the ordeal, of, a rigorous cross-examinations, theirs yet remaining unshattered, whereupon, reiteratedly credibility is to be imputed, to their respective testifications rendered, qua, the relevant factum probandum, and, as borne, in their respective examinations-in-chief.

17. The learned trial Court had, upon, anvil of Ex.PW10/B, making disclosures qua the victim/complainant, in sequel to an assault being perpetrated, upon him, by the convicts, his being entailed with simple injuries, upon his person, hence recorded a conclusion against the accused, qua theirs committing, an offence constituted under Section 323 of the IPC read with Section 34 of the IPC. Since, the aforesaid medical evidence also bears concurrence, with, the uneroded testification, of, PW-5, thereupon, the findings of conviction recorded, upon, the co-convicts, for theirs committing offences punishable, under Section 323, IPC read with Section 34 of the IPC, are, sustainable. Consequently, the findings recorded by the learned trial qua the accused committing offences punishable under Section 392 and Section 323 of the IPC read with Section 34 of the IPC, do not, suffer from any infirmity.

18. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, not suffering from any gross perversity or absurdity of mis-appreciation and non appreciation of germane evidence on record.

19. Consequently, all the appeals are dismissed. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

FAO No. 227 of 2018 along
with FAO No. 75 of 2018.
Reserved on: 3rd August, 2018.
Decided on : 8th August, 2018.

**1. FAO No. 227 of 2018**.

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

Versus

Nindu Sharma and others .....Respondents.

**2. FAO No. 75 of 2018.**

Nindu Sharma .....Appellants.

Versus

Ved Prakash Maggu & Others .....Respondents.

**Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application –** Engineering student – Death - **Monthly income- Future prospects- Determination –** Claims Tribunal assessing monthly income of deceased, an engineering student @ Rs. 10000 and awarding compensation accordingly- Appeals by claimants as well as insurer– Insurer contending that deceased was unemployed and no increase towards future prospects can be given **-** Held – Deceased was an engineering student - O n completing his engineering course he would have definitely secured an employment either in government sector or in private sector- Per mensem salary of deceased can be presumed to be Rs.15,000 - 40% increase on presumed salary to be given towards future prospects as he was 22 years- Deceased being bachelor, 50% deductions to be made for personal expenses –Multiplier of 18 applicable –Compensation re determined- Award modified – Appeals partly allowed. (Paras 4,5,6 & 7)

***Cases referred:***

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700
Sarla Verma vs. DTC, (2009)6 SCC 121

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|---|---|
| For the Appellant(s): | Dr. Lalit Kumar, Advocate, in FAO No.227 of 2018<br>Mr. Naresh K. Sharma, Advocate in FAO No.75 of 2018. |
| For Respondents No. 1 & 2: | Mr. Naresh K. Sharma, Advocate, in FAO No. 227 of 2018 and Mr. Rajinder Singh Thakur, Advocate, for respondent No.2 in FAO No. 75 of 2018. |
| For Respondent No.3: | Dr. Lalit K. Sharma, Advocate in FAO No. 75 of 2018. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The learned Motor Accident Claims Tribunal, Bilaspur, had, vis-a-vis the dependents, of, deceased Dixant Sharma, who met his end in a motor vehicle accident,

spurring, from the rash, and, negligent manner of driving, of, the offending vehicle, by Munnabar Shah, respondent No.2, hence, computed compensation, borne in a sum of Rs.16,95,000/-, along with interest, at, the rate of 7.5% per annum, from, the date of institution of petition, till its final realization. The indemnificatory liability thereof, was, burdened upon the insurer, of, the offending vehicle. The insurer as also the claimants, are, aggrieved by the award pronounced by the learned Tribunal, in, Claim Petition No. 5/2 of 2016, hence, they respectively instituted, the aforesaid appeals, before this Court.

2. The learned counsel appearing, for the insurer, of the offending vehicle, has, contended with vigour, that the learned tribunal has fallaciously rendered, hence, affirmative findings, upon, the issue appertaining to the the relevant collision, which, occurred inter se the motor cycle bearing No.HP-33(T)-8275, whereon the deceased was astride, as, its driver, and, the offending vehicle, bearing No. HP-02-1662, being, a, sequel of rash and negligent manner of driving of the offending bus, by Munnabar Shah, respondent No.2. He contends, that, the apt collision, which occurred, inter se, the offending bus, and, the motor cycle, whereon, the deceased was astride, as its driver, rather being a sequel, of, rash and negligent manner, of, hence its driving, by deceased one Dixant Sharma. However, the aforesaid contention, cannot be accepted, given apart, from, the apt FIR, standing registered against respondent No.2, an eye witness to the accident, PW-2 Paras Pande, in his testification, comprised in his examination-in-chief, rather proving all the incriminatory recitals, borne therein, wherein, he makes pointed articulations, bearing, concurrence with the apt recitals borne in the FIR, Ex.PW1/C, testification whereof borne in his examination-in-chief, rather remained unshattered of its efficacy, even during the exacting ordeal of his being subjected, to, an inexorable cross-examination, by the learned counsel appearing, for the insurer. The apt sequitur thereof, is, qua the affirmative findings rendered by the learned Tribunal, upon, the issue appertaining to the apt collision, being a sequel, of, rash and negligent manner, of, driving of the offending bus, by respondent No.2, rather not suffering from any apparent fallacy.

3. Be that as it may, one Nindu Shrma, the mother of the deceased, as apparent, from a perusal, of, her testimony, as placed before this Court, for its perusal by the learned counsel for the claimants, makes therein only a bald testification, unsupported by any apt befitting best corroborative evidence thereof, qua the deceased, from his purported avocation, of, his imparting private coaching(s) to students, from, his abode, his hence drawing, a, per mensem salary of Rs.15,000/-, hence, in the learned tribunal, not, meteing any credence thereto, is, rather construable, to make hence befitting, and, sagacious, apt conclusion. The learned counsel, for the insurer, further more contends, that hence the award of the learned tribunal, computing a sum of Rs.10,000/-, as per mensem salary, drawn by the deceased, on his coming, to be employed as an Engineer, rather warranting interference by this Court. However, the learned counsel appearing for the claimants, in FAO No. 75 of 2018, has contended with much vigour, that, with the deceased in contemporaneity, vis-a-vis, his demise, evidently as personified by Ex.PW1/J, prosecuting his 5th semester in B. Tech Civil Engineering course, and, with PW-3 one Rakesh Kumar, rendering, a, testification qua his after completing, his B. Tech engineering course, his being deployed, as, a Junior Engineer, in the PWD department, and, his rearing a salary of Rs.17,000/- per mensem, (i) thereupon, when hence imminently, the deceased would akin therewith, rather upon his completing his engineering course, would obtain a similar employment hence in a government sector or in a semi government sector, and, would also draw a salary akin to the salary, drawn by PW-3, hence, the salary, of, the deceased was enjoined to be computed in consonance therewith, and, significantly without any deduction, therefrom being meted, as untenably meted by the learned tribunal. The veracity of Ex.PW1/J, is, not contested by the insurer. The prestige of the college, whereat,

the deceased, at the relevant time, was prosecuting his studies, is also not cast any shadow of doubt. The effects thereof (i) are that deceased Dixant Sharma, on completing his engineering course, his, hence definitely securing an apt employment, either in government sector, or in a non government sector, whereupon, there being also a likelihood, of, his drawing a salary not less than Rs.17,000/- per mensem. The effect of the aforesaid inference, would be eroded, (ii) only, upon, evidence being adduced, by the insurer, comprised, in the graduates of the apt College, of Engineering, on obtaining, hence, employments in the government sector or in the non government sector, theirs drawing salary less than Rs.17,000/- per mensem. However, the aforesaid evidence is amiss, thereupon, it is concluded that deceased Dixant Sharma, would, on completing his engineering course, from, the College of Engineering, would hence definitely rather draw a salary not less than Rs.17,000/-, upon, his coming to be employed with a government agency or with a non government agency. However, keeping in view the facts and circumstances of the case, the per mensem salary of the deceased, is, presumed to be Rs.15,000/-.

4. The learned counsel appearing, for the insurer has relied, upon paragraph No. 58, of, a decision rendered by the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.58 extracted hereinafter:

> "58. The seminal issue is the fixation of future prospects in cases of deceased who were self employed or on a fixed salary. Sarla Verma, 2009 ACJ 1298 (SC) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects It has not, per se, allowed any future prospects in respect of the said category."
>
> (p.2721)

and has, hence, contended (i) that with, a, trite expostulation existing therein vis-a-vis, the validity(ies), of meteing, of hikes vis-a-vis the future incremental prospects qua the last salary drawn, by the deceased, being bedrocked, upon, firm evidence qua the deceased, at the relevant time, holding, a permanent job, and, his being below 40 years, (ii) thereupon, with, the extant factual scenario, rather visibly, depicting only qua the mere likelihood, of, the deceased, being employed, on his completing, the apt engineering course, from, the apt College of Engineering, hence, he cannot per se be concluded, to, with any iota, of, certitude, hence, rear an income of Rs.15,000/- per mensem, upon the concomitant, mere, likelihood, of, his gaining employment in a Government sector or in a non government sector, nor hence he can be concluded to be holding, any, indefeasible entitlement(s) qua hence any meteings, of, any hikes and accretions, towards, future prospects, upon, the aforesaid per mensem salary. (iii) Moreso, reemphasisingly, when, the aforesaid paragraph, appertains, to a scenario, where, the deceased, at the relevant time, hence, holds a permanent employment, whereas, the deceased contrarily hereat rather evidently, not, at the relevant time, hence holding, any permanent employment, either, in the government sector or in the non government sector, (iv) thereupon, render infirms, hence, any, apt meteings, of the relevant hikes, vis-a-vis, the further incremental prospects. The aforesaid submission does hold vigour, given, a clear precise expostulation, occurring in paragraph supra, of, the deceased, at the relevant stage, being enjoined to evidently, hold a permanent job, and, his (v) also his evidently drawing, therefrom, a certain income also when hence it cannot be concluded that, upon, his completing, the apt Engineering course, he, would definitely secure, a permanent job, with a government agency or with a non government agency, nor thereupon it can be hence concluded, of, his deriving any certain income therefrom, (vi) yet the apt meteing(s), do, despite haziness qua the certainity, of, his employment, and, also

nebulousness, qua certainity, of, derival, of, income therefrom, rather arise, from, the imminent likelihood, of, the deceased, on completing his course, in engineering, his hence getting tan apt employment, with, a government agency, or in a non government agency, especially when the aforesaid imminence, of, all likelihood(s), is, rather axed, by the fatal accident, (vii) thereupon, renders attracted hereat, the mandate, occurring in the paragraph 59, of the verdict of the Hon'ble Apex Court, rendered, in Pranay Sethi's case (supra), paragraph whereof stands extracted hereinafter, (viii) conspicuously, when, hence, for all aforestated reasons, this Court, is, disinclined, to, accept the apposite herewith, all, the aforesaid submission(s), of, the learned counsel, for the insurer, AND, moreso when parity(IES) vis-a-vis apt hikes, is visited, upon, apt employment(s), both, in government, and, in non government sector. Paragraph No.59 reads as under:-

> "59.Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the

> inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life,etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable." (p.2721-2722)

Consequently, while, placing reliance thereon, 40% hikes or accretions, on anvil, of, future incremental prospects, qua the last salary drawn by him, from the imminent likelihood, of, his obtaining employment, in a non government agency or in a government agency, is, rather rendered hence aptly meteable, (i) especially when the deceased, is reflected, in the postmortem report, to be aged 22 years, at the relevant stage. Consequently, after meteing 40 %, increase(s), vis-a-vis, the apposite last drawn salary, thereupon, the relevant last drawn salary, of, the deceased, is recoknable to be Rs.21000/-, [Rs.15000/-(estimated salary of the deceased)+Rs.6000/-(40% of the last drawn salary). Significantly, with the deceased, being, a bachelor, 50% deduction, is to be visited, upon, a sum of Rs.21,000/-, deducted amount whereof, is, calculated at Rs.10,500/- per mensem. Consequently, the annual dependency, including, the future hikes towards the apt future incremental prospects, is, worked out, now at Rs.10,500X12=Rs.1,26,000/-.

6. The further, contention of the learned counsel appearing, for the insurer, that upon the aforesaid sum, of annual dependency, a multiplier of 13, is enjoined to be applied, is, however, rejected, for the reason, (a) that with there occurring a candid pronouncement in a case tilted as **Sarla Verma vs. DTC**, reported in ***(2009)6 SCC 121***, that a multiplier of 18, is, applicable for the age groups of 15 to 21, and 21 to 25 years. Consequently, with the deceased, as depicted, by the postmortem report, Mark-A, being aged about 20 years at the relevant time, hence a multiplier of 18 is rather hereat applicable. After applying the apposite multiplier of 18, the compensation amount, is assessed in a sum of Rs.1,26,000/-x 18=Rs.22,68,000/- (Rs. Twenty two lacs and sixty eight thousand only).

7. Moreover, the learned Tribunal, has committed a gross illegality by its quantifying compensation vis-a-vis the claimants under apt conventional heads, namely (i) love and affection, and (iii) funeral expenses, in a sum of Rs.50,000/- and Rs.25,000/ respectively. Consequently, with the Hon'ble Apex Court in a verdict rendered in **Pranay Sethi's** case (supra), rather expostulating, that reasonable figures, under conventional heads, namely, loss to estate, and, funeral expenses being quantified, only upto Rs.15,000/- , and, Rs.15,000/- respectively, hence, the award of the learned tribunal is also interfered, to the extent aforesaid. Accordingly, in addition to the aforesaid amount of Rs.22,68,000/-, the claimants, are, entitled to assessment, of, compensation(s), under conventional heads, namely, loss to estate, and, funeral expenses, sums of Rs.15,000/-, and, Rs.15,000/-, as such, the total compensation, to, which the claimants are entitled comes to Rs.22,68,000/- +Rs.15,000/- + 15,000/-= Rs.22,98,000/-(Rs. Twenty two lacs and ninety eight thousand only).

8. For the foregoing reasons, the appeals filed by the insurer as also by the claimants are partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.22,98,000/-(Rs.twenty two lakhs and ninety eight thousand only) along with pending and future interest @9 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the

aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants in the hereinafter extracted manner:-

> "Petitioner No.1, being entitled to 70% amount along with proportionate interest and petitioner No.2 being entitled to 30% amount along with proportionate interest"

All pending applications also stand disposed of. Records be sent back forthwith.

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

Vinod Kumar .....Petitioner.
Versus
M/s Nova Security Service Pvt. Ltd. ....Respondents.

CWP No. 2658 of 2016.
Reserved on : 30th July, 2018.
Decided on: 8th August, 2018.

**Industrial Disputes Act , 1947 –** Section 9 A- **Requirement of giving notice – Circumstances explained -** Services of petitioner terminated by employer after holding disciplinary proceedings – Challenge thereto – Labour Court refusing stay of termination order- Petitioner filing writ and challenging termination of services on ground that no statutory notice u/s 9A of Act was given to him before terminating his services – Termination from services involved change in terms and conditions of employment and notice was required to be given- Held – Section 9 A of Act is applicable when terms and conditions of services of workman are intended to be altered by employer - It is not attracted when services are being terminated after holding due disciplinary proceedings against workman concerned. (Paras 1 & 2)

For the Petitioner: Mr. Shivank Singh Panta, Advocate.
For the Respondent: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

Through the instant petition, the petitioner seeks quashing of order, borne in Annexure P-5, and, also espouses relief for quashing of orders, borne in Annexure P-8, whereunder, the apposite interim relief qua staying of operation, of order dismissal of the services, was declined, vis-a-vis, the petitioner.

2. The aforesaid apt application, was, cast during the pendency of the apt reference petition, before, the learned Industrial Tribunal-cum-Labour Court, Shimla. Apt reference whereof, stands, couched in the hereinafter extracted phraseology:-

> "Whether the demand Notice dated 12.01.2009 raised under section 2K of the Industrial Disputes Act,1947 by Sh. Ashok Kumar son of Sh. Tula Ram Malik and 9 others drivers before the management of the Oberio Cecil Hotel, Chaura Maidan, Shimla and management of Wild Flower Hall, Mashobra, Shimla with the plea that the terms and conditions of their service have been changed by the

concerned management without complying with the provisions of section 9-A of the Act, ibid, is legal and justified? If not, to what wages, service benefits and relief the concerned drivers are entitled to from the concerned employer as per demand notice dated 12.1.2009."

"Whether the Demand Notice raised by Sh. Ashok Kumar son of Shri Tula Ram Malik & 9 others drivers vide demand notice dated 12.01.2009 (copy enclosed) that their employers are the management of the Oberoi Cecil Hotel, Chaura Mandan, Shimla and Management of Wild Flower Hall, Mashobra, Shimla and M/s Nova Security Prvate Ltd., Quite Office NO.14, Sector 35-A Chandigarh cannot be considered to be their employer, as alleged in the Demand Notice and is legal and justified? If yes, to what service benefits and relief the concerned drivers are entitled to as per Demand Notice dated 12.1.2009."

The aforesaid reference visibly appertains, qua a dispute holding visible contradiction, vis-a-vis, the relief espoused, in, the apt application. The effect thereof, is, qua per se, hence, the apt application, whereon the relief to the petitioner, rather stood declined, being not maintainable before the learned tribunal. The further reason for validating, the, refusal of apt relief, vis-a-vis, the petitioner, is engendered, from, (I) despite the apt relief being previously, sought for, as, an interim relief, though an earlier application, whereon, on 31.07.2014, rather the learned tribunal, declined relief to the petitioner, (ii) yet, the, petitioner subsequent thereto, in as much as, on 1.8.2015, espousing by his casting an apt application hence for rendition of a similar therewith apt relief, thereupon, the subsequent thereto, application was barred, and was not maintainable. (iii) Preeminently, with the order of dismissal recorded, upon, the earlier, application, for want of its being quashed, rendered it, to acquire conclusivity, (iv) and also with the subsequent application standing cast under the provisions of Section 9A of the Industrial Disputes Act, provisions whereof stand extracted hereinafter:-

**"9A. Notice of change**.- No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change,--

(a) without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or

(b) within twenty- one days of giving such notice:

Provided that no notice shall be required for effecting any such change--

(a) where the change is effected in pursuance of any [1] settlement or award]; or

(b) where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply."

(v)Provisions aforesaid, though, make trite expostulation(s) qua the employer being barred to change the terms, and, conditions, of, the service of the workman, deployed by him or by it, (vi) unless preceded by a statutory notice, (viii) AND, though stand relied upon by the applicant/petitioner, to seek, the, affording of relief upon his apt application, (ix) yet no strength can be derived therefrom by the petitioner, given theirs appertaining to the apt pre-reference stage, and, upon transgression thereof, by the employer, hence equipping the workman, to, raise an industrial dispute in respect thereof, and, on failure(s) to seek, for,

an apt reference, being made by the Labour Commissioner, vis-a-vis, the Industrial Tribunal. (x) However, when the relief claimed in the application, is, openly contradistinct therewith, besides when there is no bar in the provisions, borne in Section 9A of the Industrial Disputes Act, against, the employer, qua, initiating or concluding, any, departmental inquiry, against, the delinquent employee, nor with any bar being embodied therein, against, the employer, or upon inquiry officer concerned, for, hence rendering findings against the delinquent workman, n sequel whereof, the order, of, dismissal, of, the workman from services, is, rendered, (xi) thereupon, also the mandate, of, Section 9(A) of the Industrial Disputes Act, is, unavailable for recourse by the petitioner, rendering hence, the apposite application being not maintainable, as aptly concluded by the learned tribunal.

3. Be that as it may, even if, assumingly, though the contest reared by the respondent, appertains qua the petitioner being engaged by M/s Mercury Car Rental, and, hence the order dismissing his services, rendered by M/s Nova Security Service Private Limited, hence, being infirm or invalid, thereupon, also the only efficacious alternative remedy available for recourse, vis-a-vis, the petitioner, is, comprised in his casting, an onslaught, upon, the order of dismissal, by his concerting to raise an industrial dispute in respect thereto, and, thereafter also his making strivings for qua the Labour Commissioner, rather making the apt reference, in respect thereto, vis-a-vis, the industrial Tribunal concerned.

4. For the foregoing reasons, there is no merit in the instant petition, and, it is dismissed accordingly. Consequently, the orders impugned before this Court are affirmed and maintained. All pending applications also stand disposed of. No costs.

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

Vipin Kumar & others .....Appellants/Defendants.
Versus
Roshan Lal .....Respondent/Plaintiff.

RSA No. 461 of 2006.
Reserved on : 27th July, 2018.
Decided on : 8th August, 2018.

**Specific Relief Act, 1963** – Sections 34 & 38 – **Himachal Pradesh Tenancy and Land Reforms Act, 1972** – Sections 31 & 104 (Act) - Suit for declaration and injunction – Grant of – Plaintiff filing suit for declaration that he was tenant in suit land under predecessor- in-interest of defendant and has become owner under provisions of Act – Defendant contesting suit and claiming plaintiff having relinquished tenancy in favour of his father - Trial court decreeing suit – First Appellate court dismissing defendant's appeal - RSA – Evidence revealing plaintiff continuously recorded as tenant under predecessor-in- interest of defendant – Revenue entries wrongly entered in favour of defendant without orders of competent authority – Relinquishment of tenancy in favour of predecessor-in-interest of defendant not permissible under law - Plaintiff found in possession of land initially as tenant and having become owner under Act – Held, lower courts justified in decreeing plaintiff's suit – Judgments and decrees of lower courts upheld – RSA dismissed (Paras 8, 9 & 10)

**Himachal Pradesh Land Revenue Act, 1954** – Sections 46 & 171 – Wrong revenue entries – Jurisdiction of civil court – Held, party aggrieved by wrong revenue entries recorded in

periodical records, entitled to file declaratory suit before civil court – Jurisdiction of civil court not barred. (Para 11)

**Limitation Act, 1963 –** Article 113 – Wrong revenue entries – Limitation for filing suit – Computation – Held, period of limitation in filing suit will commence from date when opposite party makes invasion on plaintiff's rights on basis of wrong revenue entries – Date of making entries not relevant. (Para 12)

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| For the Appellants: | Mr. Rajneesh K. Lal, Advocate vice to Mr. Sanjeev Sood, Advocate. |
| For the Respondent: | Mr. Ajay Sharma, Advocate. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The plaintiff's suit for rendition of a declaratory decree, vis-a-vis, the suit khasra numbers, stood, affirmatively decreed by the learned trial Court, and, in an appeal carried therefrom, by, the aggrieved defendants, before the learned First Appellate Court, the latter Court also affirmed the verdict pronounced by the learned trial Court. The defendants/appellants, being aggrieved therefrom, hence, motion this Court, through, the instant Regular Second Appeal.

2. Briefly stated the facts of the case are that the plaintiff had filed a suit for declaration claiming himself to be owner in possession and with consequential relief of permanent injunction restraining the defendants from interfering over the suit land detailed in the plaint. The plaintiff further claimed that the revenue entries qua the ownership and possession over the suit land comprised Khasra No.1250 and the entries of ownership over Khasra No.1251 with defendants are wrong, illegal and collusive. The plaintiff has further claimed that the land has been carved out during settlement from old Khasra No.248 measuring 4 kanals, 19 marlas, which has been shown in the ownership of predecessor-in-interest of the defendants and in possession of the predecessor-in-interest of the plaintiff one Labhu as tenant and the tenancy has never been relinquished at any time thereafter, but the defendants in-connivance with settlement staff after getting bifurcation of old khasra NO.248 into suit land has also changed the entries qua possession including the owner in possession over the suit land as the plaintiff has never been dispossessed by the defendants. The plaintiff has further averred that defendant No.1 had instituted a false suit titled as Kishori Lal vs. Roshan Lal seeking declaration qua part of suit land comprised in Khasra No.1251 in which the present plaintiff being defendant filed counter claim seeking his right over the suit land, but that suit was withdrawn by defendant No.1 and thereafter the present plaintiff also withdrew his counter claim with permission to file a suit/counter claim afresh and thereafter the present suit has been filed by the plaintiff before the learned trial Court seeking declaration and injunction against the defendant qua the suit land.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objection qua maintainability, jurisdiction and locus standi etc.. On merits, the defendants have denied any right, title or interest of the plaintiff over the suit land as the defendants have denied the possession of the plaintiff over the suit land in any capacity including tenancy as pleaded in the plaint. The defendants have further pleaded and claimed that father of the plaintiff had relinquished his tenancy rights orally in favour of the defendants during his life time and handed over the vacant possession, since then, the defendants have pleaded and claimed to be owner in possession of the suit land and has further claimed and pleaded that the plaintiff forcibly trespassed over part of suit land

comprised in Khasra No.1251 in July, 1990, but the defendants have denied any tenancy of the plaintiff over the suit land. The defendants have further pleaded and claimed that the entry during settlement was found to be incorrect as the possession of the defendants was found over the suit land and thereby the proper entry has been incorporated during settlement. However, the defendants have pleaded and claimed that he name of the plaintiff in column of possession on part of the suit land being encroacher has been recorded during settlement in connivance with settlement staff as the plaintiff has trespassed over the part of the suit land after the withdrawal of the previous suit by the present defendant. The defendants have specifically pleaded and claimed that neither the plaintiff nor his predecessor-in-interest has ever remained in possession over the suit land in any capacity during the pendency and thereby have pleaded and claimed that the plaintiff has no right, title or interest over the suit land.

4. The plaintiffs filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is tenant in possession of the suit land and has become owner of the suit land by operation of law as alleged?OPP
2. Whether revenue entries during settlement are collusive, illegal and wrong, as alleged?OPP.
3. Whether the plaintiff has trespassed in Khasra No.1251 after the withdrawal of the previous suit by defendants as alleged?OPD.
4. Whether the plaintiff was never inducted as tenant on the suit land, as alleged? OPD.
5. Whether the plaintiff has no locus standi to sue for declaration and injunction as he is not in possession of the suit land? OPD.
6. Whether the suit for declaration and injunction is not maintainable? OPD.
7. Whether the civil court has no jurisdiction to try the present suit? OPD.
8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom, by, the defendants/appellants herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the findings recorded by the learned trial Court.

7. Now the 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, on 30.10.2007, 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 suit of the plaintiff seeking correction of long standing revenue entries to which presumption of truth is attached was maintainable or triable by the civil courts when relief could only has

been granted by the revenue courts under Section 171 of the Himachal Pradesh Land Revenue Act?

2. Whether the suit of the plaintiff for declaration and correction of revenue entries which were admittedly made more than 15 years prior to the filing of the suit was within limitation?

3. Whether the presumption of truth attached to the long-standing revenue entries showing the defendant-appellant to be owner in possession of the property can be held to be rebutted and the inference drawn by the courts below are based on wrong assumptions not sustainable in law?

**Substantial questions of Law No.1 to 3:**

8. The predecessor-in-interest of the plaintiff, one Labhu, is, in the apt revenue record comprised, in, the jamabandi, appertaining to the year 1953-54, borne in Ex.P-7, and, in the jamabandi, appertaining to the year 1959-60, borne in Ex.P-6, besides in the jamabandi, appertaining to the year 1967-68, EX.P-3, and, further in khasra girdwari, appertaining to the suit property, commencing from 24.10.1968 to April, 1974, khasra girdawari whereof is borne in Ex. D-5, hence, continuously recorded therein, to be, a, tenant under the defendants, vis-a-vis, the suit land. However, the efficacy of the entries borne therein, is, contested by the defendants. All the aforesaid reflections, borne, in the afore referred exhibits, do, inevitably carry, a, presumption of truth, and, upon the defendants' contest, vis-a-vis, efficacy thereof, rather achieving succession, (a) thereupon, the apt presumption of truth, as, carried by the reflections, borne, in the aforesaid exhibits, would be eroded, (b) with a concomitant effect qua the concurrent verdicts pronounced, by, both the learned Courts below, whereunder, the plaintiff's suit stood decreed, rather constraining this Court, to, reverse the apt concurrent verdicts.

9. Be that as it may, it is incumbent, upon, this Court to allude, to, evidence, as, adduced by the defendants, for, hence displacing the presumption, of, truth, garnered by the aforesaid exhibits, wherein, the predecessor-in-interest, of the plaintiff, is, reflected as, a, non occupancy tenant, vis-a-vis, the suit khasra number. In the defendants' endeavour to repel, the efficacy of the presumption, of, truth, marshalled by the aforesaid reflections, borne in the exhibits aforesaid, (i) the defendants merely contend that, upon, failure of the plaintiff to adduce receipts, in display of galla being purveyed by one Labhu, to the defendant or their predecessors-in-interest, hence per se, thereupon, the presumption of truth, ascribable to the apposite entries, hence, getting eroded. However, the aforesaid espousal reared by the defendants, is, amenable to falter, (ii) given the defendants, acquiescing qua Labhu, cultivating the suit land, from about 20 to 25 years, (iii) and, also the defendants rearing a plea of the suit land being mortgaged, vis-a-vis, Labhu, (iv) and, thereafter on redemption of the suit land, rather the defendants holding possession of the suit khasra numbers. Moreover, the aforesaid plea(s), are, per se flimsy and pretextual, (v) given theirs being raised, without any contention in consonance therewith, standing embodied in the apt written statement, (vi) and, hence theirs being reared beyond pleadings, hence are, discardable, corollary whereof, is qua, an inference being bolstered qua the defendants acquiescing, vis-a-vis, the predecessor-in-interest of the plaintiff, one Labhu, hence, holding possession, of, the suit khasra number(s). The defendants had also reared a plea qua the predecessor-in-interest of the plaintiff, one Labhu making oral relinquishment of his tenancy, vis-a-vis, the suit khasra number(s), and, qua the defendant. Even the aforesaid plea, cannot be ascribed any tenacity, given no documentary evidence, for, hence meteing succor thereto, being adduced, rather when there exists a statutory interdiction,as, borne in Section 31 of the H.P. Tenancy and Land Reforms Act, provisions

whereof stand extracted hereinafter, against relinquishment, of, tenancy(s) qua the landowner, (vii) thereupon, the aforesaid plea also cannot be accepted, rather it gives momentum, for, erection of a firm inference, qua the defendants acquiescing, qua one Labhu holding, the, apposite capacity of, a, gair maurusi, vis-a-vis, the suit khasra number(s), (viii) importantly, when as aforestated, no cogent evidence, stands adduced, even for sustaining the aforestated pretextual plea, and, as, may be comprised in the apposite therewith rapat, rather being entered by the Patwari Halqua concerned. Provisions of Section 31 of the H.P. Tenancy and Land Reforms Act read as under:-

> **"31. Relinquishment**.--No relinquishment of a tenancy shall be made by a tenant in favour of landowner. However, if a tenant wants to make a voluntary surrender of his tenancy land, the same shell be in favour of the State Government. The State Government shall have right to induct any suitable tenant or landless agricultural labourer to the relinquished land in the manner to be prescribed."

In summa, the inevitable sequel thereof, is, qua the presumption of truth ascribable to all the reflections occurring in Ex.P-3, Ex. P-6, Ex.P-7, Ex.D-5, wherein, one Labhu, the predecessor-in-interest of the plaintiff, stands depicted, as a tenant, vis-a-vis, the suit khasra number(s), hence remaining uneroded, thereupon, conclusivity is to be ascribed, vis-a-vis, the apposite reflections, borne in all the aforesaid exhibits.

10. The effect, of, ascription(s) of conclusivity, vis-a-vis the apt reflections, carried in the aforesaid exhibits, does, foist, a, duty upon this Court, to conclude qua, the, purported stay entry borne in exhibit D-2, exhibit whereof, is a copy of missal hakiyat bandobast jadid, appertaining to the year 1976-77, wherein, the plaintiff stands displayed in the apposite column, to, rather hold unathorised possession of the suit kahsra numbers, rather carrying any validity or otherwise. The aforesaid reflections carried in Ext. D-2, in case, stand, established to be authorisedly made, thereupon, given its comprising, the latest revenue record appertaining to the suit land, would, hence render them, to, enjoy preeminence, vis-a-vis, prior thereto prepared revenue records, and, also would hence rebut the presumption of truth, as, carried by all the apt entries, borne, in the aforesaid preceding therewith apt revenue records. In determining whether the purported stray entry borne in Ex. D-2, carries, any, presumption of truth or also is authorisedly made, this Court on making disinterrings, from, the apposite thereto record, has, rather failed to discover any valid order made by the competent revenue officer, in sequel, whereto, the purported stray entry, borne in Ex.D-2, stood recorded. The effect, of, want of making, of, any valid order, by any revenue officer, in sequel whereto, EX.D-2, was prepared, rather renders, all the apt reflections borne therein, hence, manifesting qua the plaintiff standing depicted as an encroacher, vis-a-vis, the suit land, being, hence construable to be unauthorisedly made, (i) hence, they does not don any mantle of any validity, sequel thereof is qua theirs being enjoined to be quashed and set aside, also hence it does not outweigh the creditworthiness, of, a;; the reflections borne in the aforesaid exhibits, wherein, Labhu, the predecessor-in-interest of the plaintiff, is depicted as, a, tenant, vis-a-vis, the suit land.

11. The learned counsel appearing for the aggrieved defendants/appellants herein, has contended with much vigour (i) that with the provisions borne in Section 171 of the H.P. Land Revenue Act (hereinafter referred to as the Act), especially the one occurring, in clauses (v) and (vi) to sub-section (2) of Section 171 of the Act, the relevant provisions whereof stand extracted hereinafter:-

> "171. Exclusion of jurisdiction of Civil Courts in the matters within the jurisdiction of Revenue Officers.-Except as otherwise provided by this Act-

(1).....

(2) A Civil Court shall not exercise jurisdiction over any of the following matter, namely-

(i).....

(ii).....

(iii).....

(iv) any notification direction the making or revision of a record-of-rights;

(v) the framing of a record-of-rights or periodical record or the preparation, signing or attestation of any of the documents included in sch a record;

(v-a) order regarding complete remeasurement of an estate or sub-estate under section 33A of this Act;

(vi) the correction of any entry in a record-of-rights, periodical record or register of mutation;....."

hence casting a statutory interdiction, against, the Civil Courts rather making any order for correction of any entry, borne in a record of rights, or against theirs making any order, for any correction in the register of mutation, nor hence with, the, civil court, holding any jurisdiction, to direct the framing of record of rights, whether annually or periodical, (ii) whereas, with the purported stray entry borne in Ex. D-2, appertaining, to the apt jurisdiction statutorily vested in the revenue officers concerned, and, also falling within the statutory interdiction cast, in, clauses (v) and (vi) to sub-section(2) of Section 171 of the Act, (iii) thereupon, the apt verdicts concurrently hence decreeing the plaintiff's suit rather are construable to be rendered without jurisdiction, and, hence the apt verdicts, are, amenable to suffer negation. However, the aforesaid contention reared, before this Court by the learned counsel, appearing for the defendants/appellants herein, has no foundation, as, it has been made, with his being completely unmindful, vis-a-vis, the provisions borne in Section 38, and, in Section 46 of the Act, provisions whereof also stands extraction hereinafter:-

**38. Restrictions on variations of entries in records.** - Entries in records-of-rights or in [periodical] records, except entries made in [periodical] records by patwaris under clause (a) of section 36 with respect to undisputed acquisitions of interest referred to in that section, shall not be varied in subsequent records otherwise than by -

(a) making entries in accordance with facts proved or admitted to have occurred;

(aa) making entries in respect of Government land in accordance with the order made by the State Government or by a Revenue Officer not below te rank of the Collector;

(b) making such entries as are agreed to by all the parties interested therein or are supported by a decree or order binding on those parties; and

(c) making new maps where it is necessary to make them.

**46. Suit for declaratory decree by persons aggrieved by an entry in a record.** - If any person considers himself aggrieved as to any right of which he is in possession by an entry in a record of rights or in [a periodical] record, he may institute a suit for a declaration of his right under [chapter VI of the Specific Relief Act, 1963]"

(i) whereas both the aforesaid provisions, are, be read in conjunction, with clauses (v) and (vi) to sub-section (2), of, Section 171 of the Act. Apparently, clauses (v) and (vi) to sub-

section (2) of Section 171 of the Act, confer an exclusive right upon a revenue officer, to, prepare the records, of rights, whether periodical or annual, and, also foist exerciseable jurisdiction, in, the revenue officer concerned, to, only initially make orders, for correction of any entry, in the records of rights or to make any order for making corrections, in the register of mutations, (ii) obviously, hence the Civil Courts, are barred to usurp the aforesaid jurisdiction, statutorily foisted under clauses (v) and (vi) to sub-section (2) of Section 171 of the Act. Nonetheless, the aforesaid simplistic conception carried by the aforesaid provisions, only, appertains, vis-a-vis, the apt jurisdiction contemplated, in, clauses (v) and (vi) to sub-section (2) of Section 171 of the Act, or in other words, it appertains to the apt jurisdiction, in respect thereto, as, exclusivity conferred upon the revenue officer concerned, (iii) yet their apt connotation, vis-a-vis, their scope and domain, as aforesaid, rather does not extend to Civil Court(s) hence being ousted to test the validity(ies) thereof nor their mandate(s) are extendable, to a construction of it overriding or benumbing, the, effect of the provisions borne, in, Section 38, and, in, Section 46 of the H.P. Land Revenue Act, (iv) rather the latter provisions are to be read in conjunction therewith, and, upon making a conjunctive reading thereof, vis-a-vis, clauses (v) and (vi) to sub-section (2) of Section 171 of the Act,(v) hence the inevitable inference therefrom, is, rather qua the exercise of jurisdiction, under, powers vested in the revenue officer under clause clauses (v) and (vi) to sub-section (2) of Section 171 of the Act, being statutorily made amenable, to face the apt test of validity(ies), upon, emergence, of, evidence qua the exercise of jurisdiction, under, clauses (v) and (vi) to sub-section (2) of Section 171 of the Act, by the Revenue officer, (vi) being not founded, upon, the facts proved on record, and, the relevant exercise of jurisdiction being not preceded by any order made by the Revenue officer concerned, and, the orders made by the revenue officer being not acquiesced, by apt interested parties or not being supported by any decree binding upon the parties. Consequently, when evidently hereat, the purported stray entry borne in Ex. D-2, does not satiate, any of the aforestated ingredients, cast in Section 38 and Section 46 of the Act, (vii) and with the latter provisions foisting a statutory right in the aggrieved, to make a challenge, upon, erroneous or false entries, as, carried in the apt revenue record, by his casting a civil suit, (viii) thereupon, obviously statutory preeminence, is, given to the verdicts, and, decrees pronounced by the Civil Courts, vis-a-vis, orders, if any, pronounced by the revenue officers, under the clauses (v) and (vi) to sub-section (2) of Section 171 of the Act, (ix) also hence the mightest clout or sway, is to be assigned, to the judgments and decrees pronounced by the civil courts, vis-a-vis, any orders initially or prior thereto, made by the Revenue Officers concerned. The effect of the aforesaid inference is qua the exclusionary provisions, depended upon, by the counsel for the appellant, and, as borne in Section 171 of the Act, are hence subject, to the provisions borne in Section 38 and in Section 46 of the Act, and, thereupon, the Civil Court(s) hence hold(s) jurisdiction to test the validity of any orders, as, initially made by any Revenue Officer, for making any entry in the record of rights, whether annual or periodical, and, concomitantly also hold jurisdiction to test the validity, of, any revenue entry(ies).

12. The learned counsel appearing for the aggrieved defendants/appellants herein, has, contended that, with the purported of stray entry borne in Ex.D-2 being effected in they year 1976-77, hence, with the suit being instituted belatedly therefrom, hence, the plaintiff's suit rather warrants, it being dismissed, it being filed beyond limitation. However, the aforesaid submission, cannot be accepted, as the apt accrual of causes of action, vis-a-vis, the aggrieved plaintiff, from the apposite entry, is not engendered, from the date of making of the entry, rather is engendered, from, the date of acquisition of knowledge, vis-a-vis, the entry, or accrual of apt causes of action qua the aggrieved, arising from, any proven overt acts, of, invasion or interference mounted, vis-a-vis, the settled rights, of, the aggrieved, upon, the suit property. Bearing in mind, the aforesaid, with the plaintiff acquiring knowledge, vis-a-vis, the invalid stray entry borne in Ex.D-2, (a) upon, prior to the

institution of the extant suit, the defendants instituting a suit, wherein, they espoused relief for rendition of a declaratory decree, vis-a-vis, the suit kahsra numbers, (b) and, also with his averring, qua thereat his acquiring knowledge, vis-a-vis, the inefficacy of the purported stray entry borne, in, Ex.D-2, and, when also leads evidence in consonance therewith, (c) thereupon, the date of preparation of Ex.D-2, is, insignificant nor therefrom the apt causes of action accrue, vis-a-vis, the plaintiff, rather accrual of causes of action, vis-a-vis, the plaintiff rather hence accrue, upon, his acquiring knowledge, vis-a-vis, the inefficacy of the purported stray entry, borne in Ex. D-2. Consequently, the plaintiff's suit is within limitation.

13. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial questions, of law are answered in favour of the respondent/plaintiff, and, against the appellants/defendants.

14. In view of the above discussion, there is no merit in the present Regular Second Appeal, and, it is dismissed accordingly. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Anita & others .....Appellants.

Versus

Chain Singh (deceased) through LRs. .....Respondents.

RSA No. 86 of 2005 &
CMP No. 7394 of 2016
Reserved on : 1.6.2018.
Decided on : 11.6.2018.

**Code Of Civil Procedure,1908 -** Order XLI Rule 25 – Remand of suit- Procedure- Held, where Court from whose decree appeal is preferred has omitted to frame or try any issue or to determine any question of fact which appears to Appellate Court essential to right decision of suit upon merits, Appellate Court may if necessary frame issues and refer same for trial to Court from whose decree appeal is preferred and in such case, it shall direct such Court to take additional evidence required - And such Court shall proceed to try such issues and shall return evidence to Appellate Court together with its findings and reasons – On facts, documents by defendants directed to be tendered before First Appellate Court with further direction to afford an opportunity to plaintiffs to adduce rebuttal evidence if any and thereafter pronounce fresh decision - Record of RSA ordered to be retained. (Paras 9 & 10)

For the appellants: Mr. Ajay Sharma, Advocate.

For the Respondents: Ex-parte.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge**

The instant appeal is directed by the aggrieved appellants, against, the, concurrently recorded verdicts, by both the learned courts below, whereby they pronounced affirmative decrees of permanent prohibitory injunction, and, of mandatory injunction vis-à-vis the suit property, and, against the defendants'.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for permanent injunction, restraining the defendants from forcibly ousting plaintiff from exclusive hissadari possession, digging foundations or raising any construction by arbitrary choice or from changing nature of the land measuring 8 kanals 10 marlas bearing khewat No. 801 min, khatauni No. 1131 min, khasra No. 3275 per jamabandi for the year 1980-81, situate in village Amb, Tehsil Amb, District Una, H.P. till final partition between the parties. In the alternative, prayer for mandatory injunction was also made directing the defendants to remove construction marked by letters ABCD shown in red colour in the site plan attached with the plaint in case defendants succeeded in raising construction during the pendency of the suit. It has further been submitted that the suit land is jointly owned by the plaintiff, defendant No.1 and other co-sharers but possession is with the plaintiff as hissadar. Defendant No.2 is husband of defendant No.1 whereas the other defendants are stranger having no right in the suit land. HP PWD road is stated to be abutting the suit land i.e. Hamirpur Road and thereby land is valuable one. No co-owner can use the land to his exclusive use.

3. The suit was contested by the defendants and he has filed written statement, wherein, they have taken preliminary objections of maintainability, non-joinder, mis-joinder of parties and valuation. It has been submitted that the suit land is owned by defendant No.1, plaintiff and other co-sharers but stated that plaintiff is not in its exclusive hissadari possession and defendant No.1 had purchased 10 marlas land out of suit land from one Surinder Singh and others who were co-sharers to the extent of 1/3rd share vide registered sale deed dated 9.7.1997. total area was measuring 7x13 karm abutting to the road and defendant No.1 was put in possession by the then owner and in this respect, mutation No. 4403 was also sanctioned. Earlier the suit land was owned by one Hardev Singh, Shiv Dev Singh and predecessors of Chain Singh who were in individual possession on different parcels of land and had also constructed shops over it and thereby all co-owners were entered as owners in possession. The shops fell down and the suit land became vacant as abadi plot, however, possession remained with all the co-owners individually to the extent as they were owners. Exclusive possession as hissadar was never with the plaintiff. It is also stated that partition has taken place through competent authority and in this respect, mutation No. 4441 has been sanctioned showing co-owners in their individual possession and entries showing the land to be abadi are absolutely wrong and have been made mechanically. The possession of 10 marlas of land is with defendant No.1, which has been purchased by her from Rattni Devi and the same has been shown in the site plan. Earlier vendor of defendant No.1 was in possession of shops which have fell down and now defendant No.1 has raised construction over some portion. The defendant in no way raised construction over more land than for which she was entitled nor has gone out of possession, thus, construction raised is over the land which was put in her possession by the earlier owner. Thus dismissal of the suit with costs has been prayed.

4. The plaintiff filed replication, to, the written statement, of, the defendant, wherein, he denied the contents of the written statement, and, re-affirmed, and, re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled to the relief of injunction, as prayed? OPP
2. Whether plaintiff is entitled to the relief of mandatory injunction for demolition of construction marked by letters ABCD shown in red in the site plan, as alleged? OPP
3. Whether the suit is not maintainable in the present form? OPD.
4. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD.
5. Whether the suit has not been properly valued? OPD.
6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, decreed the plaintiff's suit. In an appeal, preferred therefrom, by the defendants, 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 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 13.9.2005, this Court, admitted the appeal on the hereinafter extracted substantial questions, of, law:-

i) Whether both the learned courts below erred in appreciating the provisions of law applicable, pleadings of the parties and evidence adduced by them, thereby vitiating the impugned judgments and decrees?

ii) Whether both the learned courts below mis-read and misappreciated oral and documentary evidence specifically Ex. D-6 dated 21.9.1987 on the basis of the orders of the Assistant Collector dated 9.9.1997 thereby vitiating the impugned judgments and decrees?

iii) Whether suit as laid is not competent in view of the frame of the suit and without looking into this aspect of the matter, impugned judgments and decrees as passed stand vitiated and liable to be set aside?

iv) Whether in view of the dismissal of contempt petition under order 39 rule 2-A of the code of Civil Procedure, findings now returned by courts below qua raising of construction during pendency of suit being contrary findings vitiated the impugned judgments and decrees?.

**Substantial questions of law No. 1 to 4.**

8. Before proceeding to answer the hereinabove extracted substantial questions of law, it is, to be borne in mind, the paramount factum qua, during, the pendency of the instant appeal, before this court, the defendants/applicants rather instituting an application before this Court, application whereof, is, cast under the provisions of Order 41 Rule 27

CPC, wherein, they hence espouse affording, of, relief, for, placing on record, certain documents, adduction whereof, being, just and essential, for, rendering clinching findings, upon, the hereinabove extracted substantial questions of law. The necessity of theirs' being adduced into evidence, is, espoused to be generated (i) by reflections' rather occurring therein, of the plaintiff, since deceased, now represented by his LRs, alienating the suit property, hence his LRs', nowat, holding no locus standi, to, validate the impugned concurrent pronouncements, nor their' holding, any, locus to press, for, their efficacious execution. Apparently, all the disclosures hence occurring in the apposite documents, in respect whereof, leave for theirs' being adduced into evidence, is, concerted, do sustain, the, espousal made before this Court, by the learned counsel for the defendants/appellants, (ii) thereupon prima facie it appears, that, in case this Court assumingly hence affirms, the, concurrently recorded pronouncements made by both the learned courts below, thereupon an untenable bestowment rather being made upon the plaintiff/ respondent, to, enforce the apt decree(s).

9. Be that as it may, if the apposite leave, is, hence deemed necessary, for being granted, to, the aggrieved appellants/ defendants, and, further since the documents, in, respect whereof leave, is, granted, to the appellants/ defendants, also, enjoins, the, further necessity, of, the apposite documents being tendered and exhibited, with a, compatible opportunity, to the plaintiff/respondent, to adduce rebuttal evidence, (i) whereas, their apposite tendering, exhibition, and, also, the, subsequent thereto, affording, of an opportunity, for adducing rebuttal evidence, to the respondent/plaintiff, may appropriately, only occur, before the learned First Appellate Court, (ii) thereupon, the matter is remanded to the learned First Appellate Court, to permit the adduction, tendering and exhibition, of, the apt documents 'AND, whereafter, it shall afford an opportunity, to the plaintiff(s) to adduce evidence, in rebuttal thereto, and, subsequently, it, shall record findings apposite, to the locus standi, of the plaintiff/respondent, and also, SHALL return findings qua hence the plaintiff's suit, for rendition of, a, decree, of permanent prohibitory injunction, and for mandatory injunction, vis-à-vis, the suit property, being, yet maintainable, and, whether the plaintiff(s)/respondent(s) nowat, hold, any locus standi, to continue, with the civil suit or to enforce the apt decree, as may, come hence to be pronounced.

10. Consequently, while exercising powers vested, in this Court, under Order 41 Rule 25 CPC, provisions whereof stand extracted hereinafter:-

> "25. **Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.-** Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;
>
> and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time]."

the apt documents are directed to be tendered, besides exhibited, before the learned First Appellate Court (a) whereafter, the learned First Appellate Court, upon, affording an opportunity to the plaintiffs', to, adduce apt rebuttal evidence, it, shall thereafter pronounce a fresh decision, upon, issues No. 1 and 2. However, the file of the Regular Second Appeal shall be retained by this Court. After a decision is recorded by the learned First Appellate

Court, upon the aforesaid issues, it shall, transmit its decision, to this Court. Obviously, any aggrieved therefom, shall be, entitled, to raise objections thereto, before this Court. The learned trial Court shall make its decision, within three months, after its receiving, the matter from this Court, and, prior thereto, it shall also ensure its ensuring prompt effectuation of valid personal service, upon, the defendants/appellants, and, upon the respondents/ plaintiff. Meteing, of, answers, vis-à-vis, the hereinabove substantial questions, of, law is hence deferred.

Records be sent back forthwith. All pending applications also stand disposed of. No order as to costs.

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

State of H.P. .....Appellant.
Versus
Ishwar Dass .....Respondent.

Cr. Appeal No. 691 of 2008
Decided on: 16.7.2018

**Indian Penal Code, 1860** – Section 279 and 304- A –Rash and negligent driving-Proof of-Trial court convicting and sentencing accused of causing death of victim by his rash driving-– A Post mortem report showed that the victim died due to hemorrhage and shock resulting from head and intrathoracic injuries - Evidence on record showed that the deceased victim arrived at the site of occurrence abruptly – Victim was not in sight of the accused – Workshops existed at the site with vehicles stationed there for repair work - A truck was stationed there and the deceased suddenly appeared from its rear – Held, accused while driving the offending vehicle meted adherence with the standards of due care and caution - Ld. Appellate Court's judgment not suffering from any perversity and absurdity, judgment maintained and affirmed – No merit found in appeal, accordingly dismissed. (Paras 9, 10 & 11)

For the appellant: Mr. Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel, Dy. A.Gs., for the appellant.
For the respondent: Mr. Lovneesh Kanwar, Advocate,

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge (oral):**

The instant appeal stands directed, against, the verdict of acquittal, pronounced by the learned Additional Sessions Judge, Mandi, District Mandi, H.P. in Criminal Appeal No. 13 of 2005, whereunder he reversed the judgment of conviction, and, consequential imposition, of, sentence(s) upon the accused, as, recorded by the learned trial Court, vis-a-vis the offences charged.

2. Brief facts of the case are that on 13.5.1998, the Medical Officer, CHC, Ratti, telephonically informed the police at Police Station, Balh, Mandi, about the accident case whereupon Rapat Ext. PW-9/A was incorporated in the daily diary and ASI Sh. Balbir Singh, PW-9 alongwith Constable Diwan Chand, Constable Narpat Ram and Constable Amar Singh

rushed to CHC, Ratti wherefrom the Investigating Officer PW-9 sent a ruqua Ext. PW-9/C to the Police Station alleging therein that on spot inspection, it was found that deceased Nihal Singh whose dead body was kept at CHC Ratti had died in an accident. It was found on spot that jeep bearing No. HP-37-0787 which was on its way from Ner Chowk to Sundernagar, left its side and went in the wrong side for a distance of 30 feet and struck against Nihal Singh in Kachha portion of the road, as a result of which Nihal Singh sustained injuries on his person and died. The driver left the jeep on the spot and ran away and the front tyre of the jeep were in wrong direction towards "dhank". The accident had taken place due to rash and negligent driving of the driver of the jeep No. HP-37-0787. On the basis of Ruqua Ext. PW-9/A, a formal FIR was registered against the accused. The post mortem of the body of the deceased was got conducted by the I.O. PW-9 at Zonal Hospital, Mandi. After post mortem, the Medical Officer PW-6 vide his report Ext. PW-6/A opined that the cause of death of deceased Nihal Singh was haemorrhage and shock resulting from head injury and intrathoracic injury. During investigation, the I.O. PW-9 prepared spot map Ext. PW-9/B and recorded the statements of witnesses. The offending jeep was taken into possession vide seizure memo Ext. PW-5/A. The I.O. PW-9 got mechanically examined the offending jeep and obtained mechanical report Ext. PW-3/A. The I.O. PW-9 also got photographs Ext. PW-4/A to Ext. PW-4/C of the offending jeep and of the spot clicked from PW-4 the negatives whereof are Ext. PW-4/D and Ext. PW-4/E. After completion of investigation, the challan against the accused was prepared and presented before the learned trial Court.

3. Notice of accusation stood put to the accused, by the learned trial Court qua his committing offences punishable under Section 279, and, under Section 304-A, of, the Indian Penal Code, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 9 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded, wherein, he pleaded false implication. However, he did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of conviction qua the accused. However, in an appeal carried therefrom, by, the convict before the learned appellate Court, the latter Court reversed the findings of conviction, and, proceeded to acquit the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned appellate Court, standing not based, on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

7. The learned counsel appearing, for the respondent/ accused, 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, hence evaluated the entire evidence on record.

9. PW-1 and 2, are, respectively the daughter, and, the widow of deceased Nihal Singh. The aforesaid Nihal Singh, during the course of his attempting, to, at the relevant site, hence trudge across the road, was hence rather struck by the offending vehicle, driven

by the accused. In sequel to his being struck by the offending vehicle, he, is revealed/unfolded by post mortem report, borne in Ext. PW-6/A, to hence suffer his demise, reasons' whereof stand ascribed therein to arise, from, hemorrhage and shock resulting, from head and intrathoracic injuries. PW 1 and PW 2 being related to Nihal Singh, are hence interested witnesses, yet, per-se, thereupon their testifications' cannot be construed to be bereft, of, vigor, (i) unless evident gross apparent embellishments and improvements, are, made by each in their respectively recorded testifications, vis-à-vis, their previously recorded statements' in writing. However, in their respectively rendered testifications, both did not grossly contradict their respectively recorded previous statements in writing. Moreover, with another ocular witness to the occurrence, one Balbir Singh, PW-5 also rendering, a, deposition qua the occurrence, without, any gross embellishments and improvements, vis-à-vis, his previously recorded statement in writing, besides his deposition holding utmost concurrence, vis-à-vis, the testifications rendered by PW 1 and PW 2, (ii) thereupon the depositions' of all the aforestated ocular witness rather carry solemn credibility.

10. Be that as it may, this Court is also enjoined, to discover from the evidence on record, qua the defence hence succeeding, in, establishing the factum of the accused, while driving the offending vehicle, his being, at the relevant site, hence precluded from sighting, the, deceased Nihal Singh, (i) given the arrival, of the latter, at the relevant site of occurrence, being abrupt, despite when both PW 1, and, PW 2 in their respectively recorded testifications, comprised in their respective cross-examinations', rather depose qua deceased Nihal Singh, hence, walking 4-5 feet behind both of them. In making, an, endeavor to look for evidence qua, the, emergence of the deceased, at, the site of occurrence hence being abrupt, (ii) and thereupon the accused being precluded from sighting him, it is imperative to allude to the apposite therewith suggestions, meted to both PW1 and PW2, and, further to PW-5. However both PW 1, and, PW 2 meted dis-affirmative answers, to the aforestated suggestions, yet, PW-5 in contradiction thereof rather in his cross-examination, makes, articulations qua at the relevant site of occurrence, hence workshops existing, and, vehicles being stationed at the workshops, for theirs being subjected to repair(s). However, in the later part of the apt deposition, borne in his cross-examination, he has denied the suggestion, of, a truck being stationed at the relevant site, rather he has deposed qua a scooter being stationed at the relevant site.

11. The learned Additional Advocate General, on anvil, thereof, hence makes submissions, qua therefrom, it being aptly concludable, qua, it being possible for the accused, to, hence sight the appearance of the deceased, at the relevant site, (i) and, hence concomitantly, it, cannot be concluded qua the emergence of the deceased, at relevant site, being abrupt nor it can be concluded qua the accused in driving the vehicle, hence meteing adherence, with, the norms of due care and caution. However the strength of the aforestated submission, is, emaciated given, (a) PW-7, in his cross examination in contradiction therewith, rather, rendering an echoing qua in vicinity of the relevant site, a, truck being stationed, and, from its rear, the deceased Nihal Singh hence making his sudden appearance, at the relevant site wherefrom it is aptly concludable qua the accused, rather proving qua in his driving the offending vehicle, his, hence meteing adherence with the standards of due care and caution, (b) significantly also when the aforestated factum, deposed by PW-7 in his cross-examination remained not concerted to, to be repulsed by the learned APP, comprised in the latter, hence, seeking permission of the Court, to declare him hostile, and, permit him to cross-examine, PW-5, vis-à-vis, the aforestated echoings made by him, in his cross-examination, as conducted by the learned defence counsel, (c ) thereupon this Court, is, constrained to conclude qua the prosecution hence accepting, the, echoings made, by PW-7 in his cross examination. Even though, the learned Additional Advocate

General further contends with vigor, that the aforestated deposition, as, rendered by PW-7, is belied by the reflections, borne in the site plan, and, by the photographs, as, existing on record. However, the aforesaid submission addressed before this Court, is, rendered bereft of its strength, given, the preparation, and, clicking of photographs, occurring, a, day subsequent to the occurrence, and, also the preparation of the site plan rather also occurring, a, day subsequent to the occurrence.

12. A wholesome analysis of evidence on record portrays qua the appreciation of evidence as done by the learned appellate Court, not, suffering from any perversity and absurdity nor it can be said qua the learned appellate Court in recording findings of acquittal hence committing any 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 not deem it fit and appropriate qua the findings of acquittal recorded by the learned appellate Court hence meriting any interference.

13. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned appellate 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.**

Nirmala Katoch .....Petitioner.

Versus

Karor Chand Katoch (deceased) through LRs & others .....Respondents.

CMPMO No. 17 of 2018
Decided on : 16.8.2018

**Code of Civil Procedure, 1908 -**Order XXXIX Rule 2A **-**Disobedience of order - Procedure and poof- Trial court dismissing application without affording opportunity to parties to lead evidence -District judge allowing appeal and remanding matter -Petition against - Held - Application cannot be dismissed by trial court without giving opportunity to lead evidence - - Matter remanded to trial court to decide afresh after giving opportunity to parties to lead evidence and decide same on merit -Petition disposed off. (Paras 1 & 2)

For the petitioner: Mr. Neeraj Gupta, Advocate.

For the respondents: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate, for respondents No. 1 (a) to 1 (d).

The following judgment of the Court was delivered:

**Sureshwar Thakur, J (oral)**

The learned counsel for the petitioner, has, restricted, (i) his challenge, to the impugned affirmative order, recorded, by the learned District Judge (I) Mandi, H.P., upon, Civil Misc. Appeal No. 13/2016, as instituted therebefore, (ii) against, the disaffirmative orders pronounced by the learned Civil Judge (Sr. Division) Court No.1, Sundernagar, District Mandi, H.P., upon an application, cast under the provisions of Order 39 Rule 2-A

CPC, (iii) only, vis-a-vis, the observations, made by the learned appellate Court, in, the order under challenge before this Court, and, as occur in paragraph-8, being ordered be not borne in mind, by, the learned Court, of Civil Judge (Senior Division), Sundernagar, District Mandi, H.P., on, his receiving the lis, on remand. This Court, has, considered the aforesaid submissions, and, finds merit therein, whereupon the apt observations, extracted hereinafter:-

> "In the light of aforesaid rival contention raised before this Court by Ld. Counsel for the parties, I have perused the case file with care and find merit and force in the contentions of the ld. Counsel for the appellant and find no merit in the contention of the ld. Counsel for the respondent. From the close scrutiny of the record of the case file reveals that in a appeal titled as Karor Chand Katoch vs. Nirmala Katoch etc. filed in the court of Additional District Judge Mandi, H.P. who vide order dated 15.3.2013 in a CMP No. 17 of 2012 titled as Nirmala Katoch vs. Karor Chand Katoch arising out of the CMA No. 21-VI of 2012 dated 3.9.2012 has directed the parties to maintain the status quo qua the nature and possession of the suit property consisting land and structure comprised in khewat No. 108, khatauni No. 185 khasra No. 2968 measuring 1036 Sq. Mtrs, situated in muhal Sundernagar, 26/8, Tehsil Sundernagar, Distt. Mandi, H.P. Respondent No.1 Smt. Nirmala Katoch wilfully disobeyed the above status qua order parted with the part of the suit land i.e. one shop on the ground floor on dated 11.8.2014 by renting out the same to the same to the bank of India Mandi town, Distt Mandi, H.P. for installing ATM. Respondent No.2 is a Manager of the bank of India branch Mandi H.P. and is also responsible for conducting the business of bank and ATM in the suit premises. Status quo order has been specifically brought to the notice of respondent No.2 vide representation in writing dated 11.8.2014. He has been specifically requested not to violate the above order of the court i.e. by taking on rent of the suit premises and installing the ATM thereon. But respondent No.2 appears to be hand in glove with the respodnent No.1 and has ignored his request. As such, the above acts, omissions and commission of the respondents amounts to deliberate and willful disobedience and breach of the above status quo order dated 15.3.2013. Order of the ld. Addl. District Judge, Mandi dated 15.3.2013 is enclosed with the appeal. On its scrutiny, its relief clause reveals that in view of the finding given on point No.1 above, appeal is ordered to be allowed and impugned order dated 3.9.2012 passed by ld. Trial court is set aside and application is ordered to be allowed to the extent that both the parties to the application will maintain status quo qua the nature and possession of the suit property as it exists at the time of filing the suit and application till disposal of the suit on merits. Application under Order 39 Rule 2-A CPC filed on the basis of said order is dismissed by the ld. Court below i.e. without giving any opportunity of leading evidence to both the parties on merits i.e. against the settled principle of law. In view of the aforesaid position of the matter, I think it appropriate to remand the present application to the ld. Court below to decide afresh by giving opportunities to both the parties to lead evidence and decide the same on merit. So order passed by ld. Court below is not legally sustainable in the eyes of law, which requires interference of this Court. Hence this point is decided in negative."

ARE (i) given theirs' ultimately presenting, the learned Civil Judge (Sr. Division), with a fait accompli, are, thereupon ordered to be not borne in mind by the

remandee Court (ii) conspicuously for obviating the afore ill-consequences, which may hence rather ensue, (iii) thereupon reiteratedly, the aforestated extracted findings, are directed to be not borne in mind, by the learned Civil Judge, while making his decision, upon, CMP193-VI of 2014.

2. In view of the above observations, the instant petition stands disposed, of, alongwith all pending applications, if any. The parties are directed to appear before the learned trial Court, on **5.9.2018**.

3. 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.

**Dasti copy.**

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

Reliance General Insurance Company Ltd. .....Appellant.

Versus

Smt. Leela Devi & others .....Respondents.

FAO No. 372 of 2017.
Reserved on : 13.09.2018.
Decided on : 20th September, 2018.

**Motor Vehicles Act,1988** -Sections 166 and 173 -Motor accident -Claim application -Compensation under conventional heads -Determination -Claims Tribunal allowing application of legal representatives of deceased and granting Rs. 1 lakh towards loss of consortium to his widow -Appeal against -Held, grant of compensation under conventional heads not in tune with National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700, -Compensation under conventional heads brought down -Appeal partly allowed -Award modified.(Paras 3 & 4)

***Case referred:***
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant: Mr. Jagdish Thakur, Advocate.
For Respondents No. 1 and 2: Mr. Malay Kaushal, Advocate.
For Respondent No. 3: Ms. Megha Kapur Gautam, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal, Bilaspur, H.P., upon, MACP No. 6/2 of 2016, whereunder, compensation amount comprised, in, a sum of Rs.11,37,044/- alongwith

interest accrued thereon, at the rate of 7.5% per annum, from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer.

2. Deceased Joginder Pal, as, unfolded by the apt postmortem report, borne in PW1/A, met his demise, in sequel, to, a road side accident. The claimants are his dependents/successors-in-interest. The learned counsel appearing for the insurer, does not contest, the validity, of, the apt affirmative findings, rendered by the learned tribunal, upon, the apposite issue appertaining, to, the demise of one Joginder Pal, rather being a sequel of rash and negligent manner, of, driving of the offending vehicle by its driver, nor he contests the fastening, of, the apt indemnificatory liability, upon, the insurer, of, the offending vehicle. However, the counsel, for the insurer has with much vigour, made a serious attempt, to rip apart the validity, of, computation made by the learned Tribunal, vis-a-vis, the per mensem slarary of the deceased, and, the apt computation appertaining therewith, is, comprised in a sum of Rs.10,000/- per mensem. The learned counsel for the insurer, has, for carrying forth his espousal, drawn, the attention of this Court, to, the testification of PW-4, the employer of deceased Joginder Pal. PW-4, during the course of his recording, his testification, has, tendered into evidence Ex.PW4/B, exhibit whereof comprises the apt salary certificate of deceased Joginder Pal, and, therein recitals occur, qua deceased rendering employment with him, from, 13.09.2015 to 1.09.2015, (a) and his being paid salary comprised in a sum of Rs.14,000/- for the month of July, 2015. However, even though, the salary certificate, at the time of, its, adduction of evidence, was without any demur, by the counsel for the insurer rather permitted to be exhibited, (b) and, per se thereupon, the afore recitals, borne therein though acquire an aura of authenticity. However, the learned counsel for the insurer, has contended (c) that with PW-4, during, the course of his thereat being subjected to cross-examination, his, qua the apt attendance register, borne in EX.PW4/C, rather making acquiescings to a suggestion put thereat, qua the attendance register not carrying against the name, of the employees concerned, their respective signatures, (d) hence, both Ex.PW4/B and Ex.PW4/C, losing their respective probative vigour. However, the aforesaid contention, cannot be accepted, (e) as in the latter part of his cross-examination, PW-4, has volunteered that his liquidating salary to the deceased, through, cheques and a compatible therewith entry being made, in, the apt pass book. Even when, the afore testification rather stands rendered by PW-4, yet the learned counsel for the insurer, for, rather ripping apart veracity thereof, omitted to make any appropriate motion, for eliciting from the bank, whereat, PW-4 was maintaining his account(s), the records appertaining therewith, nor he made endeavours for eliciting the apt pass book, (f) whereas, the elicitations of the aforesaid record, rather constituted the best evidence, for belying the aforesaid echoings, made by PW-4. The effects, of, afore omissions, are adversarial, vis-a-vis, the insurer, and, the further concomitant sequel thereof, is that, the notional income, drawn by the learned tribunal, on anvil of Ex.PW4/A, and, comprised in a sum of Rs.10,000/- per mensem, rather being both appropriate and tenable, and, warranting no interference.

3. Be that as it may, the learned counsel appearing for the insurer has canvassed with much vigour before this Court, that, the meteing of hikes constituted, in, 15%, upon, a sum of Rs.10,000/-, rather being ridden, with, a gross fallacy, (i) and when he anchors, the aforesaid submission, upon, the apt mandate of the Hon'ble Apex Court, as, borne in the judgement rendered by the Hon'ble Apex Court, in, a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700,*** given, it rather not vindicating, any meteing, of, hikes towards future incremental prospects, vis-a-vis, any self employed deceased being aged more than 50 years or when he is engaged, in a non governmental organization or entity, (ii) whereas, with the deceased, being self employed

or being aged more than 50 years, it being impermissible, to mete 15% hikes towards, future incremental prospects. However, the aforesaid submission, rather falters, given, the Hon'ble Apex Court in ***Pranay Sethi's case (supra)*** rather validating the meteing of hikes, vis-a-vis, future incremental prospects, even qua a self-employed deceased being aged more than 50 years, as, the deceased hereat evidently, is. The relevant paragraphs whereof stand extracted hereinafter:-

> "57. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and non- violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the apposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma (supra) and it has been approved in Reshma Kumari (supra). The age and income, as stated earlier, have to be established by adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.
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> 58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.
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> 59.Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a

permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life,etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self- employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts. "

***(p.2721-2722)***

4. Since the postmortem report reflects, qua the deceased being aged 55 years, hence, the meteing of 15% increase(s) towards future incremental prospects, vis-a-vis, the apposite per mensem income of the deceased, by the learned tribunal does not suffer from any fallacy.

5. The learned counsel appearing for the insurer has contested, the, computation of compensation made by the learned tribunal, upon, the dependents, of, the deceased, under heads, namely, "Loss of consortium vis-a-vis spouse/wife", comprised in a sum of Rs.1,00,000/- and under the head "Funeral charges", a sum of Rs.25,000/-, on anvil, of its being in conflict with the verdict of the Hon'ble Apex Court rendered in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, whereupon, hence, he contends that the learned tribunal has committed, a, gross error in assessing a sum of Rs. One lacs, under, the head "loss of consortium, to, petitioner No.1", and, Rs.25000/-, under, the head "Funeral Expenses". Consequently, the assessment of compensation, under, the head "funeral expenses" in a sum of Rs.25,000/-, vis-a-vis, the petitioner, is, reduced to Rs.15,000/-, as also the quantification of compensation, under, the head "loss of consortium, to, petitioner No.1", and, borne in a sum of Rs.one lac, is, reduced to Rs.40,000/-. Consequently, the petitioners are held entitled to compensation amount under the following heads as under:

| | | |
|---|---|---|
| 1. | Loss of dependency come | Rs.10,12,044/- |
| 2. | Loss of Consortium to petitioner No.1 | Rs. 40,000/- |
| 3. | Funeral charge | Rs. 15,000/- |
| | **Total** | **Rs.10,67,044/-** |

6. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.10,67,044/-, along with pending and future interest @7.5 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants as ordered by the learned tribunal. All pending applications also stand disposed of. Records be sent back forthwith.

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

Dila Ram .....Appellant/plaintiff.

Versus

Shri Milkhi Ram & Anr. .....Respondents/Defendants.

RSA No. 279 of 2014.
Reserved on : 18th May, 2018.
Decided on : 21st May, 2018.

**H.P Land Records Manual** - Para 8.36-B - **Hindu Law** -Relinquishment of undivided share in coparcenery -Effect- Whether a legal heir can relinquish his share in inherited property in

favour of other legal heir by excluding remaining coparceners ? Held -Yes -Plaintiff filing suit and challenging relinquishment of undivided share by defendant no.2 in favour of defendant no.1 - Trial court dismissing suit – First appellate court dismissing plaintiff's appeal -RSA - Further held, in Himachal Pradesh a coparcener can validly relinquish his share in coparcenary in favour of one or more coparceners to the exclusion of other coparceners - Relinquishment will not operate for benefit of other excluded coparceners -Appeal dismissed.(Paras 1,2,5,7,9 & 12)

***Case referred:***

P.R. Munuswamy Naidu vs. Vs. Venkatesan and Ors, (1997)2 MLJ 18

| | |
|---|---|
| For the Appellant: | Mr. G. C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate. |
| For Respondents: | Mr. Varun Rana, Advocate. |

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for declaration, as well as for, rendition of a decree for permanent prohibitory injunction, qua, the suit khasra number(s), was, hence dismissed.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for declaration and injunction, to declare the relinquishment deed executed by defendant No.2 of his share in favour of defendant No.1, out of the suit land comprised in Khewat Khatauni No.373/412, Khasra No.823, 838, land measuring 10-17-9 bighas situated in Muhal Kalohad/27, Tehsil Sunder Nagar and Khewat No.52, Khatauni No.65, Khasra No.301, 303, 307, 308, 324, 325, 326, 331, 333, measuring 32-0-4 bighas, situated in Moza Jola/353, Tehsil Sadar, District Mandi, H.P. as per the jamabandi for the year 1997-98. The plaintiff aver that previously the land was owned by their father Sh. Mahant Ram, who was having six sons and one has expired. All the legal representatives have inherited the land of Sh. Mahant Ram. The plaintiff alleged that defendant No.2, illegally and against the law executed relinquishment deed of his share in favour of defendant No.1. The defendants were requested to cancel the relinquishment deed, but all in vain.

3. The defendants contested the suit, however, they had failed to within the stipulated period, file written statement to the plaint, hence their defence was struck off.

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

5. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 17.06.2015, 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 one of the legal heirs can relinquish his share in the property inherited from his father in favour of one of his legal heirs excluding the other under the Hindu Law?

b) Whether there has been mis-reading and mis-appreciation of oral as well as documentary evidence especially Ext. P-1 to P-4 and PY to PZ and on that count, the judgment and decree under challenge is vitiated, hence not legally sustainable?

**Substantial questions of Law No.1 to 2:**

6. Uncontrovertedly, as, borne in the jamabandis apposite to the suit land, AND, as comprised in Ex.PY, and, in Ex. PZ, the suit land is undivided inter se the co-owners. From amongst, the recorded co-owners, Guman Singh, defendant No.2 through relinquishment deeds, respectively, borne in Ex.P-1, and, in Ex.P-2, alienated/released, his share, in the joint Hindu ancestral coparcenary property vis-a-vis Milkhi Ram, co-defendant No.1. The valid execution of the aforesaid relinquishshment deeds, is not, under challenge nor any challenge, is, cast vis-a-vis their execution, hence, emanating from, any vice of fraud or mis-representation, practised, by defendant No.1 Milkhi Ram vis-a-vis co-defendant No.2 one Guman Singh. Importantly also the relinquishments made by co-defendant Guman Singh, upon, co-defendant Milkhi Ram, are, also not contended to be beyond, his share in the ancestral coparcenary property.

7. However, the learned senior counsel appearing, for the plaintiff/appellant, while placing reliance, upon, a judgment, rendered by the Hon'ble Madras High Court, in case titled as ***P.R. Munuswamy Naidu vs. V. Venkatesan and Ors***, reported in ***(1997)2 MLJ 18***, the relevant paragraphs No.12 to 14 whereof are extracted hereinafter:-

> "12. In N.R. Raghavachariar's **Hindu** Law - Principles and Precedents' - 8th Edition, (1987), at page 237, it is said thus:
>
> A coparcener can renounce his interest in the joint family estate. The renunciation does not result in a general partition of the family. Such a renunciation merely extinguishes his interest in that estate, but does not affect the status of the remaining members quoad the family property, and they continue to be coparceners as before, the only effect of the renunciation being to reduce the number of persons to whom shares would be allotted if, and when, a division of the estate takes place. A coparcener can renounce his interest only in favour of all the coparceners and when he renounces in favour of only one of them, the renunciation, enures for the benefit of even the others,...his renunciation which enures for the benefit of all the other coparceners may take the form of a gift of the entire interest of a coparcener in favour of another coparcener.
>
> 3. In Mulla 's '**Hindu** Law' - 15th Edition (1982) at page 357, it is said thus:
>
> Renunciation or relinquishment of his share - A coparcener may renounce his interest in the coparcenary property in favour of the other coparceners as a body but not in favour of one or more of them. If he renounces in favour of one or more of them the renunciation enures for the benefit of all other coparceners and not for the sole benefit of the coparcener or coparceners in whose favour the renunciation is made. Such renunciation is not invalid even if the renouncing coparcener makes it a condition that he would be paid something towards maintenance. The renunciation or relinquishment must, of course, be genuine. If fictitious and not acted upon it would be inoperative as between the parties and partition can be claimed....

14. In a Full Bench decision of this Court reported in Chella Subbanna v. Chella Balasubbareddi : AIR1945Mad142 , it was held as follows:.

The relinquishment by one coparcener of his interest in the family estate in favour of the members of the coparcenary does not amount to an alienation; it merely amounts to an extinction of his interest in favour of the others. The gift of his interest to one of several other coparceners would not mean the extinction of that interest. It would mean an alienation of it. It is well-settled law that there cannot be such a gift to a stranger and it is now clear that there cannot be a gift to a fellow coparcener if the family is to remain undivided.

There is another Privy Council judgment which supports the proposition that there cannot be a renunciation by one member of a joint family in favour of one of several other members of the family while the family remains joint. In Vasantrao v. Anandrao 6 B.L.R. 925 one Madhawaro executed a release of his interest in the family property in favour of his father. The Bombay High Court held that the release must be treated, as being, not for the benefit of the father alone, but of the coparcenary and the shares were to be determined as though Madhawrao had died. This case went to the Privy Council as Anandrao v. Vasantrao 9 B.L.R. 595 their Lordships held that the governing principles had been rightly applied by the High Court and dismissed the appeal. At p. 497, 10th Edn. of Mayne the learned editor expresses the opinion that dicta in Pedayya v. Ramalingam I.L.R. 11 Mad. 406 and Thangavelu Pillai v. Doraiswami Pillai 27 M.L.J. 272 cannot be considered good law especially after the decision of the Privy Council in Venkatapathi Raju v. Venkatanarasimha Raju (1936) 71 M.L.J. 558 : I.L.R. 69 IndAp 307 : I.L.R. 1937 Mad. 1. It follows from what we have said that we are in full agreement with this opinion and that additional support for it is to be found in the judgment of their Lordships in Anandrao v. Vasantrao 9 B.L.R. 595. The answer which we give to the question referred is this : A member of a joint **Hindu** family governed by the Mitakshara law cannot give his interest in the family estate to one of several coparceners if they remain joint in estate. In such circumstances he can relinquish his interest but the relinquishment operates for the benefit of all the other members. The costs of this reference will be costs in the appeal."

(I) AND conspicuously, on anvil, of, underlined apt portions thereto, hence, rears espousals qua the apposite relinquishment deeds, respectively borne in Ex.P-1, and, in Ex. P-2, even if, they were made, by co-defendant Guman Singh, singularly vis-a-vis co-defendant Milkhi Ram, (ii) nonetheless, in compatibility, with, the apt hereinabove extracted underlined portions, of, the verdict, rendered by the Hon'ble Madras High Court, wherein it is contemplated (a) of the apposite release rather enuring, for, the benefit of the entire body of coparceners; (b) AND, with an interdiction, hence, being cast therein, against the making of any release, by one coparcener in favour of one or more of them; (c) besides upon any renunciation or release being made by a coparcener vis-a-vis one or more members of the coparcenary body, thereupon, the renunciation rather enuring, hence, for the benefit of the entire body of the coparceners, and, not for the apposite benefit of one coparcener, vis-a-vis whom, the apt release is made; (d) rather all benefits thereof hence enuring, for the benefits, of, the entire body, of, coparceners. However, the submission, as addressed, before, this Court, by the learned senior counsel appearing for the appellant (i) is sparked by gross misreading(s), of, the import, AND, of the intrinsic nuance, of the apt verdict, as, is comprised, in the apt hereinabove extracted paragraphs; (ii) the misreading, of, import thereof, arises, from the factum of the learned senior counsel appearing, for the appellant/plaintiff, focusing merely upon the underlined portions thereof, (iii) hence, making

contemplations,of, an interdiction being cast, against, the coparcener making a release or renunciation vis-a-vis one or more members, of the coparcenary body, (iv) and, he also proceeds to dwell, upon, and centralize, his arguments, upon, the further contemplation occurring therein, qua, upon the apt interdiction aforestated, being infringed, thereupon, the benefit of the apt renunciation, rather enuring vis-a-vis the other members of the coparcenary body, especially, vis-a-vis whom, the apt renunciation is not made; (v) hence concomitantly, he argues that the benefit, of, the relinquishment deeds, even if, made by co-defendant Guman Singh vis-a-vis only one co-owner, namely, Milkhi Ram, thereupon, all benefits thereof also enuring vis-a-vis all other members, of the coparcenary body, including the plaintiff.

8. The misreading, by him, of the afore-referred contemplations, borne, in the apt hereinabove extracted paragraphs, hence, occurring in the verdict rendered by Madras High Court, in, P. R. Munuswamy Naidu's case (supra), (i) is, germinated, by, the mis-signification ascribed by him, to the parlance borne therein i.e. “enuring of benefits of apposite relinquishements qua the entire members, of, the coparcenary body”, (ii) even when made by the relinquisher vis-a-vis one or two members, of, the coparcenary body, and, not made vis-a-vis other members, of coparcenary body, (iii) whereas, the mis-signification ascribed thereto by him, would fade into the domain of irrelevance or insignificance, (iv) given the apposite paragraphs, of, the judgment relied, upon, by him, rather, also, ascribing, the signification vis-a-vis the phrase “enuring for the benefits of the entire body of coparceners”, qua its hence carrying, the import, of, upon occurrence, of, the apposite relinquishments, (v) thereupon, the relinquisher's share in the undivided property, to the extent, he makes, the apt, relinquishment vis-a-vis one or more members of the entire body, of, the coparcenary body, hence, concomitantly being reduced, (vi) AND, if the apt, relinquishment is made by him, of, his entire share, in the coparcenary property, thereupon, his share in the ancestral coparcenary property being extinguished besides being rendered extinct, (vii) as also, of the determinations, of, the share of other members, of the coparcenary body vis-a-vis whom the relinquishments are not made, being hence enjoined to be made, in consonance, with, the apt extinctions, of, the share of the relinquisher, (viii) who makes, the relinquishment, of his share vis-a-vis one or more members of the coparcenary body, (ix) besides reiteratedly also, the determination(s), of the shares of other members, of the coparcenary body, vis-a-vis whom, the apt relinquishment, is not made, being determined, as if, the relinquisher, is ousted, from the coparcenary body. The ascribing, by this Court, to the apt hereinabove extracted paragraphs, of, the verdict, of, Mardras High Court in P.R. Munuswamy Naidu's case (supra), qua hence, theirs rather carrying the aforesaid connotations besides significations, emerges, on a thorough, incisive, and, on an in depth analysis thereof. (x) Significantly, also, the apt contemplations occurring therein, significantly, qua, the enurings, of, benefits of the apposite relinquishment deed vis-a-vis those members of the coparcenary body, who are not executants thereof nor, are, mentioned therein, as, beneficiaries thereof, being not amenable qua imputation, of, any, signification, nor, being construable, to be carrying any import, qua, dehors theirs not being executants thereto, theirs rather deriving, all, benefits thereof, in proportion to their shares, in the coparcenary property, (xi) given any meteing, of, aforesaid significations, vis-a-vis the phrase “enures for the benefit of the members of the entire coparcenary body” rather would thereupon, hence, extinguish, besides efface the very purpose, of, the further contemplations, hence, occurring therein, wherein, courts, of, law apparently rather validate the making of the release deeds, by one coparcener vis-a-vis the other coparcener, in the coparcenary body, (xii) and, also validate the apposite releases, being made, by, the apt relinquisher, of his share, in the coparcenary body vis-a-vis one or more members of the coparcenary body, and, to the exclusion, of, the other members, of the coparcenary body.

9. In aftermath, the relinquishment deeds, when, as aforestated are provenly hence validly and duly executed, and, are shorn of any vice of fictitiousness or mis-representation, (i)thereupon, the apposite relinquishment deeds, only result in (a) elimination, of, co-defendant No.2 Guman Singh, from, the coparcenary body, in case, he has relinquished, his entire share vis-a-vis co-defendant No.1 Milkhi Ram; (b) of hence, concomitantly, with, there occurring elimination of Guman Singh, co-defendant No.2, from, the coparcenary body, thereupon, hence, thereafter, the shares, of, other members of the coparcenary body, being amenable for re-determination, in consonance with the apt relinquishment deeds; (c) co-defendant Guman Singh being barred to make, any, demand for partition, of, his share in the coparcenary property, given his renouncing his share therein, (d) whereupon, upon demand for partition being made, by member/members of the coparcenary property, the separate allocations of earmarked shares, upon, hence dismemberments, of, the undivided property, rather occurring in consonance, with, the determination of shares, made, in compatibility with the apposite relinquishment deeds.

10. Be that as it may, the relinquishment deeds, are also, made within the ambit of 8.36B of the H.P. Land Records Manual, provisions whereof stand extracted hereinafter:-

> "8.36-B "Release" is an instrument whereby a person renounces a claim upon another person or against any specified property. It predicates the existence of a claim upon another person or against any specified property, which claim the person, executing the document renounces by a deed of release.
>
> The person in whose favour there can be a release, must possess a pre-existing right or interest in the property. A release, in law, may be effected either for consideration or for no consideration. Where one co-owner of a property, be a deed, relinquishes his right to possession and his title in favour of the other co-owner, such deed is a release deed.
>
> Subject to the provisions contained under section 118 of the H.P. Tenancy and Land Reforms Act, 1972 and section 3 of the H.P. Transfer of land (Regulation) Act, 1968, the mutation of release shall be attested by the Revenue Officer if a co-owner relinquishes his whole or any part of his claim (share( in favour of one or the other co-owner in a joint ownership either based upon registered deed or oral agreement entered by the patwari on the basis of report made to him under section 35 of the H.P. Land Revenue Act. As mentioned under para 8.1(5) supra, the Revenue Officer cannot compel the parties to execute registered deed of Release and Settlement. Mutation can be attested on the basis of oral agreement under section 38 of the H.P. Land Revenue Act, 1954, if otherwise legal."

(i) wherein, also a clear stipulation is borne, whereby, a co-owner of undivided land, is, permitted to relinquish, his whole or any part of his share vis-a-vis one or the other co-owners, by his executing, an apposite registered deed of release. Since, the apposite relinquishment deeds, are made in consonance therewith, and, assumingly, if the argument, of, the learned counsel appearing, for the appellant, is, tentatively accepted, yet with a specific apt hereat mandate, occurring in H.P. Land Records Manual, (ii) thereupon, with a reading, of, the verdict rendered, by the Madras High Court in P.R. Munuswamy Naidu's case (supra), rather not making any clear unraveling, qua, in, compatibility vis-a-vis existence, within, the State of H.P., of, the hereinabove extracted mandate, within domain whereof, the relinquishment, of a share by a co-owner in the undivided land vis-a-vis one or the other co-sharers, is, rather permissible, also in Madras hence an alike mandate rather

existing, thereupon the specific mandate extracted hereinabove also hence subsumes, the effect, if any, even if tentatively, of the aforesaid espousal, made by the counsel for the plaintiff/appellant herein, (iii) more so when mandate thereof, is, not demonstrably disclosed to be hence declared ultra vires.

11. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondents/defendants and against the appellant/plaintiff.

12. In view of the above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Shayma Nand & others .....Petitioners.

Versus

State of H.P. & others ....Respondents.

CWP No. 5547 of 2012 along with CWP No.5799 and CWP No. 2853 of 2012.
Reserved on : 15th May, 2018.
Decided on : 21st May, 2018.

**Land Acquisition Act, 1894** – Sections 18 & 28-A- **Limitation Act**, **1963**- Section 5 – Applications for re-determination of compensation- Delay- Condonation – whether Land Acquisition Collector (Collector) competent to condone delay caused in filling applications for re-determination of compensation – Applicants filing applications before Collector for re-determination of compensation on basis of Award of Reference Court passed in favour of other landowners- Also seeking condonation of delay caused in moving such applications – Collector condoning delay but his successor -in -interest reviewing order and declining condonation of delay- Petition against- Held, Collector has no jurisdiction whatsoever under Section 28-A of Act to condone delay- Power to condone delay vests in Reference Court on basis of applications transmitted by Collector- Order of Collector condoning delay itself without jurisdiction- Petitions dismissed with liberty to petitioners to approach Collector again under Section 28-A of Act. (Paras 3 to 5)

For the Petitioners: Mr. V.D. Khidta, Advocate (in all petitions).

For the Respondents: Mr. Hemant Vaid, Addl. A.G. with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel, Dy. Advocate Generals.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

Since, common questions of facts, and, law are involved in all the aforestated petitions, hence, they are being disposed, of, by a common judgment.

2. The land of the petitioners, along with, the lands, of, other landowners concerned, was, acquired for construction, of, a helipad, at Rohru. The apposite notification, whereunder, the lands of the landowners concerned, was, brought under acquisition, was, issued on 2.9.1993. The Land Acquisition Collector concerned, rendered his award, on, 15.12.1995, and, thereunder, hence, assessed compensation vis-a-vis all the landowners concerned. The award of the Land Acquisition Collector concerned, was, assailed by the aggrieved, by theirs preferring petitions, under, Section 18, of the Land Acquisition Act, before, the Collector concerned, petitions whereof, were, thereafter hence transmitted, to the learned Reference Court, for a pronouncement, of, an adjudication thereon. The learned Reference Court, under, a rendition made on 18.1.1999, enhanced compensation amount vis-a-vis those landowners, who, had constituted the apposite reference petitions. Subsequently, the petitioners herein, whose lands, alongwith the aforesaid, were, also under a common notification, hence, acquired for construction, of a helipad at Roharu, (i) AND, who did not alike other land owners, hence contest the award pronounced by the Land Acquisition Collector, by theirs casting petitions under Section 18, of, the Land Acquisition Act, (hereinafter referred to as the Act), before, the Collector concerned, (ii) for enabling the latter, to forward them, to the learned Reference Court concerned, rather hence, on anvil, of, the mandate borne, in, Section 28-A of the Act, provisions of whereof stand extracted hereinafter:-

> " **28A Re-determination of the amount of compensation on the basis of the award of the Court**.
>
> (1) Where in an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the Court: Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.
>
> (2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.
>
> (3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18."

(iii) hence sought parity qua compensation determined vis-a-vis those landowners concerned, who, had instituted reference petitions, before the Collector concerned, under, the provisions of Section 18 of the Act, and, petitions whereof, were, forwarded to the Reference Court, AND, the latter thereon, hence, enhanced the compensation amount vis-a-

vis the apt aggrieved landowners. The mandate of Section 28A, of the Act, obviously, warranted its application vis-a-vis, the scribed motions, made by the petitioners herein, before, the Collector concerned, motions whereof, were, constituted, under, Section 28A of the Act. However, the apposite motions, were belatedly made, and, the apposite delay, in, the belated endeavours of the petitioners, were concerted, to be condoned by the petitioners, by theirs instituting apposite application(s), cast under Section 5 of the Limitation Act, before the Collector concerned. The apposite application(s), cast under the provisions of Section 5, of the Limitation Act, were, as apparent, from, perusal, of, order(s) recorded on 24.05.1997 (existing at page 62 of the paper book), hence allowed, and, the apposite delay was also condoned. However, subsequently, the successor-in-office, of, the authority concerned, who, pronounced, the order of 24.05.1997, rather dismissed the application(s), cast under the provisions of Section 5 of the Limitation Act, and, obliviously also proceeded, to not, on anvil of Section 28A, of the Act, hence mete vis-a-vis the petitioners herein, the statutory benefits, of enhanced compensation, as, were bestowed, upon other aggrieved landowners, who, unlike the petitioners, had, preferred reference petitions, before, the learned Reference Court.

3. The learned counsel, appearing for the petitioners, has on anvil, of, an pronouncement, recorded by this Court, in, CMPMO No.204 of 2005, in case, titled as Vilaswati and others vs. State of H.P., pronouncement whereof, is, vis-a-vis those landowners, whose lands, were acquired, under, a notification common inter se them, and, the petitioners herein, AND, more particularly by emphasising, upon, expostulations, occurring, in paragraph No.12 thereof, paragraph whereof stand extracted hereinafter:-

> "12. However, as noticed hereinabove, delay in the present case has been condoned by the Land Acquisition Collector. No doubt the Land Acquisition Collector did not have the jurisdiction or the power to condone delay, in view of the above stated legal position, but that order could not have been reviewed or held to be infructuous by the successor of Land Acquisition Collector, who passed the order condoning the delay, because the Land Acquisition Collector does not have be power to review his own order."

Hence has proceeded, to, espouse, (i) of, with the co-ordinate bench of this Court, hence, discountenancing, the apt reviewing(s), by, the apt successor-in-office, of an earlier affirmative order, rather made by his predecessor-in-office, upon, an application, cast under Section 5 of the Limitation Act, (ii) thereupon, he contends, that alike therewith, the orders rendered on 7.12.2004, being amenable, for, theirs being quashed and set aside, and, rather, alike therewithin, hence, directions being enjoined to be pronounced, upon, the Land Acquisition Collector concerned, to, pronounce a fresh decision, upon, the application(s) pending before him, and, as, stand constituted under Section 28-A of the Act, (iii) also he contends that with uncontrovertedly, the respondents rather implementing vis-a-vis the petitioners in CMPMO No. 204 of 2005, the pronouncement, recorded by this Court, (iv) thereupon, alike therewith, for ensuring non perpetuation, of, any discrimination inter se them, and, the petitioners herein, this Court also proceed, to make a direction, upon, the Land Acquisition Collector concerned, to bring the apposite parities, inter se the petitioners, in CMPMO No. 204 of 2005, and, vis-a-vis the petitioners herein. However, for the reasons to be assigned hereinafter, the aforesaid submission, is, unacceptable to this Court (v) given, a catena of judicial verdicts, making clear expostulations, of, the Land Acquisition Collector concerned, being wholly disempowered, to make any pronouncement, upon applications, cast before him, under the provisions, of Section 5 of the Limitation Act, (vi) thereupon, with the orders, occurring at page 62 of the paper book(s), whereunder, the predecessor-in-office of the apt Reviewing authority concerned, hence condoned the apposite delay, rather begetting visible infraction(s) vis-a-vis the apt aforesaid mandate, occurring, in a catena, of

judicial verdicts, (vii) hence, befittingly constrains this Court, to, contrarily conclude that, despite, the apt review by the successor-in-office, of, the initially recorded order, rather being also beyond the domain, of his jurisdiction, (viii) nonetheless rather thereupon alone, the orders made subsequent, to, the orders occurring, at page 62, of the paper book, not constraining this Court, to, disturb, the apt thereof, hence, reviewing orders, given, theirs being also stained, with, an entrenched vice of voidness. (ix) Nor, in the garb of the purported inapposite exercise of jurisdiction of review, by, the authority, who pronounced the apt reviewing orders, (x) nor hence, in the garb of, theirs being untenable, this Court, would impute any sanctity qua the initial orders, hence, made by the apt predecessor-in-office, orders whereof occur at page 62, of the paper book, (xi) reiteratedly when the initial orders, are, made beyond the mandate of judicial verdicts, wherewithin, rather clear, candid and forthright, view is expostulated, of, no jurisdiction being foisted, in, the Land Acquisition Collector, to, condone delay(s), in the apposite motions, being made before him, by the landowners concerned, AND, concomitantly, with grave irredeemability, gripping the initial orders, by mere circumvention(s), their stain of voidness, being hence incurable. (xii) In aftermath, with the initial order, being gripped, with an apparent vice, of, statutory disempowerment, and, with the aforesaid vices, travelling continuously, upto, the stage of the successor-in-office reviewing it, also hence, the inaptly made apposite order, of, review, cannot constrain this Court, to set it aside, (xiii) reiteratedly given thereupon, this Court, condoning, the inapt exercise, of, jurisdiction, by the authority concerned, who, pronounced the initial order existing at page 62, of, the paper book. For hence avoiding, to overcome, the vices, of, nonest and voidness, gripping, the initial order(s), thereupon, concomitantly, the apt reviewing orders, are, rendered rather construable to be both redundant, besides irrelevant. (xiv) Conspicuously when unless the aforesaid construction, is placed upon the apt Reviewing orders, thereupon, the catena, of verdicts, hence, barring the apt exercise, of jurisdiction by the Land Acquisition Collector concerned, would be circumvented, (xv) nor foists any, leverage in the petitioners, to, on anvil thereof, contend that in consonance, with, the verdict pronounced, by a coordinate bench of this Court, in CMPMO No.204 of 2005, alike directions therewith, being meted upon the respondents herein, also, hence, theirs being required to be implemented, AND, rather contrarily the intially rendered orders, enjoin theirs being quashed and set aside.

4. Even otherwise, no reliance can be placed, by this Court, upon, the rendition, made, by a coordinate bench of this Court, in CMPMO No. 204 of 2005, dehors, its acquiring any conclusivity, given it remaining unassailed, before the Hon'ble Apex Curt, as also, it standing implemented, AND, besides its non implementation vis-a-vis the petitioners herein, also cannot, purportedly hence sequel any befallment, of, or any perpetuation, of, discrimination, upon, the petitioners herein, besides the tentative meritworthiness, thereof, is, blunted, for the reasons (a) given the decision recorded by this Court, in CMPMO No. 204 of 2005, whereby, it proceeded, to, after reversing the order, of review, made, by the apt successor-in-office, of, the authority, who untenably pronounced the initial void orders, (b) AND, even despite the fact that the initial orders, were, purportedly inaptly reviewed, also rather hence rid the initial orders vis-a-vis, all, the gross irredeemable entrenched stains, of, apt statutory disempowerments, (c) thereupon, rather with a coordinate bench, of this, Court, earlier hence visibly condoning the inapt initial exercise of jurisdiction, by, the apt predecessor-in-office, and, also hence rendering a verdict, clearly per incuriam vis-a-vis the apt jurisidictional interdictions, cast in a catena of judicial verdicts, (d) wherewithin, an absolute bar, is cast, against the Land Acquisition Collector, in condoning, the apposite delay, in, the belated preferment of, an application under Section 28A of the Act, (e) rather with the apposite empowerment being solitarily vested, in, the Reference Court, and, being exercisable, only upon, the apposite application(s), being referred by the Collector concerned vis-a-vis it, whereas, with the

apposite transmission, not, evidently occurring hereat, also constrains this Court, to hence, dissent therefrom..

5. For the foregoing reasons, all the petitions, are dismissed. However, for meteing complete justice vis-a-vis, the petitioners, it is still open, to, the petitioners herein, to institute appropriate application(s), before, the Land Acquisition Collector concerned, who may thereafter forward them, to the learned Reference Court, for the latter, hence, in accordance with law, condoning, the delay, in, the apposite motions, being made before the Land Acquisition Collector concerned, and, on the delays being condoned, the Courts concerned/he Collector concerned shall make a pronouncement, on merits, in accordance with law. The aforesaid exercise shall be be completed within six months from today. All pending applications also stand disposed of.

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

FAO No. 226 of 2015 along
with FAO No. 227 of 2015.
Reserved on : 16th May, 2015.
Decided on : 21st May, 2018.

**1. FAO No. 226 of 2015**.

Shriram General Insurance Company Limited. .....Appellant.

Versus

Smt. Byasa Devi & Others .....Respondents.

**2. FAO No. 227 of 2015**.

Smt. Byasa Devi & another .....Appellants.

Versus

Ranbir Singh & Others .....Respondents.

**Motor Vehicles Act, 1988 -** Sections 166 and 173 - Motor accident - Claim application – Death of engineering student – Monthly income – Determination - Claims Tribunal taking income of deceased , an engineering student at Rs1000 p.m. and granting compensation- In appeal, insurance company arguing that deceased was simply an engineering student and his monthly income should be taken equivalent to wages of skilled worker as fixed vide Govt. notification – Held,- aforesaid notification pertains to wages of workmen- It does not relate to employees who work in supervisory capacity- Services of an engineer cannot be equated with that of skilled workman-Deceased on employment would have earned Rs 1000 p.m. – Tribunal was justified in taking income of deceased at Rs 10000 p.m. (Para 4).

***Cases referred:***

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

Sarla Verma vs. DTC, (2009)6 SCC 121

For the Appellant(s): Mr. Jagdish Thakur, Advocate in FAO No. 226 of 2015.

For Respondents No. 1 & 2: Mr. Rajesh Verma, Advocate in FAO No. 226 of 2015
Mr. Tek Chand, Advocate vice to Mr. Ashok Tayagi, Advocate in FAO No. 227 of 2005.

For Respondent No.3: Mr. Tek Chand, Advocate vice to Mr. Ashok Tayagi, Advocate in FAO No. 226 of 2005.
Mr. Jagdish Thakur, Advocate, in FAO No. 227 of 2005.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The learned Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P., had, vis-a-vis the parents, of, deceased Kamlesh Kumar, who met his end in a motor vehicle accident, spurring, from the rash, and, negligent manner of driving, of, the offending vehicle, by Dilbag Singh, respondent No.2,hence, computed compensation, borne in a sum of Rs.16,45,000/-, along with interest, at, the rate of 9% per annum, from, the date of institution of petition, till its final realization. The indemnificatory liability thereof, was, burdened upon the insurer, of, the offending vehicle. The insurer as also the claimants, are, aggrieved by the award pronounced by the learned Tribunal in MAC Petition No. 153-MAC/2 of 2013, hence, they respectively instituted, the aforesaid appeals, before this Court.

2. The learned counsel appearing, for the insurer, of the offending vehicle, has, contended with vigour, that in the learned tribunal, hence, computing the income of the deceased, at Rs.10000/- per month, rather is ridden with a gross fallacy, arising, from the factum (a) of, his yet at the relevant time rather prosecuting his course in engineering, as reflected, in Ex.PW4/Q, at IIT college; (b) hence with his thereat, not, rearing any income nor any cogent evidence existing on record, qua, upon his completing the course, in engineering, from, the aforesaid institution, his imminently besides inevitably proceeding, to, draw a salary of Rs.10,000/- per month, (c) reiteratedly, hence, rendered the aforesaid apt computation, to be, grossly flawed, and, (d) he further contends that concomitantly, the meteing(s) of accretions/hikes, of 50%, vis-a-vis the aforesaid per mensem prospective salary, of the deceased, being also ridden, with a gross inherent legal fallacy. Furthermore, he contends that, though, the deceased, at the relevant time, was, aged 20 years, hence, upon the relevant figure, of annual dependency, a multiplier of 13, than, of 18, was applicable vis-a-vis the apt tenable figure of annual dependency.

3. The veracity of Ex.PW4/Q, is, not contested by the insurer. The prestige of the college, whereat, the deceased, at the relevant time, was prosecuting his studies, is also not cast any shadow of doubt. The effects thereof (i) are that deceased Kamlesh Kumar, on completing his engineering course, from, IIT college of Engineering, his hence definitely securing an apt employment either in government sector, or in a non government sector, whereupon, there being also a likelihood, of, his drawing a salary not less than Rs.10,000/- per mensem. The effect of the aforesaid inference, would be eroded, (ii) only, upon, evidence being adduced, by the insurer, comprised, in the graduates of IIT College, of Engineering, on obtaining, hence, employments in the government sector or in the non government sector, theirs drawing salary less than Rs.10,000/- per mensem. However, the aforesaid evidence is amiss, thereupon, it is concluded that deceased Kamlesh Kumar, would, on completing his engineering course, from, IIT College of Engineering, would hence definitely rather draw a salary not less than Rs.10,000/-, upon, his coming to be employed with a government agency or with a non government agency.

4. However, the learned counsel, for, the insurer has persisted, to, resist the tenacity of the aforesaid inference, on anvil (I) of with their existing hazy, and, nebulous evidence vis-a-vis the certainty(ies), of, rather contrarily hence the likely/possible income

hence being drawn, by the deceased, upon, his completing, the, engineering course, from, IIT College of Engineering, (ii) thereupon, the apposite notification, prescribing, the minimum wages vis-a-vis the skilled category of workman, wherein, a sum of Rs.163/- per day is prescribed, rather constituting the apt tangible material, for, hence computing the per mensem salary, of, the deceased. However, the aforesaid submission also founders, for, the simple reason (iii) that the apposite notification, visibly appertaining, only, to those workman belonging, to, the highly skilled, skilled, semi skilled or unskilled apt categories, (iv) whereas, deceased Kamlesh Kumar, being not construable to be a workman nor concomitantly, hence, his being construable, to be, a highly skilled workman, nor hence his per diem wages, are, construable to stand computed, in a sum of Rs.163.79. The further reason, being (v) that an Engineer, not on any logical foundation being construable to be a workman, rather, the categorization, of, workmen, in the apposite notification, apt portion whereof, is, extracted hereinafter, respectively as highly skilled or semi skilled or unskilled workman,

| Sr. No. | Scheduled Employerment | Category of workers | Total Miimum Wages per day (in Rs.) |
|---|---|---|---|
| 5. | Engineering Industries | High Skilled | 163.79 |
| | | Skilled | 163.79 |
| | | Semi Skilled | 133.51 |
| | | Un-skilled | 130 |
| | | Clerical and Non Technical Supervisor staff | 145.32 |

Only appertaining, to, workmen, who, perform in consonance therewith the apposite task(s), (vi) AND not appertaining, to, those employees, who, render employment, in supervisory capacity(ies), as, the deceased would, on his completing, the apt course of Engineering, hence perform, (vii) unless of course evidence stood adduced that the students, who, graduated, from, IIT College of Engineering, AND, on theirs obtaining employment in the government sector or in the non government sector(s), theirs, under their respective employers, rather coming to be categorized in the highly skilled category, (viii) whereas, hereat, with the aforesaid evidence, being tritely amiss hereat, thereupon, it is to be construed, of, his on gaining employment, in a government agency or in a non government agency, his being enjoined, to, perform, apt, technical supervisory functions. Further, fortification to the aforesaid inference, is, garnered, from, the apposite notification also prescribing vis-a-vis, the clerical or non technical staff, per diem wages quantified at Rs.145.32, (ix) nowat, if, the notification intended, that the technical supervisory staff, in category whereof, the deceased would obviously fall, given his completing, the apt technical course, thereupon, it would hence make alike therewith palpable displays, in the apposite notification, especially qua the category apposite therewith. However, no category vis-a-vis, the apt technical supervisory staff, in category whereof, the deceased, upon, being employed in the government or non government agency, would hence fall, rather not occurs in the apposite notification, (xi) thereupon, it is to be concluded that all the prescriptions in the apposite notification, of, per diem wages, of, Rs.163.79, being meted, vis-a-vis the highly skilled workmen, not, obviously appertaining, to, the apt hereat hence technical supervisory

staff. Contrarily, for all the reasons aforesaid, the computation of per mensem salary, of, the deceased, as made, by the learned Tribunal, is neither erroneous nor fallacious.

5. The learned counsel appearing, for the insurer has relied, upon paragraph No. 57, of, a decision rendered by the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.58 extracted hereinafter:

> "58. The seminal issue is the fixation of future prospects in cases of deceased who were self employed or on a fixed salary. Sarla Verma, 2009 ACJ 1298 (SC) has carved out an exception permitting the claimants to bring materials on record to gt the benefit of addition of future prospects It has not, per se, allowed any future prospects in respect of the said category." (p.2721)

and has, hence, contended (i) that with, a, trite expostulation existing therein vis-a-vis, the validity(ies), of meteing, of hikes vis-a-vis the future incremental prospects qua the last salary drawn, by the deceased, being bedrocked, upon, firm evidence qua the deceased, at the relevant time, holding, a permanent job, and, his being below 40 years, (ii) thereupon, with, the extant factual scenario, rather visibly, depicting only qua the mere likelihood, of, the deceased, being employed, on his completing, the apt engineering course, from, IIT College of Engineering, hence, he cannot per se be concluded, to, with any iota, of, certitude, hence, rear an income of Rs.10,000/- per mensem, upon the concomitant, mere, likelihood, of, his gaining employment in a Government sector or in a non government sector, nor hence he can be concluded to be holding, any, indefeasible entitlement(s) qua hence any meteings, of, hikes and accretions, towards, future prospects, upon, the aforesaid per mensem salary. (iii) Moreso, reemphasisingly, when, the aforesaid paragraph, appertains, to a scenario, where, the deceased, at the relevant time, hence, holds a permanent employment, whereas, the deceased contrarily hereat rather evidently, not, at the relevant time, hence holding, any permanent employment, either, in the government sector or in the non government sector, (iv) thereupon, render infirms, hence, any, apt meteings, of the relevant hikes vis-a-vis the further incremental prospects. The aforesaid submission does hold vigour, given, a clear precise expostulation, occurring in paragraph supra, of, the deceased, at the relevant stage, being enjoined to evidently, hold a permanent job, and, his (v) also evidently drawing, therefrom, a certain income also when hence it cannot be concluded that, upon, his completing, the apt Engineering course, he, would definitely secure, a permanent job, with a government agency or with a non government agency, nor thereupon it can be hence concluded, of, his deriving any certain income therefrom, (vi) yet the apt meteing(s), do, despite haziness qua the certainity, of, his employment, and, also nebulousness, qua certainity, of, income to be derived therefrom, rather arise, from, the imminent likelihood, of, the deceased, on completing his course, in engineering, his hence getting employment, with, a government agency, or in a non government agency, especially when the aforesaid imminence, of, all likelihood(s), is, rather axed, by the fatal accident, (vii) thereupon, renders attracted hereat, the mandate, occurring in the paragraph 59, of the verdict of the Hon'ble Apex Court, rendered, in Pranay Sethi's case (supra), paragraph whereof stands extracted hereinafter, (viii) conspicuously, when, hence, for all aforestated reasons, this Court, is, disinclined, to, accept the apposite herewith, all, the aforesaid submission(s), of, the learned counsel, for the insurer, AND, moreso when parity(IES) vis-a-vis apt hikes, is visited, upon, apt employment(s), both, in government, and, in non government sector. Paragraph No.59 reads as under:-

> "59.Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed

> salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life,etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."
>
> (p.2721-2722)

Consequently, while, placing reliance thereon, 40% hikes or accretions, on anvil, of, future incremental prospects, qua the last salary drawn by him, from the imminent likelihood, of, his obtaining employment, in a non government agency or in a government agency, is, rather rendered hence aptly meteable, (i) especially when the deceased, is reflected, in the postmortem report, to be aged 20 years, at the relevant stage. Consequently, after meteing 40 %, increase(s) vis-a-vis the apposite last drawn salary, thereupon, the relevant last drawn salary, of, the deceased, is recoknable to be Rs.14000/-, [Rs.10000/-(estimated

salary of the deceased)+Rs.4000/-(40% of the last drawn salary). Significantly, with the deceased, being, a bachelor, 50% deduction, is to be visited, upon, a sum of Rs.14,000/-, deducted amount whereof, is, calculated at Rs.7,000/- per mensem. Consequently, the annual dependency, including, the future hikes towards the apt future incremental prospects, is, worked out, now at Rs.7000X12=Rs.84,000/-.

6. The further, contention of the learned counsel appearing, for the insurer, that upon the aforesaid sum, of annual dependency, a multiplier of 13, is enjoined to be applied, is, however, rejected, for the reason, (a) that with there occurring a candid pronouncement in a case tilted as **Sarla Verma vs. DTC**, reported in ***(2009)6 SCC 121***, that a multiplier of 18, is, applicable for the age groups of 15 to 21, and 21 to 25 years. Consequently, with the deceased, as depicted, by the postmortem report, borne in Ex.PW2/A, being aged about 20 years at the relevant time, hence a multiplier of 18 is hereat applicable. After applying the apposite multiplier of 18, the compensation amount, is assessed in a sum of Rs.84,000/-x 18=Rs.15,12,000/- (Rs. Fifteen lacs and twelve thousand only).

7. Moreover, the learned Tribunal, has committed an gross illegality by its not quantifying compensation vis-a-vis the claimants under apt conventional heads, namely (i) loss to estate, and (iii) funeral expenses. Consequently, with the Hon'ble Apex Court in a verdit rendered in **Pranay Sethi's** case (supra), rather expostulating, that reasonable figures, under conventional heads, namely, loss to estate, and, funeral expenses being quantified, only upto Rs.15,000/-, and Rs.15,000/- respectively, hence, the award of the learned tribunal is also interfered, to the extent aforesaid. Accordingly, in addition to the aforesaid amount of Rs.15,12,000/-, the claimants, are, entitled to assessment, of, compensation(s), under conventional heads, namely, loss to estate, and, funeral expenses, sums of Rs.15,000/-, and, Rs.15,000/-, as such, the total compensation, to, which the claimants are entitled comes to Rs.15,12,000 + 15,000/- + 15,000/-= Rs.15,42,000/-(Rs. Fifteen lakhs and forty two thousands only).

8. For the foregoing reasons, the appeal filed by the insurer as also by the claimants are partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.15,42,000/-, (Rs.fifteen lacs and forty two thousand only) along with pending and future interest @9 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants in the hereinafter extracted manner:-

> "Petitioner No.1, being entitled to 60% amount along with proportionate interest and petitioner No.2 being entitled to 40% amount along with proportionate interest"

All pending applications also stand disposed of. Records be sent back forthwith.

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

State of H.P. ....Appellant.
Versus
Rachhpal Singh ....Respondent.

Cr. Appeal No. 375 of 2009.
Reserved on: 18th May, 2018.
Date of Decision: 21st May, 2018.

**Punjab Excise Act, 1914 (as applicable to State of H.P ) –** Section 61(i)(a) **–** Recovery of liquor without licence – Police filing charge sheet against accused for having recovered Country and Indian Made Foreign Liquor from bag thrown by him – Trial court acquitting accused – Appeal against – State contending wrong appreciation of evidence on part of trial court – Facts revealing that on seeing police, accused allegedly fled from spot – Bag not recovered from his conscious and exclusive possession – No evidence regarding person who revealed identity of accused to police – Identification parade also not held – Identification of accused during trial weak piece of evidence – Held, prosecution failed to firmly link accused to alleged offence – Appeal dismissed – Acquittal upheld. (Paras 2 & 10)

For the Appellant: Mr. Vikrant Chandel, Deputy Advocate General
For the Respondents: Mr. Nitesh Negi, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge**

The instant appeal stands directed, against, the judgment rendered, on, 19.06.2009, by the learned Addl. Chief Judicial Magistrate, Dehra, District Kangra, H.P. in Criminal Case No. 17-i/2006/21-III/2006, whereby, he acquitted, the accused for his allegedly committing, an offence punishable under Sections 61(i)(a) of the Punjab Excise Act as applicable to the State of H.P (hereinafter referred to as the Act.

2. The facts relevant to decide the instant case are that on 25.7.2005, ASI Tarsem Lal along with other police personnel was present on patrolling and Naka duty near Jaur Bar and at around 6.45 p.m., accused came on the spot along with one jute bag on his head, who, on seeing the police party, after leaving the bag on the spot fled away towards jungle. The gunny bag was checked and two card boxes i.e. on containing 12 plastic bottles of country liquor "Lal Quila" and another containing 12 bottles of IMFL "Bag Piper" were recovered. Consequently, six nips i.e. three from each card box were separated for the purpose of chemical test and the nips and lose bottles were sealed with seal "T" and seal after use was entrusted to witness Pardeep Raj Singh. On inquiry, it was revealed that the person fled away from the spot was Rachhpal Singh alis Pali son of Shri Hans Raj, resident of Upper Balwal. The case property was taken in possession vide memo Ex.PW1/A in presence of witnesses. A rukka Ex.PW5/B was sent to police station Dehra through HHC Rukam Deen, on the basis of which, FIR Ex.PW2/A was registered against the accused. Thereafter the police completed all the codel formalities.

3. On conclusion of investigations, 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 offences punishable, under Sections 61(i)(a) of the Act. In proof of the prosecution case, the prosecution examined 5 witnesses. On conclusion of recording of the prosecution evidence, the statement, of the accused under Section 313, of, the Code of Criminal Procedure was recorded by the learned trial Court, wherein the accused claimed innocence, and, pleaded false implication.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded in favour of the accused/respondents. The learned Addl. Advocate General for the State, has concertedly, and, vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondents herein, has, with considerable force and vigour, contended qua the findings of acquittal recorded, by, the learned trial Court rather standing based on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The relevant cache of liquor was recovered under memo, comprised in Ex.PW1/A. (a) All the prosecution witnesses concerned, in their respectively rendered testifications, echoed, with utmost unanimity and concurrence vis-a-vis the recovery of the apposite cache, of, liquor being made under Ex.PW1/A. (b) Along therewith each of the prosecution witnesses, in their respectively rendered tesitifcations, make apparent underscorings vis-a-vis the recovery of cache, of liquor, as, made under Ex.PW1/A, also bearing congruity therewith, at, the apposite stage of its production, in Court, (c) besides, with, the apt descriptions embodied, in Ex.PW1/A vis-a-vis the English alphabet, of seals embossed on the relevant boxes, also at the time, of production of case property in court, bearing congruity(s) therewith, (d) also the English alphabet, of, seal impression(s), as recited, in EX.PW1/A, to be embossed on the bags/boxes, apparently remaining unbroken, at the stage, of, production of the case property in Court, (e) AND, the CTL in its report comprised, in, Ex.PW5/F making, clear unrebutted echoings, vis-a-vis the sample bottles, sent to it, for analysis, containing therewithin liquor, also remaining uncontrovereted. (f) Preponderantly, the factum of the sample bottles retrieved, from, the entire cache of the liquor recovered, at the site, comprised in site plan, embodied in Ex.PW5/C, bearing analogity therewith. In aftermath, the prosecution prima facie does succeed in proving the charge against the accused.

10. Be that as it may, the paramount link, for conclusively connecting the accused vis-a-vis the recovery of cache of liquor, from, his purported conscious and exclusive possession, through, memo Ex.PW1/A, rather was comprised, in, a forthright candid evidence, being testified by the prosecution witnesses vis-a-vis the person from whose conscious and exclusive possession the cache of liquor was recovered, being a person, none other, than the accused. In establishing the trite factum probandum, the prosecution, was, faced with a uphill task, (a) given the accused being not apprehended, from, the site of occurrence rather emphatically, with, his purportedly being the person, who at the relevant time, hence was carrying a gunny bag with him, AND, his purportedly, being one, who, after sighting the police, abandoned the gunny bag and thereafter fled towards jungle, (b) thereupon, the identity of the accused, for, sustaining the charge vis-a-vis him, was enjoined to be firmly established, by, apt evidence comprised in the factum, of, the Investigating Officer, on revelations being made to him vis-a-vis the key characteristics features and traits of the accused, his thereafter holding a valid test identification parade, whereupon, the

identity, of, the accused stood clinchingly established, and, thereupon his identification in Court would be efficacious. However, the Investigating Officer, in his cross-examination, has acquiesced, to a suggestion of his, not holding, the relevant test identification parade. The omission, of, the Investigating Officer, to hold the test identification parade, constrains an inference, of no apposite profile vis-a-vis the key characteristics features, and, traits of the accused, being available, with the Investigating Officer concerned. (c) With a further effect, of, the identification in court, of, the accused being extremely frail besides weak piece, of evidence, for firmly connecting the accused, with, the relevant factum probandum. Tremendous vigour qua the aforesaid inference, of the, prosecution abysmally failing, to adduce the most potent evidence, for, linking the accused hence with the charge, is, galvanized by PW-1, making a deposition, of, the identity of the accused, being revealed by a salesman, working at a liquor vend, (d) thereupon, it was incumbent, upon, the Investigating Officer, to record his previous statement in writing, with clear communications borne therein vis-a-vis the key characteristic features, and, traits of the accused, and, also the Investigating Officer concerned, was, in sequel thereto, enjoined to hold, a valid test identification parade, for enabling, the identifier of the accused to therein, hence identify the accused, whereupon, alone, the identification, of, the accused in Court, by PW-1, would gain vigour. However, neither the previous statement of the person concerned, who purportedly revealed the identity, of, the accused hence was recorded by the Investigating Officer, nor hence in sequel thereto, any valid test identification parade was carried by the Investigating Officer, besides, obviously the identifier of the accused, did not identify, the accused therein, thereupon, it cannot be concluded that the prosecution, has firmly linked the accused, in the commission of the alleged offence.

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

12. Consequently, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

RFA No. 26 of 2010 along with RFA No. 27 of 2010.
Reserved on : 16th May, 2018.
Date of Decision: 21st May, 2018.

**1. RFA No. 26 of 2010**

The Land Acquisition collector, H.P. Housing and Urban Development Authority
....Appellants.

Versus

Narinder Singh & others ....Respondents.

**2. RFA No. 27 of 2010**

The Land Acquisition collector, H.P. Housing and Urban Development Authority
.....Appellants.

Versus

Narinder Singh & others ..Respondents.

**Land Acquisition Act, 1894 –**Sections 18 & 23 – Acquisition of land for public purpose - Reference - Compensation - Market value - Determination - Exemplar sale transactions - Relevancy - Held, while adjudging compensation amount, two principles have to be borne in mind - Proximity in time and proximity in location of land with respect to which exemplars have been brought on record - Exemplar sale deeds not conforming to these principles cannot be taken into account while determining value of land - RFA dismissed - Award of Reference Court upheld. (Paras 3 & 4)

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|---|---|
| For the Appellant(s): | Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajit Jaswal, Advocate in both appeals. |
| For respondents No.1 &2: | Mr. Dheeraj K. Vashishta, Advocate, vice to Mr. R.P. Singh,Advocate in both appeals. |
| For Respondent No.3: | Mr. Hemant Vaid, Addl. A.G. with Mr. Vikrant Chandel and Mr. Mr. Yudhvir Singh Thakur, Deputy Advocate Generals in both appeals. |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

Since, common question of law and facts are involved in both the aforesaid appeals, hence, both are being disposed, of, by a common judgment.

2. The landowners' land, was, acquired for a public purpose, and, the Land Acquisition Collector concerned, determined vis-a-vis the acquired lands, hence, compensation amount, comprised, in a sum of Rs.90,000/- per kanal, irrespective, of, the diverse classification, of, land(s), as, brought to acquisition. Being aggrieved therefrom, the landowners, through, the Collector concerned, hence, cast reference petition(s) under Section 18 of the Land Acquisition Act, before, the learned Reference Court, and, the latter enhanced, the amount of compensation, to, a sum of Rs.1,20,000/- per kanal, irrespective, of, contradistinct classifications, of, lands as brought to acquisition. Being aggrieved therefrom, the appellant(s) herein preferred the instant appeal before this Court, for hence begetting its reversal.

3. The learned counsel appearing, for, the appellant(s) has with much vigour contended, before, this Court that, the apposite besides tangible materials rather hence begetting satiation, of, the twin principles, enjoined to be borne in mind, by the learned reference Court, while adjudging compensation amount, principles whereof are comprised in, (a) proximity in time angle, evinced, from the execution of apposite sale exemplars, bearing proximity in time vis-a-vis the issuance of the apposite notification, AND, (b) the lands borne in the apposite sale exemplars, also, holding proximity in location angle vis-a-vis the location of the lands, as, brought to acquisition, are hence rather borne, in sale exemplars, embodied in Ex.RW1/A, and, in Ex.RW1/B, (i) AND, he further contends, that the discarding of the aforesaid, renders the impugned award(s), to be, ingrained with an inherent legal frailty. The aforesaid submission is not amenable for acceptance, by this Court, given RW-1, who tendered the aforesaid sale exemplars, into evidence, rather not during the course, of, his examination-in-chief, hence making, any, apt candid voicings qua rather satiation(s) being meted, qua the afore referred twin principles. Reiteratedly, hence, no reliance was amenable, to be placed thereon.

4. The learned counsel appearing, for, the appellant(s), has thereafter proceeded, to contend before this Court (i) that any imputation of credence vis-a-vis Ex.PW2/A, exhibit whereof, carries therein, the average annual sale price vis-a-vis Barani Abal category of land, AND, appertains to the mohal concerned, wherein, the lands brought, to acquisition, are located, is also fallible, (ii) given the preparation, of, Ex.PW2/A, occurring four years subsequent to the issuance, of, the apposite notification, and, hence it visibly being a post notification average annual sale price, appertaining, to barani abal category of land, hence no credence, is, liable to be meted thereto. However, the aforesaid submission, also, lacks vigour, as, a circumspect perusal, of, paragraph No.14 of the award(s) impugned before this Court, rather, contains a valid reason, assigned by the learned reference Court, for, imputing credence thereto, (ii) especially when the learned reference Court, has proceeded to deduct 10% for each year, commencing since 2004, upto, the year of issuance of the apposite notification, from, the average sale price, carried therein, of, barani abal category, of, land, as, embodied in Ex.PW2/A. The meteings, of, apt deduction(s), hence, also wanes, the effect, if any, qua the preparation, of, Ex.PW2/A, rather, carrying a post notification computation, of, one year average annual sale price, of, barani abal category of land. In summa, the computation of compensation, by the learned reference Court, vis-a-vis, the lands, as, brought to acquisition, is, squarely grooved besides anvilled, upon, an appropriate appreciation, of, the material on record, and, warrants no interference.

5. For the foregoing reasons, there is no merit in the instant appeals, and, they are dismissed accordingly. The impugned award(s) are maintained and affirmed. 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.**

The Director, Technical Education and others

.....Appellants/defendants.

Versus

Lekh Ram (since deceased) through his legal heirs

....Respondents/Plaintiffs.

RSA No. 43 of 2009.
Reserved on : 6th August, 2018.
Decided on : 23rd August, 2018.

**Himachal Pradesh Urban Rent Control Act, 1987-** Section-5 - Statutory enhancement on contractual rent-- Principles – Applicability- Held, principles contained in Act regarding enhancement in rental permissible on contractual rent being based on reasonableness and good conscience can be extended to premises located in non- urban areas - Landlord can not seek exorbitant enhancement in rent even if there is no stipulation prohibiting such increase in rent deed ( Para 11)

For the Appellants: Mr. Hemant Vaid, Addl. A.G. with Mr. Vikrant Chandel, Dy. A.G.

For the Respondents: Mr. Sanjeev Kuthiala, Advocate with Ms. Garima Kuthiala, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The plaintiff's suit for recovery of arrears, of, rent was partly decreed by the learned trial Judge, and, in an appeal preferred therefrom, by the aggrieved plaintiff, before, the learned First Appellate Court, the latter Court, rather modified the verdict pronounced by the learned trial Court, upon, Civil Suit No. 262/1 of 2002. Consequently, the defendants being aggrieved therefrom, hence motion this Court through the instant regular second appeal.

2. The subject matter of the present suit, is, recovery of arrears of rent along with interest with regard to rented out building of the plaintiff, situated at place Diggal, w.e.f. March, 1997 to February, 2002. It is averred that in the year 1987, the plaintiff has rented out his building to defendant No.2 @ Rs.750/- per month. The rent of the aforesaid building was assessed by the H.P.P.W.D. authority for a period of five years. The period of five years has expired in the year 1992. Thereafter, the H.P.P.W.D. department again reassessed the rent @ 912/- per month for a period of five years, w.e.f., the year 1992-1997. As per the plaintiff, further five years agreement is to be made on the basis of reassessment. Defendant No.2 requested the H.P.P.W.D. authorities to reassess the rent of the building vide letter dated 22.7.1999, for five years. The Executive Engineer, H.P.P.W.D., Nalagarh reassessed the rent @3015/- per month from March, 1997 to February, 2002. The Executive Engineer informed the defendants with regard to reassessment of rent and the copy of the same is also forwarded to the plaintiff. The plaintiff requested the defendants to pay reassessed rent @ Rs.3015/- per month, w.e.f. March, 1997. The defendants did no pay any heed to pay the reassessed rent. The defendants have paid an amount of Rs.912/- per month, w.e.f., March, 1997 to February, 2001 and the balance amount of Rs.2103/- per month as rent w.e.f. March, 1997 to February, 2001 is to be paid. The defendants have also not paid any rent from March, 2001, to February, 2002 and as such the defendants are in arrears of rent to the tune of Rs.3015/0- per month w.e.f. March, 2001 to February, 2002, and as such the defendants are arrears of rent to the tune of Rs.1,16,019/-. According to the plaintiff he issued legal notices to the defendants through his counsel under Section 80 CPC, but despite the service, the defendants have not paid any heed to pay the rent to the plaintiff.

3. The defendants contested the suit and filed written statement, wherein, the have taken preliminary objections qua the plaintiff being entitled to rent at the rate of Rs.1003/- per month w.e.f. February, 1997 to July 2001, the plaintiff filed the present suit with dishonest motive as he has misled the H.P.P.W.D. authorities to assess the rent of additional accommodation on 12.06.2001 w.e.f. February, 1997 (retrospectively) which was taken in possession by the defendants in August, 2001. The plaintiff was requested by the defendants to execute the lease deed w.e.f. February, 1997 for a period of five years. On merits, it is admitted that the building of the plaintiff has been hired for the purpose of running Girls ITI at Diggal @ Rs.750/- per month in the year, 1987, for a period of five years with the agreement of 10% enhancement of rent for every subsequent five years period. The rent was enhanced to Rs.912/- from Rs.750/- in the year 1992 for next five years i.e. 1992 to 1997. Similarly in the year 1997 with 10% enhancement, the rent will be reckoned to be Rs.1003/- for next period of five years, excluding the additional area taken in the month of August, 2001. It is averred that the defendants were paying the rent amount regularly to the plaintiff but the plaintiff has failed to execute the lease deed inspite of repeated requests of the defendants. Moreover, he is receiving the payment of rent. It is further averred that the plaintiff dishonestly and in connivance with the H.P.P.W.D. department got the rent of

his building assessed on 12.06.2001 at Rs.3015/- per month, w.e.f. 1997 to 2002 (retrospectively) by including even that area which was taken over by the defendant in august, 2001. It is pertinent to mention here that there is no additional area till July, 2001 and therefore, the plaintiff is entitled to rent at the rate of Rs.1003/- per month till July, 2001 plus rent of additional accommodation taken by the defendants w.e.f. August, 2001 subject to assessment of rent by P.W.D. department. It is also pleaded that initially only the area of accommodation was 1050 sq. meters and additional area of 72.63 sq. meters was taken in August, 2001. In fact, the plaintiff with dishonest intention had got the rent of the building reassessed at Rs.3015/- w.e.f. March, 1997 to February, 2002 by including even that area which was taken in possession by the defendant in August, 2001. The alleged assessment was got done by the plaintiff on the back of defendants by misrepresentation and in connivance with the P.W.D. department, which is not binding upon the defendants. As per the defendants, the plaintiff ha sno cause of action.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the rent was to be increased as per assessment made by HPPWD after every five years? OPP.
2. Whether the defendants are in arrears of rent, if so, to what amount? OPP
3. Whether the plaintiff is entitled to interest at the rate of 12% per annum? OPP
4. Whether the suit is bad for non joinder of necessary parties?OPD.
5. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court partly decreed 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, modified 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 6.11.2009, 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 in absence of any agreement/rent deed, learned lower appellate Court has committed error in law in relying the assessment made by Public Works Department authorities in determining the monthly rent of the premises that too retrospectively?

b) Whether the learned lower appellate Court has misread and misinterpreted the material evidence on record?

**Substantial questions of Law No.1 and 2:**

8. The learned trial Judge, has, upon, Civil Suit No. 262/1 of 2002, rendered a decree against the defendants, whereunder, they are held to be in arrears of rent w.e.f. March, 1997 to 31.07.2001 @ Rs.91/- per month, i.e. Rs.4,823/-, and, further the defendants were held to be in arrears of rent w.e.f. 1.8.2001 to February 2002 @ Rs.2103/- per month, i.e. Rs.14,721/, and, interest @6% per annum, was mandated to accrue thereon, and, was ordered to arise from the date of the suit, till, realization thereof.

9. The aforesaid verdict was not assailed by the defendants, rather was assailed by the plaintiff, (i) on the ground that in the decree rendered by the learned trial Court, the latter proceeding to untenably reduce the apposite enhancement/accretions, vis-a-vis, the contractual rent, from 300 per centum, enhancements whereof may be accurable, upon, the contractual rate of rent, after elapse, of, every five years, (ii) on the ground, given even, if, the aforesaid enhancements/accretions,remaining not specifically recited, in the relevant documents, yet, the apt non reciting rather standing subsumed, by marked apt acquiescence, of, the defendants, and, no evidence contrary thereto hence standing adduced, (iii) whereas, the aforesaid prime factum hence standing not appraised by the learned trial Court.

10. The learned first Appellate Court, in the impugned verdict, decreed, in entirety the plaintiff's suit w.e.f. March 1997 to February, 2002, and, declared the plaintiff, to, stand entitled, to enhanced rent computed at Rs.1,16,019/- along with interest at the rate of 12% per annum. Even though, the learned first appellate Court has not apparently erred in concluding (i) while rejecting, the defendant's espousal qua the plaintiff's purported claim, along with apt accretions/enhancements thereon, rather appertaining, to, the newly added accommodation, vis-a-vis, the hitherto demised premises, and, addition whereof occurred in the year 2001, especially, when as aptly concluded, there existing no befitting apt documentary evidence, for, meteing succor thereto.

11. Be that as it may, the learned first Appellate Court, has apparently, faltered and has committed, a, grave fallacy (a) in concluding, of, the plaintiff being entitled to even exorbitant increases, and, enhancements, vis-a-vis, the contractual rate of rent, (b) given there occurring no recital contrary therewith in the apt contract of tenancy, executed inter se the plaintiff and defendants. The reason for making the aforesaid conclusion is sparked by the factum (a) even if the demised premises are assumingly, not proven to stand located in an area, whereto the provisions, of, the H.P. Urban Rent Control Act, are applicable, yet the prescription(s), ordained therein qua the landlord being entitled, to increases/enhancements, vis-a-vis, the contractual rent, in a per centum, restricted upto 10%, and, the apt enhancements, hence, occurring after every three years; (b) nonetheless, the aforesaid statutory prescriptions, held in the H.P. Urban Rent Control Act, when are reasonable, hence, are enjoined to be meted appropriate apt solemnity, rather than the learned First Appellate Court, untenably, proceeding to discard, the, statutory efficacy thereof, (c) merely on the anvil, of, no apt forbidding recitals, rather existing in the apt contracts, against, the levying, of, 300 per centum enhancements/increases, vis-a-vis, the contractual rent, upon, the demised premises, and, vis-a-vis, the defendants. Moreso, when, upon, accepting the aforesaid reasoning, would beget, infraction, of, the mandate, of, the prescriptions, borne in the H.P. Urban Rent Control Act, (d) especially when thereupon, the, solemn elements of good conscience, and, reasonableness, as stand embodied therein, would suffer negation, (e) rather hence with there being no estoppel against statute(s), whereas, this Court would in validating exorbitant increases, working against statute(s) render hence inapt increases applicable, vis-a-vis, even the demised premises, nor hence, the factum, of, defendants without demur, earlier making attornments, of, unconscionable, and, exorbitant increases, would render themselves, to, hence make legally binding

acquiescences, vis-a-vis, the attorning, of, exorbitant enhancements/increases, in, the contractual rent.

12. 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. Accordingly, substantial questions of law No.1 and 2 are answered in favour of the appellants and against the respondents.

13. In view of above discussion, the instant appeal is allowed. In sequel, the judgement and decree rendered by the learned First Appellate Court upon Civil Appeal No. 1-NL/13 of 2008 is set aside, whereas, the judgment and decree rendered by the learned trial Court, upon, Civil Suit No. 262/1 of 2002 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Jarnail Singh ..Plaintiff.

Versus

Sukhbir Singh and another ..Defendants.

Civil Suit No. 100 of 2009
Reserved on : 15.5.2018
Decided on : 11.6.2018

**Specific Relief Act 1963 -** Sections 10 and 16 **-** Specific performance of agreement to sell - Grant of **–** Plaintiff entering in agreement with defendants and agreeing to sell his brick kiln , huts, tools, wooden trolleys and equipments to them - Plaintiff also delivering possession of brick kiln alongwith licence to them- On failure of defendants to pay balance amount, plaintiff filing suit for specific performance of agreement for directing defendants to purchase suit property - Plaintiff praying for damages also on account of removal of bricks and other material by defendants- Evidence disclosing that brick kiln was being run by partnership firm on lease – Only one partner had executed General Power of Attorney ( GPA) with respect to brick kiln in favour of plaintiff without consent of other partners- GPA not registered one – GPA not empowering plaintiff to transfer rights in brick kiln- Document relied upon by plaintiff as sale deed in his favour actually GPA executed by one partner only - Land underlying brick kiln owned by third party- G , unconnected with lis – Licence in name of partnership but it is not arrayed as party in suit- Held – Plaintiff cannot seek specific performance of agreement to sell as against defendants- Suit dismissed – (Paras 8,9 & 11)

For the Plaintiff: Mr. Dinesh Bhanot, Advocate.
For the Defendants: Mr. Y.P Sood, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, J**

The instant civil suit has been preferred, for, rendition, of a decree of specific performance of agreement, and, in the alternative, for, rendition, of, a decree qua possession of the suit property, besides, for pronouncement, of, a decree for pecuniary damages quantified in, a, sum of Rs.30 lacs alongwith @18% p.a., also, for rendition of a decree qua permanent prohibitory injunction, as well as, a decree qua mandatory injunction.

2. The brief facts of the case, are, that a Brick kiln named, and, styled, as, "M/S Sada Shiv Bricks Company", situated at village Ratyor, Tehsil Nalagarh, District Solan, H.P. with lease hold land, measuring 65 Bighas, comprised in Kh/Kht No. 451/592, 93 bearing Khasra No. 2044, 1999, 1994, 1997, 1998, 1995,1996 and 1992, as, entered in the Jamabandi for the year 2001-02 (for short "suit property"), is, owned by Garibu, and, under a lease agreement, the soil of the land, is, covenanted to be utilized, for, manufacturing bricks, and, longevity, of, the lease aforesaid executed inter-se the aforesaid company, and, owner thereof, was, up to 30.9.2006. The suit property, as averred in the plaint also includes licence (No. SLN/Bricks/114), Chimney, labour huts, tools equipments, frames and 15 wooden trolleys, and, the suit property,is, also averred in the plaint, to be, including 15 lacs baked, and, 10 lacs unbaked bricks. The plaintiff avers, of his, purchasing through, an agreement of 29.9.2007, the aforesaid brick kiln, from, its sole proprietor Shri Ashok Kumar Jindal alongwith, all the appendages, except the prepared bricks, and, charcoal present on the spot, and, the same also included, all, the frames and huts etc. alongwith all the lease rights. The plaintiff also avers, of, the brick kiln being free from all encumbrances, and, the possession of the same, being taken on the date of aforesaid agreement by the plaintiff. The plaintiff further avers, of, his operating the brick kiln smoothly, and, his rearing handsome returns therefrom. It is further averred by the plaintiff, qua, defendants becoming avaricious, of, the sudden upsurge, in the commercial activity in the area, and, improvement in the business prospects, hence, started sending feelers to the plaintiff, to, sell the said brick kiln, and, owing, to, persistent persuasion of the defendants, the, plaintiff agreed, to on 22.8.2008, hence sell the suit property, to the defendants, alongwith the stock of bricks about 15 lacs, and, about 10 lacs unbaked bricks besides the labour huts, frames, chimney and other equipments alongwith lease rights, for, a total consideration of Rs. 33,75,000/- only. It is further averred by the plaintiff that the relevant agreement was reduced into writing, and, was executed inter-se the plaintiff, and, the defendants, and, come to be attested, on 22.8.2008. At the time of execution of the relevant agreement, the defendants are averred, to, tender to the plaintiff, a, sum of Rupees 9 lacs, and Rs. One lac, in cash, and, Rs. 1 lac by way of two cheques, of Rs. 50,000/- each, payable at HDFC Bank, however, the same could not be en-cashed, as the same, were wrongly drawn and two fresh cheques, were, issued by the defendants, for, a sum of Rs. 50,000/-, each payable in the personal account of the plaintiff, AND, as such, a sum of Rs. 10 lacs, was, received as earnest money by the plaintiff, from, the defendants, and, the defendants further undertook, to pay the second installment of Rs. 10 lacs before 21.11.2008. It is further averred, that, the balance amount of Rs.13,75,000/-, was, to be tendered by the defendants, before 21.1.2009, and, the plaintiff was to transfer the lease, of land, in favour of the defendants, after, clearing of the total consideration of Rs.33,75,000/- on 21.1.2009 by the defendants, to the plaintiff. It stands further averred of the defendants failing to pay the second installment, of, Rs. Ten lacs, to the plaintiff, before 21.11.2008. Since the defendants failed, to, pay the second installment, of, Rs. Ten lacs to the plaintiff, and, hence as per, the terms of the agreement, the, earnest money of Rs. Ten lacs paid, to, the plaintiff on the date of agreement i.e. 22.8.2008, stood forfeited to the plaintiff, and, the agreement stood cancelled and revoked. The plaintiff instead of proceeding, with, the forfeiture of the earnest money rather gave a chance, to the defendants, to perform their part, of the agreement, and, extended the date, by 21.1.2009. It is further averred, in the plaint, that physical possession, of, the Brick kiln aforesaid alongwith licence (No. SLN/Bricks/114), Chimney, labour huts,

tools equipments, frames and 15 wooden trolleys, AND, the suit property also stands averred to be including 15 lacs baked and 10 lacs unbaked bricks, all whereof were, handed over to the defendants by the plaintiff, vis-a-vis the date of drawing of agreement i.e 22.8.2008, alongwith the lease land qua which the lease is valid from 1.10.2005 to 30.9.2016, as, per the lease deed so executed, by its owner Shri Garibu, in, favour of the above brick kiln. The said brick kiln is averred, to be, free from every encumbrances. In terms of the agreement, the plaintiff also handed over the licence No. SLN/Bricks/114 of the Brick kiln, alongwith, the other relevant documents, on the date of agreement, to the defendants. Further more it is averred, that it being agreed mutually, between, the parties that, the price of raw as well a burnt bricks, being computed later, and, as such, the same was to be paid, by the defendants to the plaintiff, and, after counting, the same. It is further been averred, that, the defendants despite having been delivered possession of the suit property, on the date of the execution of the agreement to sell i.e 22.8.2008, and, theirs having dishonestly, sold, the stock of 15 lacs baked bricks, for, a price of Rs. 25 lacs, and, further having sold 10 lacs unbaked bricks, after baking them by utilizing the coal, from the stock and the fire wood, from the stock of the brick kiln, further for a sum of Rs. 18 lacs, and, having failed to honor the terms, of, the agreement, thereupon their being thus liable to pay, for, the 15 lacs baked and 10 lacs, unbaked bricks @ 1450/ and 300/- per thousand respectively, alongwith a sum of Rs. 3 lacs for the price of stock of the coal, fire wood. The defendants being further liable to pay for the labour huts, and, other equipments/tools i.e. 16 wooden trolleys valuing Rs. 8,000/- chimney valuing Rs. 1 lac, and, other tools valuing Rs.20,000/- and Rs. 40 lacs, as, the defendants disposed, of, the stock of the bricks, coal, wood and other articles of the kiln. Thereafter, the defendants, have, abandoned the brick kiln. That the plaintiff, has, meticulously performed, his part of the obligation as per the terms, of the agreement including, obtaining the dissolution, of, the previous partnership and further offered his sincere assistance to the defendants for carrying out the terms of the agreement, but, the defendants, have intentionally avoided, to, with a malafide intention, honour the agreement, and, its terms. That the plaintiff has been throughout ready and willing his part of the agreement, and, is still ready to perform his part. That under the foregoing circumstances, it is amply clear that the defendants, have utterly failed to perform their part of the agreement, and, the defendants, are, liable for the penalty of the forfeiture, of, the earnest money of Rs. 10.00 lacs paid to the plaintiff, at the time, of the execution of the agreement. It is further averred, in the plaint, that, not only this, the plaintiff, even, after all this happened, showed generosity, and, laxity to the defendants, and served a legal notice upon the defendants dated 13.1.20009, calling upon them to pay the entire balance amount of Rs. 23,75,000/- on or before the last date i.e 21.1.2009, stipulated in the agreement, alongwith, the interest @ 18% per annum on the amount of second installment of Rs. 10 lacs, amount whereof, the defendants was supposed to pay to the plaintiff, on or before 21.11.2008. However, the defendants neither paid the balance amount nor they turned up on 21.1.2009, in, the office of Sub Registrar Nalagarh, for, the execution of sale deed, whereas, the plaintiff, remained, in the Office of the learned Sub Registrar Nalagarh, on that day, through out its course, and, kept on waiting for the defendants. Thereafter the plaintiff, at last, when the defendants did not turn up, got his affidavit sworn, and attested, before, the learned sub Registrar Nalagah. The cause of action accrued in favour of the plaintiff, on 21.1.2009, and, as such, the suit is within limitation. The plaintiff is entitled, to, a decree for specific performance, of, the agreement dated 22.8.2008, by theirs making payment of Rs.33.75 lacs to the plaintiff, as, amount of Rs.10 lacs, paid as advance, to the plaintiff, standing forfeited, on account of the default, act and conduct of the defendants, the plaintiff , is, also entitled to receive, an amount of Rs. 33.75 lacs, since the plaintiff has been ready and willing to perform his part of the agreement, dated, 22.8.2008 but the defendants have abandoned, the kiln after removing 15 lacs bricks, from suit property, and,

thus have committed a clear breach of the terms of the agreement, and, in case the defendants, are, not interested, in, the performance of their part of the agreement or want to rescind the same, in that event, the, plaintiff is further entitled to claim damages for the loss of baked and unbaked bricks, coal fuel, wood stock, chimney labour huts, tools, and, equipments to the extent of Rs.30 lacs by way of alternative relief. The plaintiff also avers in his plaint that no other suit on the same or similar ground is pending or decided by any Courts of law. It is also averred in the plaint that the present Court has jurisdiction to try the present suit. It is further averred that the value for the purpose of Court fee and the jurisdiction is Rs. 33.75 lacs, hence the present suit.

3. The suit was contested by the defendants, and, they have filed written statement, wherein, they have taken preliminary objections qua maintainability, estoppel, non-joinder of necessary parties, and, the suit is not properly valued, for the purposes of Court fee, and, jurisdiction. On merits, it is submitted, that, the plaintiff never purchased the suit property, and,document of 29.9.2007, is, a General Power of Attorney, executed by Mr. Ashok Jindal, in, favour of the plaintiff, which is not legally valid, as, the same is not registered, under, the Provisions of the Indian Registration Act. It is also contended in the written-statement, that, the defendants were persuaded, and, induced by the plaintiff to enter into an agreement to sell with respect to brick kiln with him. It is also contended that the quantity of bricks, as, mentioned by the plaintiff, were, not available on the spot. It is further contended that the plaintiff did not disclose to them the true facts about his rights, title and interest, in, the brick kiln. The defendants in their written-statement, admitted, that an agreement, for an amount of Rs.33.75 lacs was reduced, into writing between the parties on 22.8.2008, with, an understanding, that, the cost of material amounting, to, Rs.12 lacs, will be, the part of this sale consideration, and, the same will be paid after the plaintiff will get the lease transferred, in, the name of the defendants, and, the agreement was also entered into with the bonafide belief, that the plaintiff, is, competent, to, enter into a contract, his having title over the suit property. But the plaintiff failed to get the lease of land transferred in the name of the defendants , and, also failed to induct, the, defendants as partners in the firm. It is also admitted, that, a sum of Rs.10 lacs, was, paid by the defendants to the plaintiff. However, a sum of Rs. 10 lacs was wrongly taken, by the plaintiff, despite, the fact of his being aware qua his not holding title over the suit property, and, the plaintiff intentionally withheld the true facts. It is further not denied that a sum of Rs. 10 lacs was to be paid on or before 21.11.2008, but the same was not paid to the plaintiff , as he has not performed his part of, the apt, obligation fastened, in, the agreement, hence, the defendants were not required to pay the second, and, third installments as alleged. Since the contract was vitiated on account of fraud, the plaintiff, is, not entitled to claim forfeiture of Rs. 10 lacs received by him, and, on the contrary, the plaintiff, is liable to repay, a sum of Rs. 20 lacs being the double amount of the part of the sale consideration, received by him on 22.8.2008, as per the terms of the agreement. It is also admitted by the defendants, that, possession of the suit property, was, handed over to them on 22.8.2008. It is further averred, that, defendants were not handed over 15 lacs baked and 10 lacs unbaked bricks. It is further averred that the licence, which was valid up to 31.3.2009, was handed, over to the defendants alongwith chimney and damaged labour huts. However, no tools and equipments were handed over to them. It is further averred that lease land has been taken over the land owners to whom it belonged, because, the plaintiff has failed to get the licence of the brick kiln, renewed, and the land owners have after leveling the same started cultivating the same. It is denied, that the defendants sold the stock of 15 lacs baked bricks for price of Rs.25 lacs, and, further sold 10 lacs unbaked bricks, after, utilizing coal and fire wood, from, the stock for further amount of Rs.18 lacs. It is also denied that the defendants have failed, to, honour the terms of the agreement and are also liable to pay for the aforesaid baked, and, unbaked bricks at the rate of Rs. 1450/- and Rs. 300/- per

thousand, respectively. The defendant on the other hand alleged, that, there were only one lac raw bricks bricks whereof are badly damaged, and, besides them, there were about ten lacs baked bricks, on, the spot. It is also averred by the defendants, that they were always ready and willing to perform, their part of the agreement, but on account of the defect in the title, of the plaintiff, the agreement became unenforceable. It has also been admitted by the defendants, that, the plaintiff had sent a legal notice to them. In reply to the same the plaintiff, was, asked to perform his part of the agreement, before, receiving the remaining sale consideration. The suit is alleged to be barred by limitation. The remaining averments made in the plaint are denied by the defendants and thus they pray for dismissal of the suit.

4. The plaintiff filed replication to the written statement of the defendants wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, this Court, on, 25.11.2010, struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff is owner of the brick kiln subject matter of agreement dated 22.8.2008? OPP
2. Whether the plaintiff is entitled to the specific performance of the agreement dated 22.8.2008 and is entitled to payment of Rs.33.75 lacs from the defendants, as alleged? OPP
3. Whether the plaintiff has been ready and willing to perform the agreement as alleged? OPP
4. Whether the plaintiff is entitled to recover a sum of Rs.30 lacs from the defendants on account of the price of 15 lacs baked and 10 lacs unbaked bricks, chimney, labour, huts, coal, frames, fire wood and utensils etc, as alleged? OPP
5. Whether the plaintiff is entitled to forfeit a sum of Rs. 10 lacs as alleged? OPP
6. Whether the plaintiff is entitled to possession of the suit property mentioned in para-1 of the plaint? OPP
7. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction? OPP
8. Whether the plaintiff is entitled to relief of mandatory injunction? OPP
9. Whether the suit is not maintainable? OPD
10. Whether the plaintiff is estopped from filing the suit as alleged? OPD
11. Whether the agreement dated 22.2.2008 is a result of misrepresentation and fraud practiced by the plaintiff over the defendants and the agreement is void? OPD
12. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction? OPD
13. Whether the suit is bad for non-joinder of M/s Sada Shiv Brick Company and its partners? OPD
14. Relief.

6. I have heard the learned counsel for the parties, and, also gone through the entire case file carefully. For the reasons to be recorded herein-in-after, my findings on the aforesaid issues are as follows:-

| | |
|---|---|
| 1. | No. |
| 2. | No. |
| 3. | No. |
| 4. | No. |
| 5. | No. |
| 6. | No. |
| 7. | No. |
| 8. | No. |
| 9. | Yes. |
| 10. | Yes. |
| 11. | Yes. |
| 12. | No. |
| 13. | Yes. |
| Relief: | The suit of the plaintiff is dismissed. |

**REASONS FOR FINDINGS**

**ISSUES NUMBER 1 TO 11 and 13.**

7. Since, issues aforesaid are interconnected, thereupon they are amenable, for theirs' being, hence, cumulatively decided.

8. An agreement, to, sell in respect whereof, a decree of specific performance, is, espoused to be renderable, by this Court, is, comprised in Ex. P-1/A. It is executed inter-se the plaintiff, and, the defendants. The date of execution thereof, is, 22.8.2008. Apparently, it is un-controverted, that, the possession of the suit land, is, with the defendants. Prior to the relevant contract, of sale executed, inter-se, the plaintiff and the defendants, and, as, unraveled by Ex.DA, one Ashok Jindal, proprietor of the brick kiln, hence, thereunder rather constituting the plaintiff, as, his General power of Attorney, for, all the purpose(s), as, embodied therein. The aforesaid exhibit, is, not proven to be either revoked, or, cancelled pointedly at, the time contemporaneous, to, the subsequent thereto execution, of, agreement, of, 22.8.2008, agreement whereof, is borne in Ex.P-1/A. However, the relevant agreement of sale borne, in, Ex.P-1/A, as, apparently executed inter-se the plaintiff, with, the defendants, is, not under any apposite authorization, hence, bestowed upon him, under Ex.P1/E, contrarily rather Ex.P1/E visibly omits to empower him, to, execute Ex.P-1/A, in his individual capacity, as, owner of the Brick kiln. However, the plaintiff, espouses, of his holding possession, right, title and interest, to, rather independently, hence execute Ex.P-1/A, in respect of the suit property, with, the defendants, espousal whereof, is, rested upon Ex. P-1/E, sworn by one Ashok Jindal, on 28.9.2007, (i) whereas with Ex. DA, whereunder, the plaintiff stands constituted as, a, General Power of Attorney, of, one Sh. Ashok Jindal, (ii) thereupon, it appears, that, the apposite propagation reared by the plaintiff, qua, his on anvil of Ex.P-1/E, rather holding, an independent right, to, execute Ex.P-1/A, being hence falsified, (iii) rather when though Ex.DA, stood, executed, in contemporaneity, vis-a-vis, the execution of the apt affidavit, it hence, rather acquires both truth besides veracity, and, when thereunder, the plaintiff was constituted, by one Shri Ashok Jindal, as the apt General Power of Attorney,(iv) hence, subsequent thereto, execution of the relevant agreement inter-

se the plaintiff, and, the defendants, rather in his individual capacity,AND, as, owner thereof, besides, his on anvil thereof, making an espousal, of his holding right, title and interest, to rather make, it, in respect of the suit property, (v)obviously being gripped, with an entrenched taint, of, vitiation, hence arising from his visible disability, to, execute it, and, his further concomitant disability, to, also thereafter hence execute a registered deed of conveyance, in, his individual capacity, with, the defendants (vi) Moreso when, the, General Power of Attorney as embodied in Ex.DA is not proven by any cogent evidence, to hence stand cancelled. In aftermath, rendition of a decree for specific performance, is un-renderable, vis-a-vis, the plaintiff.

9. In conjunction with the aforesaid inference, this Court also bears in mind, qua, one Garibu hence executing a lease agreement, with M/S Sada Shiv Bricks Company, and, the longevity, of the aforesaid lease agreement, being up to 30.9.2016, (i) thereupon while therewith conjoining, the aforesaid trite factum, begets an inference of any representation, by the plaintiff, of, his being owner of the afore-referred brick kiln, hence to acquire tenacity, reiteratedly enjoined its adduction, into evidence (ii) given only upon, the apposite afore-stated lease deed, being adduced into evidence, and, hence its making unfoldment(s) qua all the rights', being preserved therein, vis-a-vis, one or more partners thereof, to, bestow rights as owner, upon, the plaintiff (iii) or unless any rights standing exclusively embodied therein, vis-a-vis, one Ashok Jindal, one of the partner(s), of the afore-referred firm, to, induct the plaintiff, as a sub-lessee rather would alone give leverage qua empowerments,if any, vis-a-vis the apt factum, being validly bestowed upon, the plaintiff, (iii) whereas non-adduction into evidence of the apposite lease deed, executed inter-se Garibu and afore-referred partnership firm, rather constrains an inference of one Ashok Jindal though inducted by Garibu, only as a lessee, vis-a-vis, the land whereon, the aforesaid Brick kiln was installed, yet, his being interdicted, to, contrary therewithin, hence create any interest vis-a-vis the suit property, larger than the one, wherewith he stood vested, in the soil, whereon the raw material, for hence operating the brick kiln, rather was existing. Reiteratedly, the apt tendering(s) besides exhibition, thereof by the litigants' concerned, was, imperative for, hence, enabling this Court, to, therefrom rather fathom, qua any rights, to induct sub lesses', being reserved therein to be conferable, by, one Ashok Jindal. Also reiteratedly, omission(s) thereof rather also foreclose, an adverse inference, against the plaintiff, qua it not containing, any recital, whereby any authorization was conferred or bestowed upon the apt authorized, partner(s) of M/S Sada Shiv Brick company, for selling, the suit property, to the plaintiff. Apart therefrom, even if the aforesaid, omission, has sequelled the drawing, of an adverse inference vis-a-vis the plaintiff, it was yet curable by the plaintiff, by his concerting to add, in, the array of co-defendants, one Ashok Jindal, and other partners of the firm hence, carrying the aforesaid nomenclature, (iv) thereupon, for, rather enabling him/them, to, file the apposite written-statement(s), besides, for enabling him/them, to, contest the veracity of execution, of the apposite affidavit, (v) especially when, on, anchor thereof he/they may concert, to, rip apart, the, efficacy of subsequent thereto, hence, execution of the apposite power of attorney, (vi) besides, his/theirs stepping into the witness box, was, hence imperative, for lending succor, vis-a-vis, the apt therewith pleadings, and, for the drawing of an inevitable firm conclusion, vis-a-vis, the tenacity hence acquired, by subsequent thereto affidavit, executed on 22.8.2008, by one Ashok Jindal, (vii) dehors non adduction ,of, the apt lease agreement, executed, inter-se, one Ashok Jindal with Garibu, demonstrative qua whether any rights being therein preserved therein, vis-a-vis, one Ashok Jindal, for the latter proceeding, to bestow or confer power, if any, upon the plaintiff, hence, to execute a valid contract of sale, with, the defendants. All the aforesaid, omissions', also constrain this Court, to, draw an adverse inference qua the plaintiff, rather not holding, any, absolute right title, and, interest in the suit property, hence his being disabled, to, execute the sale agreement, with the defendants nor his thereafter being

empowered to execute a registered deed of conveyance, reiteratedly hence, the, decree for specific performance, as claimed by him, is unrenderable vis-a-vis him.

10. Be that as it may, accentuated vigor vis-a-vis the aforesaid inference, is, galvanized, by the plaintiff, while being subjected, to, cross-examination by the learned counsel, for the defendants, his acquiescing qua the relevant brick kiln (a)being owned by one Ashok Jindal (b) it being run under a partnership deed (c) the apt licence being also in the name of the firm (d) it not being sold to him by the firm. Further more, he also acquiesces therein, of, it being sold to him by Ashok Jindal, under a Power of attorney executed, in his favour. The effect of the aforesaid acquiescence(s), is, of thereupon there being hence a peremptory obligation, rather hence cast upon the plaintiff, to, place on record, the partnership deed, and, with the lease deed, especially, when it was executed inter-se Garibu, with a partnership firm, and, also with the apt license stood issued by the competent authority, vis-a-vis, the partnership firm. However, none of the aforesaid documents, were adduced into evidence, thereupon vigor, if any, of the affidavit, whereunder, one Ashok Jindal, one of the partners of the partnership firm, vis-a-vis whom, one Garibu executed a lease deed, whereunder the apt conferment, is bestowed, upon the plaintiff, rather is omnibously denuded. More so, when there, is, no reference in the apposite affidavit, of, one Ashok Jindal, holding, the apposite authorization, from, other co-partners of the partnership firm, to, sell, the suit property vis-a-vis the plaintiff, besides, when obviously one Ashok Jindal, did not, hence hold any apt authorization, to, bestow all the apt rights, title and interest, as, owner, rather upon the plaintiff. The further concomitant sequel thereof, is, that, hence with a clear pronounced, disability hence forbidding the plaintiff, to, execute the sale agreement, with the defendants, thereupon his being disabled, to claim rendition of a decree, of specific performance, vis-a-vis, the suit property.

11. Apart therefrom, the, apposite licence, vis-a-vis, the afore nomenclatured brick kiln, held longevity only up to March, 2009, whereafter, the licence remained un-renewed, (i) thereupon, as afore-stated, with the apposite licence being issued rather in the name, of, the partnership firm, and, the latter remaining un-arrayed, as, a party to the lis, (ii) thereupon, it would be grossly improper, for this Court, to, also pronounce a direction, upon, an un-arrayed litigant, to, ensure renewal of the apposite licence. Want whereof, rather begets an apt corollary qua hence, this Court, being constrained, to, pronounce a decree of specific performance qua the firm, for it, in, consonance with the apt contract of sale, hence, rather executing, a, registered deed of conveyance, with, the defendants, whereas, for all the aforesaid reasons, it held the apposite singular besides apt empowerment, to execute it, AND also held the apt legal capacity to execute a registered deed of conveyance, vis-a-vis, the suit property, with the defendants.

12. In support of the, claim, for rendition of a decree, for pecuniary damages, the plaintiff was enjoined, to, adduce potent evidence qua the number of baked, and, unbaked bricks, lying on the suit property, tritely at the time contemporaneous, vis-a-vis, delivery of possession, of the suit property, by the plaintiff vis-a-vis the defendants, in respect thereof, the plaintiff has depended, upon, Ex. PW-2/A proven by PW2. However, no credence can be imputed thereto, given PW-2, in his cross-examination, upon, an apposite affirmative suggestion, being put to him, of stock and sale register, bill books and other account books, being maintained at the brick kiln, his rendering, his apt acquiesces thereto, (i) thereupon with the aforesaid, hence, constituting the best documentary evidence in respect of, qua at the time contemporaneous, to, execution of P-W-2/A, whereat, the possession of the suit property, was, delivered to the plaintiff, the afore-stated stock rather existing thereat, (i) contrarily, withholding thereof, generates, drawing of an adverse inference, against, the plaintiff, (ii) besides with PW-2 also making deposition, comprised, in his cross-examination,

of Ex.PW-2/A, not, carrying any date wise reflections, besides its not carrying, his signatures, thereupon it appears, of his surmisely preparing, it,without his tallying and collating, all entires borne therein, vis-a-vis, the entries occurring in afore-referred best documentary evidence, as comprised in stock, sale register, bill books, and other accounts books, maintained at the aforesaid kiln, wherein entries were made on a day to day basis. Consequently, any claim for rendition of a decree, for computing, in consonance with Ex.PW-2/A, of pecuniary charges vis-a-vis the plaintiff, cannot be accepted All issues are accordingly decided.

**Issue No. 12**

13. Since the averments existing in the plaint make an evident display of the suit being properly valued for the purpose of Court fee and jurisdiction, hence this issue is accordingly decided in favour of the plaintiff, and, against the defendants.

**Relief:**

14. In view of the above, the present suit is dismissed, alongwith, all applications, if any. Decree sheet be prepared accordingly. No costs.

**********

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

Chet Ram ...Appellant.
Versus
State of H.P. ...Respondent.

Cr. Appeal No. 191 of 2017
Decided on: 27.3.2018

**Narcotic & Psychotropic Substances Act, 1985 (Act) - Section 20 –** Recovery of Charas - Trial court convicting and sentencing accused of possessing Charas (800 gm) in bag carried by him – Challenge thereto – Accused contending wrong appreciation of evidence by trial court – Submitting that recovery not proved from his possession - Material discrepencies not taken into consideration by trial court – Independent witnesses not joined in investigation and his signatures were taken on papers by Investigating Officer under duress - Facts revealing (i) accused consented for search being made be Investigation Officer in presence of police officials (ii) witnesses consistently deposing about recovery of charas from bag in possession of accused (iii) no suggestion made regarding discrepancies (iv) no suggestion to any witness in cross- examination regarding duress on accused at time of taking his signatures during investigation (v) no suggestion of animosty of police officials vis-a-vis accused - (vi) various documents prepared during investigation bearing signatures of accused - Held, material on record clearly proves recovery of Charas from concious and exclusive possession of accused - Appeal dismissed - Conviction upheld. (Paras 10, 12 & 14)

For the Appellant: Mr. Anoop Chitkara, Advocate.
For the Respondent: Mr. Hemant Vaid, Additional Advocate General.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge (oral).**

The instant appeal is directed against the judgment rendered on 10.3.2017, by the learned Special Judge, Kullu, Himachal Pradesh, upon, Sessions Trial No. 23 of 2011/74/2016, whereby the appellant stands convicted, AND, is consequently sentenced to undergo rigorous imprisonment, for eight years AND to pay a fine of Rs. 80,000 /-, for commission of an offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') AND in default of payment of fine, he is sentenced to suffer simple imprisonment for six months.

2. Brief facts of the case are that on 27.11.2010, a police party consisting of ASI Jai Lal (PW-7), HC Mahender Singh, C. Nikhil Kondal (PW-3) and C. Devender Prashad had gone for patrolling from Police Post, Patlikuhal. When the party was on way from Parahari to Damchin, through jungle, at 11:45 AM, and reached Thachi Rongpul, accused was noticed coming towards Damchin side having a green coloured rucksack in his right hand. On seeing the police party, accused turned back and tried to escape. He was apprehended on the basis of suspicion of having some illegal object in the rucksack, being carried by him. On inquiry, accused disclosed his name and address. The accused could not explain satisfactorily about the contents in the rucksack. IO sent C. Nikhil Kondal to bring independent witnesses, but no witness was found available. Thereafter, C. Nikhil Kondal and HC Mahender were associated to witness the proceedings. I.O., in the presence of witnesses, apprised the accused about his legal right to be searched either before a Magistrate or a Gazetted Officer. He consented to be searched by the police present at the spot vide memo, Ext. PW3/A, but nothing illegal was found in his possession. Thereafter, the rucksack Ext. P-2, being carried by the accused was checked. In it, another blue coloured bag containing stick shaped Charas Ext. P-5, was found wrapped in polythene wrappers, Ext. P-4. The recovery of Charas was weighed and found to be 800 gms, which was repacked in same fashion and then sealed along with rucksack, Ext. P-2, in cloth parcel, Ext. P-1, with eight seals of seal impression T'. NCB form in triplicate were filled by the I.O., one of which, is, Ext. PW2/C. He also drew sample of seal 'T' on cloth pieces, one of which is Ext. PW3/D and seal, after use, was handed over to C. Nikhil Kondal (PW-3) for safe custody. The parcel of case property taken into possession vide memo, Ext. PW3/C. Copy of seizure memo was supplied to the accused, free of cost. Thereafter, I.O. prepared rukka, Ext. PW3/E and handed over same to C. Nikhil Kondal (PW-3) with a direction to carry the same to P.S. Manali, for the registration of the case and on receipt of the same. Inspector, Om Chand (PW-6), who was officiating SHO on that day in the police station, registered FIR, Ex. PW3/F, by putting his endorsement on the ruqua and handed over the case file to C. Nikhil Kondal with a direction to hand over the same to I.O. at the spot. IO prepared the spot map Ext. PW7/A, and also recorded the statements of witnesses under Section 161 Cr. P.C., as per their version. The accused was apprised about the grounds of arrest and thereafter, arrested vide memo, Ext. PW7/B, and information, qua his arrest, was given to his relative. On the completion of the proceedings at the spot, accused along with case property, was brought to Police Station, Manali and produced before officiating SHO/SI (PW-5) vide Rapat Ext. PW5/A. SI Om Chand resealed the parcel, Ext. P-1 with four seals of "O". He also filled relevant columns of NCB I form, Ext. PW2/C, and put facsimile of seal "O" thereon. He also drew sample of seal "O" Ext. PW6/A, and deposited the case property, i.e. parcel, Ext. P-1, containing 800 grams of Charas, along with sample seals "T" and "O" from NCB I form, in triplicate, and other documents with MHC of police station vide rapat, Ext. PW5/B, who entered the same in Register No. 19 of Malkhana at Sr.No. 672, the abstract of which is, Ext. PW2/A, and deposited the same in Malkhana. The case property remained in his safe custody. On 28.11.2010, after filling column No. 12 of NCB I form, PW-2 sent parcel, Ext. P-1 along with NCB forms, samples seal "T" and "O" as well as other relevant

documents to FSL, Junga, vide docket, PW2/B, through, C. Jiwa Nand (PW-4) vide R.C., Ext.PW2/D, who deposited the same in FSL Junga and obtained the receipt on R.C. and then on his return to the police station, deposited the same with the MHC (PW-2). On 28.11.2010, Investigating Officer prepared special report, Ext. PW1/A, and submitted the same before the then SDPO Manali, who after making his endorsement on the special report, handed over the same to his Reader, HC Sher Singh (PW-2), who entered the same in the relevant register, the abstract and as per analysis, the contents of exhibit were opined the extract of cannabis and sample of Charas.

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

4. The accused was charged for committing, an offence punishable, under Section 20 of the ND & PS Act. In proof of the prosecution case, the prosecution examined seven witnesses. On conclusion of recording of prosecution evidence, the statement of the accused, under Section 313 Cr.P.C., was, recorded by the trial Court, wherein he made disclosures qua his false implication. He did not lead any defence evidence.

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

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

7. On the other hand, the learned Additional Advocate General, has with compatible force and vigor, contended that the findings of conviction recorded by the learned Court below, standing, based on a mature and balanced appreciation of evidence on record, and, theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The Investigating Officer concerned, through, recovery memo borne in Ext. PW3/C, effectuated from the conscious and exclusive possession of the convict, recovery, of, Charas weighing 800 gms. In sequel to recovery(s) of the aforesaid quantum of contraband, standing effectuated, from the purported conscious and exclusive possession, of, the accused person, the Investigating Officer concerned, prepared NCB form, form whereof stands comprised in Ext. PW2/C “wherein” revelations occur, of, his “embossing upon” the bulk parcel(s) comprised in Ext. P-1 , eight seals of English Alphabet “T” (ii) also echoings occur in Ext.PW5/A, of, thereafter Ext. P-1 standing re-sealed, by the SHO concerned, at the Police Station concerned, with four seals, carrying English Alphabet “O”. The aforesaid exhibit containing therein “the” Charas, exhibit whereof stood seized under Ext.PW 3/C (iii) “from the” purported conscious and exclusive possession, of, the accused “stood” under a road certificate comprised, in Ext.PW-2/D, hence sent for analysis to the FSL concerned. The FSL Junga purveyed its report thereon, report whereof is comprised in Ext.PW6/B, wherein it recorded a firm opinion, of, the contents enclosed in the aforesaid bulk parcel “sent to it” for analysis, holding ingredients of Charas. Apart therefrom, the prosecution for

establishing the charge, to which the accused stood subjected to, relied upon the depositions' of, official witnesses.

10. The learned Additional Advocate General, has contended, that, with the FSL concerned receiving "in an untampered condition" the bulk parcel, comprised in Ext. P-1, recovery whereof stood effectuated, "through" memo comprised in Ext.PW3/C "from the" purported conscious and exclusive possession of the accused, (i) also with the FSL concerned in its report rendered in respect of, contents enclosed therein, report whereof is comprised in Ext. PW6/B "unveiling" the trite factum of "its" containing Charas, hence "ought to" constrain this Court, to affirm the findings of conviction recorded upon the accused. He contends that with the apposite NCB form, comprised in Ext. PW2/C (ii) holding complete connectivity "with" the road certificate besides with the seizure memo, comprised in Ext. PW3/C, AND, also with the report of the FSL concerned, comprised in Ext. PW6/B (iii) importantly "in respect" of all the relevant descriptions vis-à-vis all seal impression(s), initially embossed thereon "at" the relevant site of occurrence, by the Investigating Officer (iv) also in respect "of" description(s) of all the re-embossed/resealed "seal" impression(s) thereon, "by" the SHO concerned, (v) "ultimately", with the prosecution witness(es), to whom the case property stood shown in Court, theirs' thereat categorically "voicing", of, the case property "holding absolute analogity" with respect, to, all the apt description(s), in respect thereof, respectively, held in NCB form Ext. PW2/C, road certificate Ext.PW-2/D, AND, with the report of FSL, comprised in Ext.PW 6/B", (vi) thereupon the judgment of conviction returned upon the accused hence warranting affirmation. The learned counsel appearing for the accused, has contended with much vigor, that the relevant intra se connectivity(s)/congruity(s) interse the seizure of bulk parcel "through" Ext. PW3/C, "from" the purported conscious and exclusive possession of accused/appellant, vis-à-vis all the aforesaid relevant descriptions (vii) "not" standing efficaciously proven vis-à-vis the case property "at the stage of its" production in Court. He espouses that the relevant interse lack of analogity(s) in respect of description(s), of all seal impression(s) embossed thereon, at the stage when it stood seized, under memo Ext. PW3/C (viii) and also at the stage when it stood resealed, by the SHO concerned besides in respect of all the apposite seal impression(s), displayed in the report of the FSL, comprised in Ext.PW 6/B vis-à-vis the ultimate stage, of its production, in Court, whereat it stood shown to the prosecution witnesses, (ix) "is aroused" by the factum of (a) the Public Prosecutor concerned "at" the stage, of, the prosecution witness(es) concerned, standing shown, "in Court" the relevant case property "his" not adducing before the trial Court, the relevant abstract, of, the Malkhana Register, with portrayal(s) therein (x) that at the time of its standing retrieved, from, the Malkhana concerned, by its Incharge, the latter in contemporanity thereof, recording in the relevant register, apposite entries in respect thereof (xi) the Public Prosecutor concerned at the time, of production of the case property in Court, for its hence being shown to the prosecution witnesses concerned "their not" making any communication(s) therebefore, that "it" stood delivered to him, by an authorized official. (xii) However, the aforesaid submission, does not obtain any strength. (xiii) "Significantly" when a close discernment, of, the depositions', of, the material prosecution witnesses' "unveil", that the learned defence counsel "during" the course of holding them to cross-examination, (xiv) his thereat "omitting to" put apposite suggestion to them, in respect of the apposite bulk parcel borne in Ext.P-1, seizure whereof occurred, through, memo comprised, in Ext. PW3/C "not" standing related, to the apposite subsequently therewith prepared NCB Form, comprised in Ext.PW-2/C, (xv) AND vis-à-vis road certificate comprised in Ext.PW-2/D, AND vis-a-vis the report, of the FSL comprised in Ext.PW 6/B "(xvi) "intra se un-relatability whereof", arising from their occurring apparent intra se incongruity(s), with respect to all the apposite description(s), of all seal impression(s), drawn thereon vis-à-vis the ones embossed, on, Ext.P-1 AND vis-à-vis all the apposite display(s) borne in NCB form, embodied in Ext.

PW2/C. (xvii) Even though, the learned defence counsel "at" the stage, of production of Ext.P-1 in Court "had" an opportunity to decipher, from, the case property "occurrence of" any apparent mis-descriptions AND also want of any intra se congruity(s) inter se, all the aforesaid exhibits vis-à-vis bulk parcel Ext.P-1 also when the learned defence counsel thereat, held the best opportune moment, to hence make/the relevant unearthings, with respect, to, lack of all purported intra se incongruities interse the aforesaid exhibits vis-à-vis Ext.P-1 (bulk parcel) (xviii) "yet/his" failing to thereat put apposite suggestion(s) to the prosecution witness "in respect of" any lack of intra se analogity(s) erupting inter se the relevant echoings, made in bulk parcel borne in Ext.P-1, seizure whereof occurred "through" memo Ext.PW-3/C, AND respectively vis-à-vis NCB Form borne in PW2/C, road certificate Ext.PW-2/D AND the report of the FSL comprised in Ext. PW6/B" (xix) "significantly" with respect to all seal impression(s) embossed upon Ext. P-1 hence standing displayed or not displayed, in all the aforesaid memos. Consequently, his omitting to hence make any apposite unearthings, from PWs', at the relevant stage, especially with respect to lack of any intra se interse analogity(s), with, respect to all relevant description(s) borne thereon, (xx) conspicuously with respect to all seal impression(s) borne thereon vis-à-vis all seal impression(s) borne, on all memos, prepared subsequently thereto, (xxi) hence begets an inference, of, the defence acquiescing, to recovery of Charas, occurring "through" Ext.PW3/C, also its conceding, of, recovery of the relevant contraband, hence occurring, from, the conscious and exclusive possession of the accused, also thereupon an inference is galvanized, of, bulk parcel Ext.P-1, at, the imperative stage of its production in Court, hence standing efficaciously proven, to stand recovered from the site of occurrence, from, the conscious and exclusive possession of the accused.

11. This Court has with great circumspection dwelt, upon, the efficacy of the aforesaid submission(s), also has traversed, through, the entire evidence apposite thereto. Importantly, with the case property bearing the signatures of the accused; b) besides, of, the prosecution witnesses concerned ; c) importantly, with its bearing absolute concurrence(s) interse all the embossed seal impressions thereon, vis-à-vis, those borne in the relevant memos, d) thereupon, with, each of the prosecution witnesses' aforesaid, to whom the case property stood shown, in Court (ii) hence also in tandem therewith rendering testification(s) with absolute unanimity, of its, thereat bearing concurrence(s), on all the aforesaid fronts, vis-à-vis the apposite therewith recital(s) borne in memo comprised in Ext. PW3/C, whereunder its recovery(s) stood effectuated.(iii) thereupon, does reinforce the abovestated conclusion, of, upon its production in Court, its evidently holding all apt concurrence(s) with the connected therewith memos.

12. Furthermore, the sample seal taken, on piece(s) of cloth, bearing Ext. P-1, holds the signatures of the accused, as also of witnesses thereto, even Exhibit PW3/C holds the signatures of the accused, as well as of all the official witnesses thereto, (i) besides sample seal cloth parcel Ext. P-1 holds the signatures of the accused and of the witnesses thereto. (ii) With occurrence of all aforesaid signatures thereon, especially when the learned defence counsel, has not, made any attempt for ripping apart authenticity(s) thereof (iii) also his failing to make attempts, in respect of the signatures, of the accused being obtained under compulsion or under duress, also, boosts an inference of his conceding vis-à-vis the truth of all the recitals occurring therein. (iv) Conspicuously, therefrom, it is to be concluded of his omitting to, make endeavour(s) in respect of the relevant item(s) of contraband, recovered under Ext. PW 3/C, being unrelated to bag Ext.P-1. (v) Omission(s) of aforesaid endeavour(s) also negate the submission of the learned counsel for the appellant, of, the relevant recovery being bereft of any sanctity, theirs being sequelled by sheer contrivance, deployed by the Investigating Officer concerned, for thereupon his falsely implicating the accused.

13. At this stage, the learned counsel appearing, for the appellant/convict, submits (i) that with PW-3 and PW-7, in their respective deposition(s), borne in their respective cross-examination(s), hence making vivid disclosure(s) qua availability of a thickly inhabited locality in proximity, to, the site of occurrence, (ii) besides despite their, availability in proximity at the site of occurrence, yet the Investigating Officer concerned, making no concerted efforts, for associating them in the relevant proceedings, (iii) thereupon his omission(s) being hence both deliberate and intentional, for only smothering the truth of the prosecution case.

14. The force of the aforesaid submission, is blunted, (a) by evidently no apposite suggestion(s), being put to each of them by the learned defence counsel, while holding them to cross-examination qua (b) of the Investigating Officer concerned, rearing any animosity or inimicality vis-à-vis the accused, hence his omitting to join independent witnesses', in the relevant proceedings. (i) Absence of purveying of the aforesaid suggestion(s) vis-à-vis the police witnesses', by the learned defence counsel, while subjecting them, to cross-examination, (c) contrarily begets an inference, of, the mere non-association(s), in the relevant proceedings, by the Investigating Officer, of independent witnesses, though, evidently available in proximity, to, the site of occurrence, (ii) rather not emanating, from, the Investigating Officer concerned, hence concerting to smother the truth of the prosecution case, nor his omissions are construable to be either deliberate or intentional.

15. The non-association of independent witness(es), despite, their evident availability, in proximity to the site of occurrence, would assume significance, (i) upon the defence efficaciously establishing, existences, of, deep pervasive snags, in all the link evidence(s), embodied in the NCB form, prepared at the site of occurrence, upto the FSL, concerned, purveying an affirmative opinion, upon, the apposite seizure, qua contents thereof being Charas,(ii) besides the defence bringing forth cogent evidence, of theirs' being apparent lack of connectivity, interse, the case property, at the stage of its production in Court, vis-à-vis, the one, which stood recovered, under, seizure memo borne in Ext. PW3/C. (iii) However, with all the evident apt linkages appertaining vis-à-vis the recovery(s), of, the case property, under memo Ext. PW3/C, from, the conscious and exclusive possession of the accused, upto an affirmative opinion being recorded thereon, by the FSL, (iv) besides thereafter, upon, its production, in Court, rather **hence being cogently proven**, to, occur in an untampered unbroken chain AND its bearing absolute concurrence(s), with recovery(s) thereof, effectuated under memo Ext. PW3/C, (v) also with all apt linkages, in respect, of, all the evident concurrence(s) vis-à-vis all the seal impression(s) borne, on, the relevant forms prepared at the site of occurrence, vis-à-vis the ones borne on the case property, upon, its production in Court, (vi) thereupon, given evident omission(s) of the aforesaid snags, in the prosecution case, hence, did not, at all render the prosecution case, to falter merely for the Investigating Officer concerned, failing to associate independent witnesses', in the relevant proceedings.

16. 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. The impugned judgment is affirmed and maintained.

17. However, the learned counsel for the appellants/convicts, makes a prayer, at this stage, for reducing the sentence of imprisonment imposed upon the appellants/convicts. He submits that the aforesaid submission hence being amenable to acceptance, given the convict, being a young person, and, his hence being enabled to reform himself. The aforesaid submission is accepted. The sentence of imprisonment imposed,

upon, the appellant/convict is reduced, from, eight years' rigorous imprisonment to, two years' rigorous imprisonment. Sentence of fine, imposed upon the appellant/convict is, reduced from Rs. 80,000/- to Rs. 40,000/- each. In default of payment of fine, he shall further undergo simple imprisonment for three months. The period of detention already undergone by him, is ordered to be set off, from the sentence of imprisonment imposed upon him.

18. Consequently, the sentence(s) of imprisonment and of fine, imposed upon the convict, is to the extent above, hence, modified. Records be sent back forthwith.

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

M/s Pragati Papers Industries Limited ..Plaintiff

Versus

M/s Chanderpur Works Jorian and others ..Defendants

CS No. 44 of 2006
Reserved on : 15.3.2018
Decided on : 29.3.2018

**Indian Contract Act, 1872** - Sections 74 & 75 – Breach of contract - Unliquidated damages – Grant of - Circumstances – Defendants entering in agreement in September, 2000 with plaintiff for preparing and supplying fabricated material - In terms of agreement plaintiff was to supply drawings thereof to defendants - Contract renewed in 2006 - Defendants supplying only some of materials to plaintiff – Plaintiff filing suit alleging breach of contract and claiming damages in sum of rupee one crore by averring that time was essence of contract – And on account of non-performance of their part of contract by defendants, they (plaintiff ) could not commission their new plant – Facts revealing that defendants had to prepare and send consignment of remaining material after supply of drawings and inspection of finished goods - Plaintiff not supplying drawings of remaining material in time - Time not found essence of contract - Plaintiff continuing manufacturing paper in their old plant - No evidence of plaintiff suffering any loss - Demand of 'machining' found beyond scope of agreement - Suit partly decreed on admission of defendants that sum of Rs. 47,000/- was due towards plaintiff - Suit partly decreed. (Paras 8, 10, 12 & 15)

For the Plaintiffs: Mr. Rahul Mahajan, Advocate, for the plaintiff.

For the defendants : Mr. R.K. Bawa, Senior Advocate with Mr. Prashant Chaudhary, Advocate.

The following judgment of the Court was delivered:

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**Per Sureshwar Thakur, Judge**

The instant suit has been filed by the plaintiff, wherein, it, seeks recovery of Rupees one crore, along with interest @ 12% per annum, from the date of filing of the suit, uptill realization of the claim, (i) claim whereof is embedded in the defendants, rather, wanting in making the apposite supplies vis-à-vis the plaintiff(s), (ii) thereupon the latter being hence rendered disabled, to commission a new plant, besides it being deterred to market better quality glazed papers, (iii) wherefrom, the plaintiff would have secured a

remunerative price higher than the one which it fetched, from, the market, vis-à-vis the paper manufactured by it.

2. The plaintiff has averred in his plaint that Mr. S.K. Aggarwal has been duly authorized vide Board resolution to file, institute, sign, swear affidavit, to take any action for recovery of money/damages, to, file and to file this case, prosecute and to engage counsels. Vide order No. CPW 373:00-01 of 6.7.2000, the defendants made an offer for manufacturing, of M/s frames fabricated weighing approximately 10 to 11 tones @ Rs. 28/- per KG ex-works. The defendants had agreed to deliver the said MS frames fabricated, by the end of September, 2000, and, 30% advance payment was asked for. The plaintiff, vide acceptance letter dated 10.7.2000, accepted the said offer made by the defendants, for, manufacturing the MS frame fabricated. It was submitted in the acceptance offer that workmanship and the dimensions should, be as per the drawings supplied, by the plaintiff, and, any error or discrepancy would be rectified by the defendants. A cheque was also given to the defendants amounting to Rs. 1,00,000/-, as advance for execution of the work order. On the basis of acceptance of offer of the plaintiffs, the defendants started execution of work qua offer of 6.7.2000. The plaintiffs constantly asked the defendants to supply them with the MS frame fabricated, but the defendants tried to evade the issue. Thereafter, vide letter of 16.9.2002, the drawings for MS frame fabricated were again sent to the defendants, for quick execution of the work qua MS frames fabrication, however, the defendants did nothing, rather the defendants refused to entertain any visits or calls made by the plaintiff. On 28.5.2005, the defendant wrote a letter to the plaintiff, that, they have started the work of item Nos 2, 3 and 4, as shown in letter dated 28.5.2005, however, nothing was done, and, on 27.9.2005, another letter was issued by the defendants, wherein the defendants started raising baseless issues in order to avoid the job assigned to them for supplying of MS Frames. The defendants raised the immaterial issue that the plaintiff should not insist for machining. Again on 8.11.2005, the defendants wrote letter to the plaintiff, wherein, they still raised the issue of machining, whereas the plaintiff at the time of his accepting the offer, made on 6.7.2000, and had clearly submitted that they wanted finishing of the parts as per the drawing. On 25.1.2006, a meeting was held between the authorized representatives of the plaintiff and of the defendants in minutes of meeting, wherein it was specifically brought out that in respect of drawing No.PM, 2/06/272, PM-2/06/224 and PM-2/06/225, the drawings would be positively, got ready, by 30th January and, the material can be lifted by 1.2.2006, and, in respect of drawing No. PM-2/06/229, the said work would be completed by 15th of March, 2006, however, defendants failed to honour the aforesaid commitment and the plaintiff have no other option but to fax a message on 1.2.2006, regarding non-fulfillment of the commitment as per the minutes of the meeting. Further a letter on 9.2.2006 was also issued to the defendants requesting it to complete all the jobs assigned to them. The defendants on 18.2.2006, in total breach of minutes of meeting, sent the material as per the drawings No.PM-2/06/272, PM-2/06/224 and PM-2/06/225. The defendants were guilty, of not, adhering to the schedule wherewithin the job had to be completed, and, also violated the minutes of meeting. Thereafter again on 29.4.2006, the plaintiff wrote a letter to the defendant that only material qua drawing No. PM-2/06/272, PM-2/06/224 and PM-2/06/225 have been received, but material qua drawing No. PM 2-06/229 , SH 1, 2 and 3 had not been received. It was further pointed out that new project has been held up and financial losses are being suffered as a result of breach of contract in not supplying MS Frame. The defendants were asked to make good the losses. The defendants on 1.5.2006 assured that the material will be delivered by the end of May 2006. The defendants were to provide MS Frame (Fabricated) on which the calander rolls had to be placed which would have improved the quality of the paper by smoothening, glazing and shining. It is further averred in the plaint that the time was the essence of the contract and, the defendants failing to adhere to the time schedule. It is further averred of plaintiff sufferring loss and

damages, as, it could not commission the new plant, and, also put in the market better quality glazed paper, fetching more price(s). It is further averred that the defendants are liable to damages for non delivery of MS (Frame) fabricated i.e. goods, hence prayed for rendition of decree of Rupees one Crore along with interest @ 12 % per annum from the date of filing, of the suit till payment is made.

3. The suit of the plaintiff, is contested by the defendants, by instituting written statement, to the plaint of the plaintiff. By way of written statement, the defendants, submit, that the defendant was made an offer, for fabrication of press frames parts of 5/6 metric tons @ Rs. 28/- per Kg, on the terms that the excise duties will be charged Nil at the time of delivery, and SCT @ 4% will be charged against submission of Form-C for availing concessional Tax as per Standard Trade Practices. It is averred that it is, nowhere mentioned, in the acceptance letter of 10.7.2000, that the quantity would be 10 to 11 tons, and, the acceptance letter is silent, about the finished material and machining. The plaintiff had to supply the remaining drawings, as stated in the letter of 10.7.2000, but failed to do so. The plaintiff has suppressed the fact that vide fax message/letter, of 10.8.2000, the plaintiff himself wrote to the defendants qua the drawings submitted vide letter of 10.7.2000, being cancelled, and, requested/instructed that, the defendants may not start work till the fresh drawings of press frames part and, dispatched/sent to the plaintiff. However, the plaintiff did not submit the drawings to the defendants, from 16.7.2000 till 16.9.2002, and, the fact of the matter, is that the plaintiff himself slept over the matter. It is further averred that vide letter of 10.8.2000, the plaintiff had requested the defendants, not, to start the work till fresh drawings of press frames parts, are submitted to the defendants, whereas the defendants had already started fabrication work, asked by the plaintiff regarding fixation of gun metal bush or MS Bush. The defendant requested the plaintiff, to, inform the defendants, so as to enable, the defendants to proceed with the work. On 16.9.2002, the plaintiff sent some drawings, for fabrication work, to the defendant, and, the defendant, on 9.10.2002 wrote to the defendant, that the defendant would supply the material at the old rate of Rs. 28/- per KG upto the value of Rs. 3,00,000/- It is further contended in the written statement, that, the plaintiff himself had not submitted the drawings to the defendant for a period of about 5 years. The plaintiff did not, despite several communications, reply to the query raised by the defendants. The defendants submits that the plaintiff admits that from 6.7.2000 till 28.5.2005, the plaintiff did not care to, ask the defendant, as to whether, the work so entrusted was completed or not and even otherwise, the clarifications regarding the discrepancies, of the drawings, was not made available by the plaintiff. Defendants were time and again writing, and representing, to the plaintiff regarding discrepancies in the fresh drawings submitted on 16.9.2002 by the plaintiffs, and, requested the plaintiff to clarify the discrepancies or depute someone who could clarify the technicalities of the drawings. It was only the defendants, who, deputed his representatives to visit the plaintiff's factory, however on visiting the plaintiff's factory, it was found that there was no trained staff in the plaintiff's factory, and, there was no one who could assemble the second hand imported machinery, which the plaintiff had purchased, for construction of the factory. It was informed, to, the defendants' representative that there was no expert or qualified engineer, who could clarify the technicalities of drawings. The defendant on 3.8.2005, wrote, to the plaintiff that in terms of the earlier letter dated 19.5.2005, no inspection engineer has inspected the ready material till date, and, as such requested the plaintiff to depute their Inspector to inspect the ready material. The defendants, on 16.9.2005, again wrote to the plaintiff that none from the side of the plaintiff had inspected the ready material. The plaintiff on 17.8.2005, deputed his representative for inspection. Surprisingly, the plaintiff raised one new issue, and, stated that the press frames fabricated by the defendants should be machined, which, was neither offered nor accepted in the order. However, on 8.11.2005, the defendant clarified that the machining work would

be done as per the plaintiff's drawings, and costs thereof would be paid by the plaintiff.

4. On 25.1.2006, a new settlement/agreement /order/understanding, was entered, between the plaintiff and the defendants, with an understanding, that, the first lot of material approximately two metric ton would be ready by 30th of January, 2006, and the plaintiff would lift the material by 1st of February, 2006. The balance approximately 4 metric ton would be fabricated, after the lifting of the first lot, by the plaintiff, and, would be completed by the 15th of March, 2006. Even when the defendant sent their proforma invoice of ready material to the plaintiff for enabling them to make the payment qua stock ready for lifting, yet the plaintiff did not make the payment and rather requested the defendant that the payment would be made, after receipt, of material, at the factory site of the plaintiff. The plaintiff did not make the payment despite several requests. Despite that, the defendant delivered the finished goods as ordered by the plaintiff. It is further averred that the defendants had violated the terms and conditions, on the basis of the offer of the defendants, of 6.7.2000. The defendants and the plaintiff entered into a fresh understanding on 25.1.2006, and, the plaintiff did not fulfill the terms and conditions thereof. It is averred that there is no violation of terms and conditions of order, on behalf of the defendants, and, they are not liable for the any loss and damages, as claimed by the plaintiff.

5. The claim set up by the defendants is refuted by the plaintiff by filing rejoinder to the written statement of the defendants.

6. On the pleading of the parties, the following issues were framed on 2.4.2008:

1. Whether the plaintiff is entitled to a decree as prayed for in the plaint? OPP
2. Whether the plaintiff is entitled to interest @ 12% from the date of filing till payment? OPP
3. Whether the suit is barred by limitation? OPD
4. Whether the suit does not disclose any cause of action? OPD
5. Whether the suit is not filed by authorized and competent person? OPD
6. Whether the suit is neither competent nor maintainable on account of suit lacking complete, true and correct facts and particulars' if so its effect? OPD
7. Whether the plaintiff is estopped from filing the suit on account of his act and conduct? OPD

c) Relief.

7 For the reasons to be recorded hearinafter, my findings on the aforesaid issues, are as under:

| | |
|---|---|
| Issue No. 1 | Partly yes. |
| Issue No. 2. | No |
| Issue No. 3 | No |
| Issue No. 4 | Yes |
| Issue No. 5 | No |
| Issue No. 6 | Yes |
| Issue No. 7 | No |
| Relief | The suit of the plaintiff is partly decreed. |

**Reasons for findings**

**Issue No. 1 and 2**

8 In proof of the averments cast in the plaint, one S.K. Aggarwal, the authrorized representative of the plaintiff Company, stepped into the witness box. During the course, of, his examination-in-chief, he tendered Ext. P-1, exhibit whereof, embodies the minutes, of, meeting of the Board of Directors of the plaintiff-Company, whereby he stands authorized to sign, file, verify all documents, pleading, application, affidavits etc., and, to depose as witness in Courts of law. Ext. P-2 comprises the offer made by the plaintiff, to the defendants, for fabricating MS frames, with theirs hence carrying the weights mentioned therein, besides at the rate(s) enunciated therein. The contents of Ext. P-2 are admitted by the parties at contest. However, though subsequent thereto, certain communication(s) embodied in Ext. P-3, in Ext. P-4, in Ext. P-5 and in Ext. P-6, also occurred interse the plaintiff, and, the defendant, and, communication(s) whereof, appertain to the year 2000, (a) communications whereof are relied upon by the plaintiff, especially, for sustaining its espousal, of despite, the plaintiff making repeated, persistent reminders, upon, the defendants, to make the relevant supplies, yet the latter omitting to mete apposite compliance(s) therewith. (b) However, the effect of communication(s) if any, made interse the plaintiff, and, the defendants, rather are stripped of their probative vigour, given PW-1, during the course of his cross-examination, while meteing reply(s) to Court query(s), his making vivid disclosure(s) therein, of, ( c) only on 28.5.2005, the plaintiff, establishing the relevant contact with, the defendants, and prior thereto, the plaintiff establishing telephonic contact(s), vis-à-vis the defendants, with respect to the execution of the apposite orders. (d) However, even the factum of, prior to 28.5.2005, the plaintiff purportedly maintaining telephonic communication(s), with the defendants, for hence beseeching the latter to execute, the orders placed upon it, by the plaintiff, is not credible, (e) given PW-1 not placing on record the apposite telephone bills or any other befitting documentary evidence, in respect of the plaintiff, prior to 28.5.2005, hence establishing telephonic contact, with the defendants, whereupon the latter were requested, to execute the orders placed upon it, by the plaintiff. The aforesaid inference also enhances a further inference, of, (f) the plaintiff derelicting, since the year 2000, to 28.5.2005, for ensuring, qua the defendants' executing the relevant orders, hence a further concomitant inference is engendered, of, time being not the essence of the contract.

9 Be that as it may, dehors the aforesaid inference(s), the existence on record, of Ext. P-8, exhibit whereof, comprises, a communication made by the defendants, vis-à-vis the plaintiff, and, its circumspect reading, unveiling, of, the defendants proceeding to execute the work orders, in respect of certain items, and, theirs assuring early execution, of unexecuted items, only after, hence inspection, being done, of the completed items, (a) yet the communication(s) borne, in Ext. P-8, appear to, as divulged by Ext. P-9 and Ext. P-10, Ext. P-11 and Ext. P-12, rather remained unheeded, (b) whereupon an inference is erectable of rather derelictions hence emanating, on the part of the plaintiff, even despite the defendants' executing part of the orders, and, after their inspections' by the plaintiff, theirs assuring delivery(s) thereof, vis-à-vis the plaintiffs, and, theirs also assuring qua thereafter theirs completing the execution, of unexecuted work(s).

10. Contrarily, as divulged by Ext. P-10, and, by Ext. P-11, the plaintiff, rather made insistence(s), upon, the defendants, to make finished machining, despite, the insistence aforesaid, being beyond the scope of contract, and, being also technically unfeasible, (a) yet the defendants enjoined upon the plaintiff to supply vis-à-vis them, the apposite drawings, for hence enabling them, to completely execute the finished machining. Further more, it appears that even though under Ext. P-3, the relevant drawings were

purveyed, by the plaintiff, to the defendants, (b) however, through Ext. P-15 and Ext. P-16, the counsel for the plaintiff, has strived, to raise a contention, of the defendants not facilitating the lifting of the ready material, appertaining to drawings No. DM-2/06/222, DM-2/06/224 and DM-2/06/225, (c) yet, effect thereof, is effaced by Annexure P-14, exhibit whereof is signed by the authorized representatives, of the parties at contest, wherein, a graphic disclosure occurs, of the readiness of the defendants, to get the requisite material/items, ready on 30.1.2006, (d) and, it also carries recitals' of, the remaining material, being put to manufacture, only after, the lifting(s) of the initially manufactured lot, (e) besides an assurance is meted therein, of the entire work being completed by 15.3.2005. Subsequent thereto, the defendant dispatched, a tempo containing 6 pieces of Leavers Ex-Yamuna Nagar, to Kala-Amb, wherewith the following documents were also dispatched:

a) Invoice No. 92/E/05-06, dated 18.2.2006 for Rs. 47173, against supply of above material;

b) Packing List No. 65/E/05-06, dated 17.2.2006

c) G.R.No. 4055, dated 17.02.2006 of M/s Raj Laxmi Transport Company.

d) Delivery Challan Cum Invoice No. 00119, dated 17.2.2006.

11. Consequently, it is apparent that under Annexure P-6, the defendants had meted compliance with the recital(s) borne in Ext. P-14. Since, for the reasons aforesaid, time was not essence of the contract, and, with the plaintiff, as apparent, from the recorded signatured minutes of an apposite meeting, rather displaying acquiescing(s), besides permitting, the defendants to complete the fabrication of items, (a) thereupon it is befitting to infer of the plaintiff, condoning, the apposite delay, hence it being not open for the plaintiffs to contend, that on account of any purported delay(s), purportedly, ascribable to the defendants, any pecuniary loss or damage(s), rather being visited upon the plaintiff. Though, it is averred in the plaint, that, if the requisite items were fabricated within time, by the defendants, thereupon the plaintiff would be facilitated, to commission its new plant, and, would also be enabled to, hence ensure production of superior quality glazed papers, and, thereafter would be assured to fetch higher remunerative price(s) vis-à-vis the finished product, than, the price hitherto fetched by it, purportedly in respect of inferior quality paper. However, in respect thereto, there is no firm testification, nor any firm documentary cogent evidence stand adduced, evidence whereof may be comprised, in the books of accounts, maintained by the plaintiff, with vivid portrayals therein, qua the plaintiff continuing, to manufacture paper, at its old plant, (b) and, with further portrayal(s) therein, that since the year 2000, whereat the apposite order, was placed by the plaintiff upon the defendants, up to the year 2006, the plaintiff, for want of delivery of apposite fabrication(s), by the defendants, being hence precluded, to commission its new plant, thereupon pecuniary damages, for purported dereliction(s) or purported non-compliance(s) by the defendants comprised, in theirs not fabricating the items, being hence entailed upon the defendants. Also, the plaintiff omitted, to adduce photographic evidence, pointedly appertaining to the year 2001 to 2006, with specific delineation therein, of the plaintiff, for want of apposite fabrications, by the defendants, rather being hence precluded to commission, its new plant, rather the plaintiff manufacturing paper, at its old plant. Since the aforesaid, comprised the best documentary evidence, yet it has been visibly suppressed, thereupon the plaintiff's contention, of theirs, for, non-supply of the apposite items, within time, (a) being precluded to commission its new plant, b), and, of theirs being precluded, to fetch higher remunerative price, vis-a-vis the finished product, than, the hitherto price fetched by it, (c) conspicuously also when only, from the aforesaid suppressed material, disclosures would occur qua the plaintiff manufacturing glazed or unglazed paper, is thereupon omnibusly blunted, (d) The further inference, which is engendered therefrom, is

of the plaintiff also failing to prove the apposite derelictions or non-compliance(s), by the defendants, nor any pecuniary damages as claimed against the defendants, being amenable to be decreed Since, the defendants in his cross-examination, accepted his receiving a sum of Rs. 1,00,000/- as an advance payment, and, has also deposed that Rs. 47,000/- is the outstanding balance, yet has deposed that material worth therewith, has been purchased. (e) Nonetheless, when he has not produced any evidence vis-à-vis materials being purchased, from, the aforesaid outstanding amount, thereupon it is befitting, to decree the plaintiff's suit only vis-à-vis a sum of Rs. 47,000 alongwith interest @ 12% per annum, up to its realization, being hence defrayable by the plaintiffs, vis-à-vis the defendants.

12. Consequently, issues No. 1 and 7 are decided in favour of the defendants and against the plaintiff.

**Issues No. 3, 5 and 7**

13. It has not been shown by the defendants as to how the suit is barred by time and as to how the suit is not filed by authorized person and as to how the plaintiff is estopped from filing the suit on account of his act and conduct, hence for want of evidence in regard aforesaid, issues No. 3, 5 and 7 are decided in favour of the plaintiff and against the defendants.

**Issues No. 4 and 6**

14. In view of my findings on the aforesaid issues, neither the plaintiff can maintain the instant suit nor he has any cause of action to file the instant suit. Consequently, both these issues are decided in favour of the defendants and against the plaintiff.

**Relief**

15. In sequel to findings on issues aforesaid, the suit of the plaintiff is partly decreed, vis-à-vis a sum of Rs. 47,000 alongwith interest @ 12% per annum from the date of institution of suit, up to its realization. Decree-sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of.

**********

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

Sohan Lal and others .....Petitioners.

Versus

State of H.P. & others .....Respondents.

CWP No. 3730 of 2010.
Reserved on : 23rd April, 2018.
Decided on : 26th April, 2018.

**Himachal Pradesh Village Common Lands ( Vesting and Utilization) Act, 1974 -** Section 2 (dd) - **Himachal Pradesh Village Common Lands Scheme, 1975 (Scheme)** – Paragraph no. 4 & 5 - Grant of nautor - Cancellation thereof – Challenge thereto – Competent authority cancelling nautor initially granted in favour of plaintiff's predecessor 'R' in 1978 - In previous litigation in which State was party grant in favour of 'R' held valid in RSA - Judgment attaining finality - However, subsequently competent authorities cancelling such

grant on ground that 'R' was not entitled for it – Held, decree holding valid grant of land in favour of 'R' had attained finality – Act defining 'landless person' or 'other eligible person' and prohibiting grant of land to persons of owning land more than one acre introduced only by Amendment in 1987 - Grant in favour of 'R' in 1978 cannot be invalidated by operating aforesaid amendment retrospectively - Petition allowed - Order of cancellation set aside. (Paras 6-7)

**Case referred:**
Commissioner of Income Tax (Central)-1, New Delhi vs. Vatika Township Private Limited (2015)1 SCC 1

| | |
|---|---|
| For the Petitioners: | Mr. Y. P. Sood, Advocate. |
| For Respondents No. 1 & 2: | Mr. Hemant Vaid, Addl. Advocate General with Mr. Y.S. Thakur, Dy. .G. |
| For Respondents No.3 to 6: | Mr. Arush Matlotia, Advocate. |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The petitioners herein, who, are legal heirs of one Riharu Ram, through, the instant petition hence cast a challenge, upon, the validity of the orders, borne in Annexure P-5, whereunder, the authority concerned hence rescinded, the allotment of land, made vis-a-vis, one, Riharu Ram in the year 1978, while its exercising powers under the Himachal Pradesh Village Common Lands Vesting and Utilization Scheme, 1975 (hereinafter referred as the scheme of 1975).

2. All the averments, made, by the petitioners, in their petition, stand contested by the respondents, by the latter meteing(s) reply(ies) thereto. The respondents in their reply, rather validate the orders, borne, in Annexure P-5, whereas, contrarily, the counsel for the petitioner, vehemently contended qua it being ingrained, with, a pervasive gross illegality.

3. Apparently, upon, civil suit No. 25 of 2001, wherein, one Riharu Ram, qua whom grant of land, was made, under, the aforesaid scheme, stood arrayed as co-defendant No.2 also wherein, the State of Himachal Pradesh, was impleaded as a party in the array of co-defendants, a pronouncement of dismissal of the plaintiff's aforesaid suit hence emanated, on 29.08.2003, from, the learned Senior Sub Judge, Kangra at Dharamshala. The aforesaid verdict, was challenged, before the learned Appellate Court, by the aggrieved plaintiff, one, Rikhi Ram, and, significantly no challenge thereon was cast, by the State of Himachal Pradesh, (a) thereupon with no material being placed on record in personification, of, the concurrent verdict(s) hence dismissing, the suit of, one, Rikhu Ram, rather standing reversed in a second appeal, instituted before this Court(s), (b) thereupon conclusivity, besides finality is to be bestowed, upon, the concurrent verdicts recorded, upon, Civil Suit No. 25 of 2001. The apt portion of the concurrent verdicts, occurring in paragraph No.32 of the verdict pronounced, by the learned trial Court in C.S. No. 25 of 2001, is extracted hereinafter:

> "32. So the bare perusal of section 3 of the Act clearly provides that the suit land which vested in the Panchayat Deh earlier vested in State Govt. of H.P. free from all encumbrances. Thus, the suit land was legally transferred from

ownership of Panchayat Deh to State Govt. of H.P. . Hence this issue is decided against the plaintiff in favour of defendants."

4. The aforesaid paragraph, does make, a vivid disclosure, of the learned trial Court, making, a conclusion qua, hence, a legal transfer of ownership, occurring, from Panchayat Deh, to the State of H.P., besides in apt portion of paragraph No.33, the apt portion whereof stands extracted hereinafter:-

> "33. Therefore, under these facts and circumstances of the case the land bearing Khasra No.606/2, measuring 0-07-14 hects. Was legally allotted in favour of defendant No.2, Riharu vide mutation No.65 dated 27.6.1978, Ex.P-6 and similarly the land bearing Khasra No.606/1, measuring 0-03-06 hects. Was legally allotted by State of H.P. in favour of defendant No.3, Roshan Lal vide mutation No.68 dated 27.6.1978, Ex.P-7. So keeping in view entire facts and circumstances of the case, the allotment of suit land by State of H.P. in favour of defendants No.2 and 3 is legal and valid allotment under the provisions of H.P. Village Common Lands (Vesting and Utilization) Act, 1974....."

a firm conclusion, is, recorded of a valid allotment, being made vis-a-vis one Riharu, by the authority concerned, while, its, exercising the apt powers under the scheme.

5. The effects of the aforesaid conclusivity(ies) being hence acquired, by the verdict rendered in Civil Suit No.25 of 2001, is of thereupon, respondent No.1, being now estopped to rather contend, that the afore referred conclusion(s), being either being ill-founded or infirm. The reasons, for forming the aforesaid conclusion, arises, from the further factum, (a) the authority pronouncing, Annexure P-5, and, it thereunder hence annulling, the grant, its, rather proceeding to take into consideration, certain apposite material both germane, and, apposite vis-a-vis the mandate, of, the proviso occurring in Section 2(c), (b) conspicuously, despite, the insertion of the proviso thereto, visibly occurring prior to the institution of the suit, and, also despite, respondent No.1 herein, evidently arrayed as co-defendant No.1, in the aforestated civil suit, (c) AND, obviously, despite, its, holding awareness vis-a-vis it, though rather was enjoined, by the mandate of Order 2, Rule of the CPC, provisions whereof, stand extracted hereinafter, to hence in consonance therewith, rear pleas for invalidating the grant, made, vis-a-vis one Riharu, whereas apparently, it, not previously rearing the aforesaid plea, (d) thereupon the apposite non rearings thereat, now, estopped the authority concerned to pronounce Annexure P-5, (e) given its hence untenably invalidating the concurrent pronouncements, made by civil court(s). Provisions of Order 2, Rule 2 of the CPC read as under:-

> "**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."

(e) Even when respondent No.1, was not arrayed as a party therein, nonetheless, its, palpable omission(s) to earlier in its written statement, furnished, vis-a-vis Civil Suit No.25 of 2001, rather rear them therein, also hence bars, respondent No.1, to make any espousals, for validating the orders borne, in Annexure P-5. Reiteratedly, hence, with conclusivity being acquired vis-a-vis the aforesaid apt paragraphs of the judgment recorded, by the learned trial Court, upon, Civil Suit No.25 of 2001, thereupon, the authority concerned, was, disabled to pronounce Annexure P-5, and, also was hence interdicted, to, infract the mandate thereof, besides, was, forbidden to go behind the decree, rendered by the Civil Court(s) concerned. Nowat with authority, in pronouncing, Annexure P-5, hence, visibly going behind the conclusive, and, binding verdict recorded by the civil Courts, has thereupon transgressed the trite expostulation of law, of, judgments and decrees recorded by Civil Courts, being binding, upon, the statutory authority, and, despite theirs 'operating', as, res judicata besides operating, as statutory estoppel, (a) whereupon though, hence, it stood, disabled, to subsequent thereto, rather untenably proceed, to reverse the mandate recorded, in the conclusive judgment, and, decree pronounced by civil court(s) concerned. Apparently when hence the aforesaid trite expostulation of law is infringed, thereupon, this Court obviously deprecates, the apposite infringement, made, by the authority concerned, who pronounced Annexure P-5.

6. Be that as it may, the learned counsel appearing for the respondents, contend with vigour (i) that when, on a harmonious reading, of the provisions borne in clause 4, and, in clause 5 of the scheme of 1975, clauses whereof stand extracted hereinafter:-

> "4. **4. Enquiry preparation of statement of land available for allotment.** - When application is made under paragraph 3 or when the Tehsil Revenue Officer suo-moto initiates proceedings under the proviso of paragraph 3, he shall after giving the persons seeking allotment or being considered for allotment, an opportunity of being heard and after making such summary inquiry as he may consider necessary, prepare a statement for Revenue estate, indicating-
>
> (1) particulars of each eligible person;
>
> (2) the land, if any, owned or held by such person;
>
> (3) the area which can be allotted to such person under the Act; and
>
> (4) the revenue estate or estates for which such person indicates preference for allotment of land in case no area is available for allotment in the revenue estate where he holds land.
>
> **5. Procedure for allotment of land from the allotable pool.** - (1) After the procedure prescribed in paragraph 4 has been followed, the Tehsil Revenue Officer shall prepare a list of all eligible persons for each revenue estate in such a manner that the persons who do not own any land and the persons who own or hold less than one acre of land are placed according to the area possessed by each in an ascending order.
>
> (2) The Tehsil Revenue Officer shall also prepare a list of Khasra Numbers (with area) of the land comprised in the allotable pool area available for allotment in a revenue estate mentioning such numbers in the numerical order. Where there are killas and rectangles, the numerical order of the rectangle shall be observed first and then of killas in each rectangle.

> (3) The record of each case alongwith the lists referred to in sub-paras (1) and (2) above shall be forwarded to the Collector who shall proceed to allot the land to eligible persons in the following order of reference:-
>
> (a) member of Scheduled castes/Scheduled tribes, ex-servicemen, freedom fighters and Ex-INA personnel, covered under the Government of India scheme and also those freedom fighters who have been awarded commendation certificates by the State Government.
>
> (b) Landowners or tenants whose holdings as a result of implementation of section 104 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 are reduced below one acre;"

hence apparent unfoldings rather emerge of the apposite enshrined eligibility criteria, innately borne therein, hence being constituted in (a) the aspirant concerned, for eligibising himself, for the apposite grant, being hence made vis-a-vis him, his evidently, at the stage contemporaneous to the grant, apparently not, holding any land or holding, land, less than one acre; (b) whereupon alone his being construed to be landless. The learned counsel appearing for the contesting respondents, hence, espoused, (i) that with the father of the original grantee, being evidently alive, at the stage contemporaneous, to the grant besides when he thereat, held, land measuring 34-1 bighas, (ii) and, thereafter, on his demise, the grantee along with his brother, both, in equal shares, evidently inheriting the estate of their predecessor-in-interest, (iii) hence, the salutary purpose, of the grant being made vis-a-vis a person, who, at the relevant stage, being either landless or holding, land, less than one acre, being visibly hence scuttled. The aforesaid contention reared by the counsel, for the contesting respondents, cannot be validated, for the reasons ascribed hereinafter, (a) the introduction of hereinafter extracted proviso vis-a-vis the substantive provisons borne, in, clause (dd) to Section 2 of the Act, rather occurring, in the year 1987, provisions whereof reads as under:

> "Provided that a person whose father is alive and whose annual income from all sources exceeds Rs.3,000/- shall not be deemed to be a landless persons; and
>
> (d) "landowner" means a person having a share in the shamilat land as recorded in the land records and includes a panchayat;
>
> (dd) other eligible person means a person;
>
> (i) who, holding land for agricultural purposes less than an area whether as an owner or a tenant, earns his livelihood principally by manual labour on land and intends to take the profession of agriculture and is capable of cultivating the land personally;
>
> (ii) whose father is not alive; and
>
> (iii) whose annual income from all sources does not exceeds Rs.3,000/-;
>
> and shall not include a person who holds a share or a portion of an estate jointly owned and cultivated by two or more persons;"

(b) AND also assumingly, if the original grantee's father, was alive at the time contemporaneous to the grant, and, also when evidently, he thereat held an area of land, for hence, de-elibilising the allottee, to seek allotment, under, the scheme, (c) thereupon, the relevant scheme, especially at the apposite stage, was also enjoined to contain a clear explicit loud mandate, of hence, the original grantee being dis-entitled, to seek the making, of, the apposite grant. However, at the time contemporaneous to the grant, obviously, hence, there was no explicit, disabling apposite mandate aforestated, hence occurring in the relevant scheme, whereunder the grant was made vis-a-vis, the original grantee, (d) rather

when the apposite proviso, with a loud communication borne therein, whereunder, the apt legal disability was incurred, upon, the original grantee against his seeking grant, upon evident apposite prevalence thereat, of, an apposite disability, comprised in, his father being alive or the grantee's annual income, from, all sources exceeding Rs.3,000/-, when, as aforestated stood inserted, therein, through an amendment carried subsequent thereto, in the Act, thereupon, hence, begets inference, of, (e) of the legislature explicitly intending, qua only, in the year 1987, the aforesaid disability being created, vis-a-vis the apposite grantee, and, its omitting to create, it, at the time of the apposite grant, being made, vis-a-vis the grantee. The contention of the learned counsel, for the contesting respondent, qua the aforesaid disability, yet, prevailing at the time of grant, is, obviously unamenable to acceptance nor hence it can be concluded, that even if the original grantee's father, was alive at the time contemporaneous to the grant, (f) AND evidently, also with the latter holding land, land whereof on his demise, being likely to be inherited by the original grantee, as has evidently occurred hereat, thereupon, also per se hence the original grantee, would not render himself to be hence encumbered with the apposite disability. Also assumingly, if the aforesaid prohibition is to be concluded, to, exist/occur at the time contemporaneous to the grant, thereupon, the right, title or interest, if any, inhering in the grantee, vis-a-vis the estate of his father, would, only be construable to be a mere *spes successionis* or an obstructed heritage, (g) apparently when any contrary thereto inference would tantamount, to rearing a untenable inference, of the predecessor-in-interest, of the original grantee being untenably concluded, to stand forestalled, to execute any testamentary disposition vis-a-vis his estate, whereunder, he may ultimately, chose, to disinherit the original grantee. The aforesaid conclusion may stand blunted, by evident material rather existing on record, in display of the predecessor-in-interest, of the original grantee, rather holding land, carrying the trait(s) of ancestral coparcenary property, and, hence thereupon the acquisition thereto, by the grantee vis-a-vis the estate of his deceased father, being a mere *fait accompli*, besides thereupon alone the contentions reared, by the counsel for the contesting parties, would hold grave solemn vigour. However, the aforesaid material is not existing on record, thereupon, this Court is led to conclude, with reinforced vigour, of, despite the father of the original grantee, surviving, at the time contemporaneous to the grant, and, his holding an area of land, beyond the prescribed limit, for hence de-eligibilising the grant being made vis-a-vis his son, not per se attracting, the rigour of, any prohibitive clause existing therein, rather, the apt thereat prevalent clauses being merely hence a *spes sucessionis,* of, the grantee vis-a-vis the estate of his father, whereupon, the rigor, of, the purported disability also cannot be encumbered upon the grantee.

7. Furthermore, vigour vis-a-vis the aforesaid conclusion, is also gathered by the factum of this Court, for reasons aforestated, concluding, that with the legislature only, through an amendment made in the year 1987, creating the aforesaid eligibility, and, when hence the aforesaid eligibility, also, hence, is concluded, to be not existing at the relevant stage, (i) thereupon, the mere factum of the father of the grantee being alive, at the time of the apposite grant, is wholly unworthwhile. The Hon'ble Apex Court, in a judgement, rendered, in a case titled as **Commissioner of Income Tax (Central)-1, New Delhi vs. Vatika Township Private Limited** reported in **(2015)1 SCC 1**, relevant paragraph No.28 whereof stand extracted hereinafter:-

> "31. 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, (1870)LR 6 QB, 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."
> ...(p.21)

has made candid expostulation, therein, that the apposite disability clause or the apt prohibition clause, holding prospective force, rather than retrospective force, unless, by explicit mandate, retrospectivity hence stands bestowed vis-a-vis the apposite disability clause. However, when hereat the insertion, of, the apposite proviso aforestated, occurred in the year 1987, hence, subsequent, to the apposite grant, and, when no explicit retrospectivity is bestowed thereto, rather hence renders open an inference, of, attraction((s) of the mandate, of, apposite proviso, being vis-a-vis only those grants made subsequent to 1987, and, all disabling, fettering effects thereof, being unattractable vis-a-vis any grant made prior thereto, especially in the year 1978.

8. For the foregoing reasons, the instant petition is allowed and the order impugned before this Court, borne in Annexure P-5, is quashed and set aside. All pending applications also stand disposed of. Records be sent back forthwith.

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

Lesh Ram ....Appellant/Plaintiff.

Versus

Tej Ram and others ....Respondents/Defendants.

RSA No. 204 of 2009.
Reserved on : 31st July, 2018.
Decided on : 8th August, 2018.

**Indian Succession Act, 1925 -** Section 63 – Will – Proof - Plaintiff filing suit and challenging Will executed by his grand-father 'BR' in favour of defendants on grounds of fraud and misrepresentation – Trial court dismissing suit and appeal of plaintiff also dismissed by first appellate court – RSA - Facts showing father of plaintiff 'S' dying before 'BR' – Mother of plaintiff thereafter eloping with some other person – Plaintiff brought up by his maternal-uncle – 'BR' looked after and maintained by defendants – Marginal witness 'GN' duly supporting due execution and attestation of Will by 'BR' – Defendants performing final rites of deceased – Plaintiff even not attending final rites of 'BR' - Plaintiff failing to show as how will is vitiated by other vices - Held, no ground to interfere with concurrent finding of facts made out – RSA dismissed – Judgments and decrees of lower courts upheld. ( Paras 8-11)

For the Appellant: Mr. Balram Sharma, Advocate.

For the Respondents: Mr. K.S. Kanwar, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal is directed by the aggrieved plaintiff against the concurrent verdicts pronounced by both the learned Courts below, whereunder, both dismissed the plaintiff's suit for declaration, for, setting aside, the, Will executed by deceased Bhup Singh qua his estate, vis-a-vis, the defendants.

2. Briefly stated the facts of the case are that the Sh. Lesh Ram plaintiff has filed suit for declaration with a consequential relief of possession averring therein that late Sh. Bhup Singh was grand father of the plaintiff, who was the joint co-owner in possession to the extent of 1/8th share out of the land comprised in Khewat No.25, Khatauni No.38, Khasra Nos. Kitta 6 measuring 30-2-1 bighas, situated at Mohal Tihri No. HB 408, Illaqua Uttarsal, Tehsil Sadar, District Mandi, H.P. It has been averred that the father of the plaintiff one Sobha Ram, was the only son of Sh. Bhup Singh, who had pre-deceased the grand father of the plaintiff. The grandfather of the plaintiff was having his property in Mhal Sairi, Sub-Tehsil Aut and mohal Tihri, Tehsil Sadar, Mandi, H.P. He had already disposed of his property of Mohal Sair during his life time. The father of the plaintiff had died when the plaintiff was about three years old and after the death of the his father Sobha Ram, the mother of the plaintiff eloped with some other person and settled at some other place, while the plaintiff was brought up by his maternal grand father. It is further pleaded that when the plaintiff attained majority, he was granted Nautor land measuring 0-4-0 bighas in Mohal Sairi, Sub-Tehsil Aut, upon which the plaintiff had constructed his residential house and is residing along with his family there. The grand father of the plaintiff was having knowledge about the plaintiff, but he did not call him to his house nor honoured him despite the fact that the plaintiff was the only legal heir of his grand father, entitled to inherit him after his death. It is further pleaded that the grandfather had died at village Tihri on 9.9.2005 and on getting information of his death the plaintiff went to Tihri, performed the funeral ceremonies of his grandfather. It is further pleaded that after performing ceremony of his grand father, the plaintiff took possession of the suit land of his grandfather but the defendants on 15.9.2005 forcibly dispossessed the plaintiff and disclosed that the deceased had bequeathed he suit land in their favour and they are owners of the suit land. It is further pleaded that the defendants claimed that the deceased has executed will in favour of the defendants. It is further pleaded that after going through the said Will No. 202 of 22.8.1994, it is revealed that the Will is the result of mis-representation undue influence, coercion, fraud and deception practised by the propounder upon the testator. It is further pleaded that the Will is a forged, faked and fictitious document, having been procured by the defendants after exercising their undue influence, coercion, mis-representation of facts etc. which is also shrouded with suspicious circumstances and the suit land is the ancestral joint Hindu Family and coparcenary property devolved upon the testator from his ancestors. It is further pleaded that the deceased was not competent to alienate the same being ancestral coparcenary property.

3. The defendants contested the suit and filed written statements, wherein, they have taken preliminary objections qua maintainability and limitation. On merits,

it is pleaded that the Bhup Singh was owner in possession to the extent of 1/8th share of the land. It is further pleaded that the Will No.202 of 22.8.1994 is correct and is not the result of mis-representation, undue influence coercion, fraud and deception. It is further pleaded that the deceased has executed Will with his free consent and in good state of health in the presence of the marginal witnesses. It is further pleaded that the defendants are owners in possession of the suit land.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the suit land is joint Hindu Family Ancestral and coparcenary property, as alleged? OPP.
2. Whether the Will dated 22.081994 executed by Bhup Singh, predecessor in interest of the plaintiff in favour of the defendants is valid Will, as alleged? OPD.
3. Whether the Will dated 22.08.1994 is null and void, as alleged? OPD.
4. Whether the plaintiff is entitled for the relief of possession of the suit land, as alleged? OPP.
5. Whether the suit barred by limitation, as alleged? OPD.
6. Whether the suit is not maintainable? OPD.
7. Whether the plaintiff has not approached the court with clean hands, if so its effect? OPD.
8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court hence dismissed the plaintiff's suit. In an appeal, preferred therefrom, by the plaintiff/appellant herein, before the learned First Appellate Court, the latter Court dismissed the appeal, and, affirmed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein 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, on 4.5.2009, admitted the appeal instituted by the plaintiff/appellant, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the impugned Will is the result of mis-representation, unde influence, coercion, fraud, and deception practised by the propounder and the findings to the contrary are illegal, which has result in the miscarriage of justice?

b) Whether the alleged Will is shrouded with suspicious circumstances as it contains wrong recitals?

**Substantial questions of Law No.1 and 2:**

8. The learned counsel appearing for the plaintiff/appellants has contended with much vigour, (i) that the registered testamentary disposition executed by deceased Bhup Singh, vis-a-vis, his estate qua the defendants, being a sequel of fraud and mis-representation. However, even though the aforesaid contention is embedded, upon, averments in consonance therewith, standing, embodied in the plaint, (ii) yet the plaint omits, to, with specificity, rather adumbrate the manner, of, vices, of, fraud, mis-representation and deception, being practised, upon, the deceased testator one Bhup Singh by the beneficiaries of his testamentary disposition, (iii) nor cogent evidence stand adduced qua, in, the deceased testator, rather executing his registered testamentary disposition, borne in Ex.DW1/A, his executing it, under, a pretext of his rather executing a document other than a Will. Consequently, want of casting of pleadings with specificity, vis-a-vis, the defendants rather practising vices, of, fraud, mis-representation, upon, the deceased testator, and, also want of evidence in display, of execution of Ex.DW1/A, rather being arising, from his being pretextually beguiled, to emboss his thumb impression upon Ex.DW1/A, thereupon, begets conclusion qua the aforesaid vices purportedly permeating, the, executing of Ex.DW1/A, rather remaining not cogently proven.

9. Be that as it may, the learned counsel appearing for the aggrieved plaintiff/appellant, has contended with much vigour before this Court, (a) that there occurring gross mis-appraisal, of, the evidence on record, by both the learned Court below, (b) in both making a concurrent conclusion qua Ex.DW1/A, being proven to stand validly and duly executed, by its executant. However, the aforesaid submission is also wanting vigour, (c) given the scribe of Ex.DW1/A, visibly a registered testamentary disposition, one Bhagirath, DW-3, rather making clear articulations, in his deposition, qua at the behest of deceased testator, his scribing all the recitals occurring in Ex.DW1/A, on, 22.08.1994, (d) besides, he has proceeded to testify qua thereafter his reading over and explaining to the deceased testator, all the contents thereof, whereafter, the deceased testator, after comprehending contents thereof, hence proceeding to in his presence, and, in the presence of the marginal witnesses thereto, append his thumb impression thereon, and, whereafter, the marginal witnesses, vis-a-vis, Ex.DW1/A, also in the presence, of, the deceased testator hence, proceeding to emboss their respective signatures thereon. The aforesaid testification of PW-3, the scribe of Ex.DW1/A, remains unrebutted, even during the course of his being subjected, to, a scathing cross-examination, (e) consequently, credence is to be imputed to his testification borne in his examination-in-chief. Corroboration to the testification of DW-3 is meted by DW-4, one Geeta Nand, the apt marginal witness to Ex.DW1/A, who, in concurrence with the deposition of DW-3, has rendered, a, deposition qua the deceased testator, in his presence, and, in the presence, of, the, other marginal witness to Ex.DW1/A, embossing his thumb impression(s) thereon, and, thereafter both DW-4 and other marginal witness thereto, also in the presence , of, the deceased testator, rather appending their respective signatures thereon. He has also testified qua one Amar Singh Verma, who testified as DW-2, also in the respective presences, of, the executant of Ex.DW1/A, and, in the presence of the other marginal witnesses thereto, hence, proceeding to endorse his signature thereon, as an identifier of the deceased testator, (f) and, prominently has testified qua throughout the course of the recitals being scribed by DW-3, upon, Ex.DW1/A, and,upto the complete execution, of Ex.DW1/A, DW-3 remaining present also the executant and both marginal witnesses thereto remaining present. The afore referred testification by DW-4, the marginal

witness, remains uneroded, vis-a-vis, its efficacy, even during, the course of his being subjected, to, a scathing cross-examination, hence, his testification, in corroboration, to the testification, of, the scribe of Ex.DW1/A, is to be meted credence.

10. The effect of the concurrent corroborative testification(s) being rendered by the aforesaid witnesses, (i) is qua the propounders of Ex.DW1/A efficaciously proving hence all the enjoined statutory parameters, borne in Section 63 of the Indian Evidence Act, (ii) parameters whereof, are comprised in, theirs being enjoined to prove qua the deceased testator appending his signatures or thumb impression(s), upon, the relevant testamentary disposition, in the presences of the marginal witness, and, each of the marginal witnesses also in the presence, of, the deceased testator thereafter proceeding, to make the relevant embossings, of, their signatures or thumb impressions, upon, the apt testamentary disposition. Corollary thereto, especially when no evidence has been adduced, qua the deceased testator not being possessed, of, a sound disposing state of mind, rather, with all the aforesaid witnesses deposing qua the deceased testator appending his thumb impression upon Ex.DW1/A, after his understanding, all the recitals borne therein, (iii) rather engenders a firm inference qua the execution of Ex.DW1/A being free from any stains of it being not voluntarily executed by deceased testator, nor his in contemporaneity of his executing Ex.DW1/A, his being entailed with any mental disability not it can be concluded qua the execution of Ex.DW1/A, being a sequel of any active fraud or mis-representation or deception being exerted upon the deceased testator, by the beneficiaries thereof or by the marginal witnesses thereto. Preeminently, it hence is to be concluded qua the execution of Ex.DW1/A being not the result of the deceased testator being pretextually beguiled to execute it. Furthermore, the effect of the aforesaid conclusions, is, qua the counsel for the plaintiff, rearing mis-founded pleas qua the execution of Ex.DW1/A being sequel of fraud and mis-representation. Contrarily with DW-2, who is a practising advocate at District Courts Manadi, making a clear voicing in his testification qua after the execution of Ex.DW1/A, the latter exhibit being carried to the office of Sub Registrar concerned, whereat, also the deceased testator, had, proceeded to in the presence of the Sub Registrar, hence append his thumb impressions thereon, underneath the signatured, and, signed endorsement made by the Sub Registrar concerned, with voicings therein, qua all the recitals occurring therein, being readover and explained to the deceased testator, and, making of the apt endorsements rather ensuring from, his ensuring qua the deceased testator, and, whereat DW-2, the identifier of the deceased testator had also proceeded to emboss his signature, rather marshals an inference qua execution of Ex.DW1/A standing proven to be validly and duly executed. The aforesaid inference gathers immense strength from the factum of the relevant endorsement, being not attempted to be rid of its efficacy, by cogent rebuttal evidence, being adduced by the plaintiff.

11. Nonetheless, the counsel for the plaintiff has contended that with the plaintiff casting averment in the plaintiff, averments whereof read as under:-

> "(a). That in the Will, the testator has no son and daguther and his wife had also died. No reference in the wil has been given of his pre-deceased son Sobha Ram and of the plaintiff, who is grand-son of the deceased testator;
>
> (b) The defendants are described to be nephews of the deceased, but they are not in any manner related with the deceased and are strangers;

> (c) The bequeathed property, i.e. suit land, is the ancestral joint Hindu Family and co-parcenary property devolved upon the testator from his ancestors, who merely the custodian and Karta of the said Joint Hindu Family and ancestral, coparcenary property and was not legally competent to alienate the same in any form and manner in recognition of the right of inheritance of the plaintiff, by virtue of his birth in the said Family;"

thereupon, it was incumbent upon the propounders of Ex.DW1/A, to, render tangible explication qua therewith, whereas, no tangible explanation being meted qua the hereinabove extracted apt suspicious circumstances, hence, surrounding the execution of Ex.DW1/A, thereupon, no credence is to be meted to the testification, rendered by the marginal witnesses or to the testifications of DW-2 and DW-3. The aforesaid submission, does carry some weight, especially when the propounders of Ex.DW1/A, are, not related to the deceased testator, rather appeared to be mis-recited in Ex.DW1/A, to be his nephew, (i) yet he efficacy of the aforesaid submission, is waned, in the face of disinheritance of the plaintiff, a close relative of the deceased testator, hence emanating, as testified, by DW-5 Joginder Pal, the then Up Pradhan, of, Gram Panchayat Tihri, from, the deceased testator being maintained and looked after, by the defendants, whereas, the plaintiff neither maintaining nor tending to the needs of the deceased testator, (ii) besides when he also renders a candid and clear testification qua the plaintiff not attending, the, funeral of the deceased testator, (iii) furthermore, with his also testifying qua even the last rites of the deceased testator being performed by the defendants, and, when, the aforesaid testification is rendered by a person, who holds his abode in close proximity to the abode of the deceased testator, (iv) besides with his aforesaid testification remaining uneroded, even during, the course of his scathing cross-examination, thereupon, the voicings borne in his examination-in-chief, acquire immense vigour, and, all also hence categorically spell out the reasons, prevailing upon the deceased testator, for bequeathing his estate, vis-a-vis, the defendants, and, qua also hence the deceased testator, rather taking to disinherit the plaintiff. Consequently, this Court concludes qua the defendants rather succeeding, in, dispelling all the suspicious circumstances hence surrounding the execution of Ex.DW1/A, in sequel, it stands concluded, that, the defendants hence cogently proving, the, due and valid execution of Ex.DW1/A, by the deceased testator.

12. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court, as well as, the learned trial Court, have not, excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondents/defendants, and, against the appellant/plaintiff.

13. In view of the above discussion, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the concurrent judgment(s) and decree(s) rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Himachal Pradesh Power Corporation Ltd. ....Petitioner.

Versus

M/s ORANGE Business Service India Technology Pvt. Ltd. ....Respondent.

C. Arb. Case No. 1 of 2018
Reserved on 27.9.2018
Decided on : 8.10.2018

**Arbitration & Conciliation Act, 1996 (Act)** – Section 34 - Award – Objections thereto – Public policy of India - What is ? – Held, expression 'public policy of India' as used in Section 34 of Act means that (i) Arbitrator must comply with statute and judicial procedure (ii) must adopt judicial approach and (iii) must adhere to principles of natural justice. ( Para 2)

**Arbitration & Conciliation Act, 1996** – Section 34- Award – Objections thereto – Public policy of India - Petitioner filing objections and challenging award of Arbitrator passed in favour of Contractor on ground of its being against public policy of India - Held, mere alleging award being against public policy of India is not sufficient - Petitioner must demonstrate from material on record that Arbitrator failed to adhere to statutory provisions or he didn't adopt judicial approach or otherwise violated principles of natural justice – Relevant portions of contract containing inter-se obligations of parties must also be looked into – Agreement in question (Clause 14.2) specifically mandating that employer shall bear custom duty, local taxes including VAT on equipments imported for execution of project – Clause 21.4 of agreement also putting obligation on Contactor to handle all imported equipments at point of import at his expenses including custom clearance – Clause 21.4, however, made subject to Clause 14.2 - Arbitrator ordering employer to refund custom duty and other taxes paid by Contractor on imported equipments – Further held, in circumstances award cannot held to be against public policy of India. (Paras 5 to 9)

***Cases referred:***

Associate Builders vs. Delhi Development Authority, (2015)3 SCC 49
Navodaya Mass Entertainment vs. J.M. Combines, (2015) 5 SCC 698
Sutlej Construction Ltd. vs. Union Territory of Chandigarh, (2018) 1 SCC 718

For the petitioner: Mr. Satyen Vaidya,Sr. Advocate with Mr. Vivek Sharma, Advocate.

For the respondent: Mr. Devashish Bhoruha, Advocate with Mr. Aditya Singhal and Mr. D.S. Verma, Advocates.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, J :**

The instant petition, is, directed against, the, award pronounced, by, the learned Arbitrator, whereunder, he allowed the respondents' claim, comprised, in a sum of Rs. 1,00,30,984/-, along with 10% interest accruable thereon, for, a period from three months, after, the last import of equipment in January, 2012, till, the date, the pronouncement, of, the award. The afore sums, stood, awarded towards reimbursement of, apt, custom duty, on the imported equipment/items, made by the respondent herein.

2. The learned counsel for the petitioner, has, contended with much vigor before this Court, that the impugned award, suffers from a grave fallacy, given its standing ingrained, with, a, vice of breaching, the, fundamental policy of Indian law. He submits that the fundamental policy of Indian law, upon, breach whereof, being made by the Arbitrator, hence renders, the award to falter, stands encapsulated in a judgment, rendered in case titled ***Associate Builders vs. Delhi Development Authority (2015)3 SCC 49,*** wherein, the Hon'ble Apex Court, has, split the aforesaid head, in, three categories (i) compliance with statute and judicial proceedings, (ii) need for judicial approach, (iii) compliance with natural justice. The relevant paragraph, occurring, at, paragraphs 17, 19, 28 and 29, therein, are, extracted hereinafter:-

> "17. It will be seen that none of the grounds contained in sub-section (2) (a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.
>
> 19. When it come to construing the expression "the public policy of India' contained in Section 34 (2)(b) (ii) of the Arbitration Act, 1996, this Court in ONGC ltd. v. Saw Pipes Ltd. Held : (SCC pp. 727-28 & 744-45, paras 31 & 74)
>
> > "31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be- 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, or
> >
> > (d) in addition, if it is patently illegal.
> >
> > Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.
> >
> > In the result, it is held that:-
> >
> > (A) (1) The court can set aside the arbitral award under Section 34 (2) of the Act if the party making the application furnishes proof that:
> >
> > (i) a party was under some incapacity, or
> >
> > (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any

indication thereon, under the law for the time being in force; or

(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; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i) (a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13 (5); and

(b) Section 16 (6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract:

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Section 73 and 74 of the Contract Act and in the present case by specific terms of the Contract."

28. In a recent judgment, **ONGC Ltd. v. Western Geco International Ltd**. This Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The court held: (SCC pp. 278-80, paras 35 & 38-40)

"35. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in ONGC does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a

> check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.
>
> 38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audi alteram partem* rule one of the facets of the principles of natural justice is that the court/ authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.
>
> 39. No less important is the principle now recognized as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.
>
> 40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joins in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."
>
> 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."

A reading of the afore extracted paragraphs, as, appertaining to, the (i) necessity of compliance, by the learned Arbitrator, with, statute(s), and, judicial precedents, (ii) unfolds qua the learned Arbitrator, being, enjoined to mete adherence, to, verdict(s), pronounced by

the Hon'ble Apex Court, and, upon an evident breach thereof, making upsurgings, his award being hence rendered amenable for interference. Furthermore, the head, appertaining to, the, necessity of the arbitrator, maintaining a dedicated judicial approach, hence enjoins him, to, act (a) bereft of caprice, (b) bereft of arbitrariness, rather enjoins him, to, act in a fair, reasonable and objective manner rather for ensuring that his decision is not seen, to, stand actuated by any extraneous consideration, (c) under, the head appertaining to compliance with principle, of, natural justice, the learned Arbitrator, is, enjoined to mete adherence, to, the principles of audi-alteram-partem.

3. Be that as it may, the afore extracted paragraphs, borne, in, the judgment supra, rendered, by the Hon'ble Apex Court, and, cullings therefrom, the, afore trite principles, would not per-se hence coax this Court, to, make an inference (i) qua the award under challenge before this Court, rather warranting interference, (ii) unless the learned counsel for the petitioner further demonstrates, from, the material or the evidence, existing on record, qua, the arbitrator evidently not hence meteing adherence, to, the afore principles.

4. In making an endeavor, to, render, a, determination, whether, the, afore extracted principles, hence stand meted compliance by the learned Arbitrator (i) it is deemed important to allude, to, the material existing on record, (ii) and, to the relevant apt portions, of, the contractual obligations, cast under the relevant contract, (iii) besides to all materials' appertaining qua meteing, of, compliance or non compliance hence therewith, (iv) wherefrom, it would be rather fathomable qua the arguments addressed before this Court, by the learned counsel for the petitioner, being merit worthy or otherwise. The relevant clauses, of, the contract, respectively borne in 14.2, and, in 21.4, are, extracted hereinafter:-

> "14.2 Notwithstanding GCC Sub-Clause 14.1 above, the Employer shall bear and promptly pay all customs and import duties as well as other local taxes like e.g., a value added tax (VAT), imposed by the law of the country where the site is located on the plant specified in Price Schedule No.1 and that are to be incorporated into the facilities.
>
> 21.4 Customs Clearance
>
> The Contractor shall, at its own expense, handle all imported materials and contractor's equipment at the point(s) of import and shall handle any formalities for customs clearance, subject to the Employer's obligations under GCC Sub-Clause 14.2, provided that if applicable laws or regulations require any application or act to be made by or in the name of the Employer, the Employer shall take all necessary steps to comply with such laws or regulations. In the event of delays in customs clearance that are not the fault of the contractor, the contractor shall be entitled to an extension in the Time for completion, pursuant to GCC Clause 40."

5. A reading of clause 14.2, occurring, in the relevant contract, (i) enjoins upon the employer to bear all, the, liabilities, arising from levy of custom duty, on, the imported equipment, (ii) also the employer is enjoined to bear all liabilities, arising, from imposition, of, local tax, including value added tax (VAT), upon the relevant materials. Though, a, reading of the afore clause, does unveil, qua, the afore liabilities, being, enjoined to be contractually borne, by the employer, (iii) nonetheless the afore clause, borne in 21.4, is, also to be read in conjunction with clause 14.2, and, on, a, conjoint reading thereof, and, when a reading of the latter clause, vividly displays, qua an apt contractual obligation rather standing cast, upon, the contractor to at its expense, rather handle all the imported

equipment/items, yet, the afore initial employers' contractual obligation, is under clause 21.4, hence, contractually made subject thereto.

6. Reiteratedly, a conjoint reading of, the, afore clause 14.2, and, of clause 21.4, (i), and, apparently with the latter clause rather carrying the coinage, "subject to the employer's obligations under GCC sub-clause 14.2," thereupon reiteratedly enjoins, a, conjoint reading of clause 14.2, and, of clause 21.4 (ii) besides with, the, existence, of, a further proviso, rather in clause 21.4, and, it explicitly making it incumbent upon the employer, to, in consonance with the apt laws, and, regulations, hence make any application or to do any act, (iii) hence marshals', an, inference, qua, the liability appertaining, to discharge, of, all custom duties, upon, the, imported equipment, though, standing initially fastened, upon, the employer, yet, the afore initial fastening, of, all the afore liabilities, upon, the employer, rather not disobliging, the contractor, to, at its own expenses, (iv) hence handle all relevant imported material, and, imported equipment, rather it being, contractually obliged, to handle all formalities, appertaining to custom clearance, (v) discharge, of, contractual obligation whereof, being subject to the employers' afore initially fastened, contractual obligation, given the existence, of, a proviso in clause 21.4, (vi) wherewithin rather a contractual obligation, stands cast, upon, the employer to within the ambit, of apt laws and regulations, hence make an application or to do any act, (vii) whereupon the employer stands obligated, to, vis-a-vis, all expenses incurred by the respondent, appertaining to custom clearance rather, in consonance therewith hence mete the apt compliance(s). It appears that the salutary and holistic purpose behind, the, afore proviso, is, to ensure that in case, the employer is entitled to apt exemption(s), (vi) thereupon it, with utmost discharge and expedition, hence obtaining the apposite exemption(s), from, the department concerned, and, to thereafter incontemporanity with the import, of, items and equipment(s), rather purvey it to the contractor, for hence its being facilitated, to handle all formalities, as, appertaining to custom(s) clearance, without, it, bearing the expenses, appertaining therewith.

7. Even though, the afore contractual obligation fastened upon the contractor, respondent herein, vis-a-vis, its bearing all expenses qua handling of, the, relevant imported equipments, and, also its being obliged, to, handle all formalities appertaining, to, customs clearance, though, stood evidently meted compliance, by the respondent, (i) thereupon meteings, of, compliance by the contractor, vis-a-vis, the afore contractual obligation(s), when also for all reasons' afore stated, rather encumbered the employer, whereupon whom, the initial contractual obligation qua therewith, hence stood fastened, to, in consonance with, clause 21.4, (ii) whereunder the latter was obliged, to, in consonance with, laws and regulations, hence make any application or to do any act for the relevant purpose, to, hence mete apt compliance therewith, (iii) consequently, the respondent was entitled to insist, upon, compliance being made by the petitioner, with, the proviso borne in clause 21.4. The compliance, as enjoined to be made, by the petitioner, with the afore proviso, occurring in 21.4, of, the apt contract, appertains to its entitlement, vis-a-vis, exemption(s) on payment of custom duty(s), upon imported material, for ensuring completion of the project, by the respondent herein. There is no wrangle inter-se the contesting litigants, qua, the apt exemption certificate, standing not purveyed to the respondent herein, importantly incontemporanity, to, the occurrence, of, import, of, material/equipment(s), by the respondent herein, (i) whereupon it may hence have saved all expenses qua bearing, of, custom duties, at the point of import, (ii) thereupon, since as aforestated, all the afore relevant expenses, appertaining to levy of custom duty, were evidently borne by the respondent herein, (iii) thereupon the petitioner herein, to make a successful espousal, before this Court qua the afore liabilities being not amenable, for being fastened upon it, (iv) was rather enjoined, it to adduce material and evidence hence

personificatory, qua its purveying, the, afore exemption certificate, at the apposite stage, to, the respondent herein.

8. Contrarily, certain e-mails existing at page 101, and, at page 102, reveal (i) that the respondent, had made the requisite requisitions, upon, the petitioner herein, and, communication whereof evidently, stands, received by the petitioner herein, (ii) besides the factum qua the apt exemption certificate, standing not purveyed by the petitioner herein, vis-a-vis the custom departments, at the relevant time, is, also borne from a communication, as, occurring at page 250, of the paper book, (iii) whereunder the request addressed by the respondent herein, to, the custom department, for, hence purveying the apt refund of custom duty, vis-a-vis, it, rather sequelled, a, communication, as, occurring at page 266, of the record, from the customs' department, qua, the exemption certificate being enjoined to be submitted incontemporanity, of, import, of, equipment/ items, vis-a-vis, the custom department, whereupon, its, apt entitlement(s) rather would secure leverage, (iv) conspicuously, hereat, with, the apt exemption standing not purveyed incontemporanity, vis-a-vis, the import, of, materials/ equipments to the respondent herein, (v) thereupon, the claim qua refunding of expenses, as, incurred by the respondent, towards custom duty, at the point of import, hence thereunder stood rather declined, by the custom department.

9. The afore discussion(s) bring to the fore, the, trite factum, (i) qua given the apt exemption certificate, standing not evidently purveyed, to the respondent herein, by the petitioner herein, conspicuously incontemporanity, with, the import of goods, and, import of equipment and materials, as, made by the respondent herein, for hence executing, the project, (ii) and, when evidently the respondent herein in consonance with the contractual obligations, was enjoined to bear all expenses, in respect thereof, (iii) and, when as aforestated, in consonance with the afore apt recitals, occurring in the contract, the employer was enjoined to be fastened with the liability, to reimburse the apt expenses, vis-a-vis, the respondent herein, (i) given the initial liability appertaining therewith standing contractually fastened upon the employer, (ii) thereupon the awarding of afore sums of rupees, vis-à-vis, the respondent herein, by the learned arbitrator, does not suffer from any illegality, nor it can be said that the relevant contractual proviso hence stands mis-appreciated (iii) besides also cannot be said, that, the relevant material has been rather mis-appreciated or discarded, nor it can be said, that, all the afore alluded principles of law, occurring in the afore verdict(s), rendered by the Hon'ble Apex Court, stand meted satiation nor hence any interference is warranted in the impugned award. Contrarily, when in a case reported in ***Sutlej Construction Ltd. vs. Union Territory of Chandigarh (2018) 1 SCC 718,*** and, in a case reported in ***Navodaya Mass Entertainment vs. J.M. Combines (2015) 5 SCC 698,*** a, view stands encapsulated qua when the afore view taken by the learned Arbitrator, is, both proper and reasonable, thereupon the view taken by the learned Arbitrator, hence enjoining meteing, of, deference thereto, (iv) whereupon also it is rather not deemed fit, for, this Court, to substitute its view, vis-a-vis, the afore correct view taken by the learned Arbitrator, and, further corollary thereof, is qua, it being not deemed fit to substitute the correct view taken by the learned Arbitrator, with the view if any, of this Court.

10. In view of the above discussion, I find no merit in this petition, which is accordingly dismissed and the award of the learned Arbitrator, is maintained and affirmed. Pending application if any also stand disposed of.

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

Dheeraj Ram (since deceased) through his LRs ...Appellants
Versus
Ram Singh ...Respondent

RSA No. 125 of 2007
Reserved on : 9.5.2018
Decided on: 14.5.2018

**Transfer of Property Act,1882 (TPA)-** Section 53-A**- Specific Relief Act, 1963-** Section 38 **- Himachal Pradesh Tenancy and Land Reforms Act, 1972(Act)**- Section 104- Plaintiff filing suit for permanent prohibitory injunction by alleging his possession over 4 biswas of land under agreement to sell executed by predecessor-in –interest of defendant- Defendant contesting suit, denying plaintiff's possession and alleging plaintiff having constructing Dhara after trespassing over said land- Trial court decreeing suit and dismissing counter claim of defendant- First Appellate Court dismissing defendant's appeal- RSA- Evidence showing (i) suit land recorded in ownership of State and predecessor-in-interest of defendant as non occupancy tenant in it (ii) agreement obliging predecessor in interest of defendant to execute sale deed in plaintiff's favour as and when mutation regarding conferment of properietory rights attested in his favour (iii) Under Act, properitory rights of government land cannot be conferred on non occupancy tenant- Held, Agreement in question was beyond scope of Act- It cannot be specifically enforced- Plaintiff cannot protect his possession by invoking Section 53-A of TPA - Plaintiff can be declared sub-tenant in said land by Revenue Officer- Plaintiff entitled to retain possession till dispute regarding unauthorised construction raised by him is decided by statutory authority- RSA allowed- Decrees of lower Courts set aside.(Paras 14 to 16)

For the Appellants: Ms. Seema Guleria, Advocate.
For the respondent(s): Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge (oral)**

The plaintiffs' suit, for, rendition of a decree, for, permanent prohibitory injunction vis-a-vis the suit land, and, vis-à-vis the defendant, was, concurrently decreed, by both the learned Courts below, whereas, the defendants' counter claim, for rendition, of a decree of mandatory injunction, for, dismantling the dhara raised thereon, was also concurrently dismissed, by both the Courts below.

2. Briefly stated the facts of the case are that vide agreement to sell of 21.12.1998 the plaintiff has agreed to purchase the land measuring 4 biswas out of the total land measuring 1956.94 sq. mtr. comprised in Khasra No. 160 Mauza Kasumpti Junga, Shimla. The plaintiff has paid Rs. 40,000/- to the predecessor-in-interest of the defendant. The predecessor-in-interest of the defendant at the time of entering into agreement has given the possession of the land measuring 4 biswas to the plaintiff on the spot as would be depicted by the agreement and in lieu of this, the predecessor-in-interest of defendant fenced his plot land measuring 4 biswas on the spot. The defendants has agreed to get the sale deed registered in the name of the plaintiff as and when he will become the owner of the land as comprised in Khasra No. 160. The predecessor-in-interest of the defendant died on

21.7.2002 and thereafter right regarding the mutation regarding non-occupancy tenant is believed to be transferred in favour of the defendant and who in turn tried to grab the land which the plaintiff had agreed to purchase by removing the barbed wire through which 4 biswas of land agreed to be purchased has been fenced. Defendant tried to block the passage which goes to the plot of the plaintiff.

3. The suit is contested by the defendant by filing written statement taking preliminary objection that the suit is not maintainable and the plaintiff is estopped from filing the present suit on account of his own acts, deeds, that the suit is bad for non-joinder of necessary parties, that no cause of action ever accrued in favour of the plaintiff and that there is no privity of contract between the plaintiff and the defendant to file the present suit. The case of the defendant is that the agreement of 21.12.1998 executed in between the predecessor in interest of the defendant late Sukh Ram and the plaintiff is conditional agreement and the same is void ab-initio and is not binding against the rights of the defendant. It is contended that the plaintiff never remained in possession of the property agreed to be sold by the predecessor-in-interest vide agreement dated 21.12.1998. The defendant is in exclusive and physical possession of the suit land. It is admitted that after the death of late Sh. Sukh Ram, land in question was recorded in the name of defendant vide mutation No. 206. That the plaintiff never remained in possession of the land but after trespassing over the property of the defendant succeeded in raising a tin sheet dhara approximately 10'x12' feet on land comprised in Khasra No. 160 and for that the defendant is hereby filing counter claim for the demolition of the same.

4. The defendant has also filed the counter claim. The defendant alleged that the predecessor-in-interest of the defendant late Sh. Sukh Ram recorded in possession of the land comprised in Khasra No. 160, 161 and 162, Khata khatauni No. 159 min/202, measuring 2004-86 meters, situated at Mauja Kasumpti Junga, Tehsil and District Shimla, H.P The State of H.P, is recorded as owner of this land. The predecessor-in-interest of the defendant late Sh. Sukh Ram died on 24.6.2002 and mutation No. 206 of inheritance was entered in his favour. The plaintiff on the basis of agreement dated 21.12.1998 alleged to have been executed by late Sukh Ram is trying to interfere in the possession of the land of the defendant comprised in Khara No. 160, 161 and 162. The plaintiff recently on 5.10.2000 raised Tin sheet Dhara, measuring 10x12 feet approximately on a portion of the land comprised in Khasra No. 160, after trespassing the land possessed by the defendant. The plaintiff has no right, title or interest in the suit property and the agreement of 21.12.1998 is null and void and is not binding against the rights of the defendants.

5. The plaintiff has filed the reply to the counter claim taking the preliminary objections that the counter claim is not competent neither maintainable, that the counter claim as filed by the defendant is not only based on false grounds and if the record of the case filed by the predecessor-in-interest of defendant through defendant is seen then it will become manifest clear on record of the case that since from the time of agreement to sell the plaintiff are in exclusive possession of the suit property. On merits the plaintiff also denied the averments contained in the counter claim. The case of the plaintiff is that vide agreement of 21.12.1998, executed between the plaintiff and the defendant, the plaintiff is in exclusive possession of the land and the possession of the same land was delivered to the plaintiff by the predecessor-in-interest of the defendant on the date of agreement, as such the question of interference in possession of the defendant over the suit land does not arise. The defendant is not in the possession of the suit land as such the plaintiff cannot be restrained by way of permanent prohibitory injunction. The defendant filed the replication thereto and re-affirmed the allegations contained in the counter claim and denied the averments contained in the written statement.

6. On the pleadings of the parties, the following issues were framed on 2.4.2004:

1. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction as prayed ? OPP
2. Whether the suit is not maintainable in the present form? OPD
3. Whether the plaintiff is estopped from filing the present suit due to his own acts, deeds, conduct, admissions, and omissions? OPD
4. Whether the suit is bad for non-joinder of necessary parties? OPD
5. Whether the plaintiff has no cause of action to file the present suit? OPD
6. Whether there is no privity of contract between the plaintiff and defendant? OPD
7. Whether the defendant is entitled for the relief of permanent prohibitory injunction? OPD
8. Whether the defendant is entitled for the relief of mandatory injunction? OPD
9. Relief.

7. The plaintiff's suit, for, rendition, of, a decree of permanent prohibitory injunction vis-à-vis the suit land, and vis-a-vis the defendant, was, concurrently decreed, by both the learned Courts below, whereas, the defendants' counter claim, for rendition, of a decree of mandatory injunction, for dismantling the dhara, raised thereon, was also, concurrently dismissed, by both the learned Courts below. The aggrieved defendant instituted, an appeal, before the learned first appellate Court, and, the later proceeded, to affirm the judgment and decree, pronounced by the learned trial Court. Consequently, the defendant is aggrieved therefrom.

8. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 31.5.2007, admitted the appeal, instituted by the defendant/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether a permanent prohibitory injunction granted to plaintiff where the subject matter of the suit is immovable property and without mentioning a specific description of the property sufficient to identify it as provided under Order 7 Rule 3 CPC in the plaint or even filing any revenue record identifying the land is questioned.
2. Whether an agreement to sell can be said to be proved in accordance with law without examining the deed writer or at least one witness of the agreement?
3. Whether the learned First Appellate Court and learned Lower Court has jurisdiction or is empowered to hold a plaintiff party as a sub tenant under H.P. Tenancy and Land Reforms Act, 1972 without any pleadings

of the plaintiff for such relief or any notification form State of Himachal Pradesh regarding such conferment of sub-tenancy?

Substantial questions of law No. 1 to 3.

9. The apt agreement borne in Ext. P-1, was, executed interse the plaintiff, and, the predecessor-in-interest, of, the defendant. The valid and due execution, of, Ext. P-1, is proven by PW-2, who, in his testification, has unequivocally, deposed of, its standing executed interse the plaintiff, and, the predecessor-in-interest, of, the defendant. He has also proven the occurrence, of, his signatures, in Circle "B", drawn in Ext. P-1. However, the afore rendered testification of PW-2, in respect, of, valid execution of Ext. P-1 by the predecessor-in-interest of the defendant, though was concerted, to be ripped, vis-à-vis its efficacy, by the learned counsel for the defendant, while subjecting PW-2, to an ordeal of an exacting cross examination, yet, nothing emanated from him, for hence belying, the, testification rendered by PW-2, in his examination-in-chief, wherein he has lent rather efficacious proof vis-à-vis the valid, and, due execution, of, Ext. P-1. The effect, of, hence cogent proof being adduced vis-à-vis, the apt valid execution thereof, by the predecessor-in-interest of the defendant, also garners fortified force, from, an admission hence occurring in the cross-examination of the defendant, qua Ext. P1 hence standing executed interse the plaintiff, and, the predecessor-in-interest, of, the defendant. Consequently, it is to be firmly held, qua, cogent proof standing adduced vis-à-vis, the, valid execution, of Ext. P-1, interse the plaintiff, and, the predecessor-in-interest of the defendant.

10. Be that as it may, a perusal of Ext. P-1, underscores (i) of the predecessor-in-interest, of, the defendant hence contracting to sell the suit land, vis-a-vis the plaintiff (ii) , and also a clear depiction(s) occurs therein, of, his receiving, a, sale consideration, comprised in a sum of Rs. 40,000/-, from the plaintiff, and, qua in contemporanity vis-à-vis its execution, the, possession of the suit land being delivered to the plaintiff. The factum, of handing over possession, of, the suit property, at, the time contemporaneous, to the execution of the Ext. P-1, also gathers strength, from, the unrebutted deposition, rendered by DW-1, Junior Engineer, working with the Municipal Corporation, Shimla, wherein he has echoed, of, proceeding(s) for raising, of, unauthorized construction, upon the suit land by the plaintiff, hence being subjudice before the Municipal Corporation, Shimla. However, the aforesaid unrebutted testification, rendered by DW-1, has also to be construed, with, the trite factum, of, the Jamabandi, apposite to the suit land, depicting, in its column of ownership, qua the State of Himachal Pradesh, being owner thereof, (ii) whereas, in the column of possession, the predecessor-in-interest, of the defendant, is, recorded to be holding possession thereof, significantly as "Gair Marusi". As aforestated, nowat, with Ext. P-1 hence being concluded to be proven to be validly executed, and, with the imperative condition, occurring therein, of, the apt readiness and willingness of parties thereto, to, execute, a, registered deed of conveyance, at a stage, when title as owner vis-à-vis the suit property, is bestowed upon one Sukh Ram (iv) and, with, the aforesaid preemptory condition(s), for, hence facilitating the execution, of, a registered deed of conveyance, interse the plaintiff, and, the predecessor of the defendant, rather evidently remaining unsatiated, (v) thereupon for want of satiation, of, the apposite condition precedent, hence rendered, unamenable, for execution, the registered deed of conveyance, vis-à-vis the suit property. The effect of the suit land, hence being evidently owned, by the State of Himachal Pradesh, and, the predecessor-in-interest, of, the defendant, one Sukh Ram, who, executed Ext. P-1 vis-à-vis the suit property, with, the plaintiff, standing recorded in the apt column of possession, to be a "gair Marusi", under the State of H.P., hence directly impinges upon, the validity of espousal(s) made by the plaintiff (i) for rendition of, a, decree of permanent prohibitory injunction, AND vis-a-vis the validity, of attraction(s) hereat, of, the provisions

borne, in, Section 53-A, of, the Transfer of Property Act, provisions whereof stands extracted hereinafter:

> **"53A Part performance**: Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
>
> and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,
>
> and the transferee has performed or is willing to perform his part of the contract,
>
> then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract;
>
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

(iii) And espousal(s) qua given, the statutory coinage, occurring, in Section 2 (17) of the H.P. Tenancy and Land Reforms Act, also including therewithin, a sub-tenant, thereupon dehors non-attraction, hereat of, the mandate of Section 53-A, of, the Transfer of Property Act, rather the plaintiff being construable to be a sub-tenant, under, the recorded "gair marausi" especially vis-a-vis the suit land.

11. Initially, this Court is enjoined, to, fathom, the validity of the espousal, of, the counsel for the defendant, qua attraction hereat, vis-à-vis, the, mandate borne, in Section 53-A of the Transfer of Property Act, (i) wherein stands contemplated the doctrine of part performance, (ii) doctrine whereof is espoused to be attractable hereat, and hence arises, from, the entire sale consideration, contemplated in Ext. P-1, purportedly being, at the time of its execution rather being liquidated, by the plaintiff, vis-a-vis the predecessor-in-interest, of, the defendant, and also, in contemporanity thereof evident possession, of, the suit property, being delivered vis-à-vis the plaintiff, hence reiteratedly the completest satiation vis-à-vis its mandate, being evidently begotten. However, for the reasons to be assigned hereinafter, the mandate of the aforesaid provisions, do not beget, their apt attraction hereat a) given the gravamen or the trite groovings, of, the statutory contemplation(s), borne in Section 53-A, of the Transfer of Property Act, being, of the apt contract of sale, evidently executed interse, the executants thereof, being not beyond the ambit of law rather it being within the ambit of law. However, when the contract of sale, occuring in Ext. P-1 rather embodies, a, condition precedent, and, only upon satiation thereof, the apt registered deed of conveyance would come into being or (iii) in other words, unless the condition precedent achieved, the fullest satisfaction, thereupon alone the contract, of sale was amenable, for its completest performance. Furthermore, (b) with evidently herebefore, the apt condition precedent remaining unsatiated, besides when, at the time contemporaneous, to, the execution of Ext. P-1, a specific mandate is, borne, in the

proviso vis-à-vis Section 104, of, the Himachal Pradesh, Tenancy and Land Reforms Act, proviso whereof stands extracted hereinafter:

> "Provided that nothing contained in this section shall apply to such land which is either owned by or is vested in Government under any law, whether before or after the commencement of this Act, and is leased out to any person."

And imminently when proviso aforesaid was, in contemporanity vis-à-vis its execution, hence in force thereat, and, with a statutory bar, standing encapsulated therein, against, conferment of proprietary rights vis-à-vis non-occupancy tenants', under the State of H.P., (i) and, with the aforesaid apposite condition precedent rather perse, openly and candidly, being militative vis-à-vis the proviso, thereupon an inference, is engendered, of, the apt contract of sale borne in Ext. P-1, being contrary, to, the mandate of, the proviso apt vis-à-vis Section 104 of the Act, (ii) besides, as a natural corollary hence with no alienable title, rather at the apposite stage, hence vesting in the predecessor-in-interest of the defendant, contrarily his being rather visibly incapacitated, to, execute Ext. P-1 with the plaintiff, (i) nor also hence, with, the fulcrum of Section 53-A, of, the Transfer of Property Act, being rested, upon, an agreement to sell, rather being within the ambit of law, and, not beyond it, (i) whereas apparently, with Ext. P-1 being beyond the ambit of law, thereupon the ingredients, of, the provisions, borne in Section 53-A of the Transfer of Property Act, are not attractable hereat AND hence any apt defrayment, of, sale consideration(s) in, contemporanity, to, the execution of the Ext. P-1, is, wholly insignificant, besides, any delivery of possession, in contemporanity thereof, is also legally unworthwhile.

12. The learned counsel for the plaintiff, has argued, that the provisions of Section 43 of the Transfer of Property Act, are, however attracted vis-à-vis the facts at hand. The aforesaid contention is also unworthy, of merit, for the reason a) the trite canon hence embodied therein rather remaining evidently unsatiated, vis-a-vis execution of Ext. P-1, significantly, qua its execution being spurred by vices of fraudulence or erroneous representation , (i) especially nor also the predecessor-in-interest, of the defendant, though, at the apposite stage being visibly dis-empowered to execute it, with, the plaintiff, his rather hence not making, any, erroneous representation vis-à-vis his apposite empowerment, given the occurrence therein, of, the apt untenable condition precedent, (ii) besides, with, the aforesaid imperative ingredients obviously remaining unpleaded. nor evidence in satiation thereof, being adduced, (iii) whereas rearing, of, pleadings, in, consonance therewith, besides adduction of evidence in satiation thereof, rather was imperative, for hence attracting its clout, and, mandate. Further more, also when clear recital(s), are, borne therein qua upon apt acquisition of proprietary rights , by the predecessor-in-interest, of, the defendant, vis-à-vis the suit property, his, contractually obliging himself, to, execute, the, registered deed of conveyance, with, the plaintiff also does dis-empower, the plaintiff to contend, of Ext. P-1, being infected with vices of fraudulence or erroneous representation(s) , (iv) also he cannot contend, of, statutory benefits thereof, being accruable vis-à-vis him, nor is he hence amenable, for, being construed to be vis-à-vis the recorded owners of the suit land, as a "gair marusi" thereunder nor also it can be said, of, the trite ingredient existing therein, of his, being a transferee in good faith, for consideration, hence, begetting satiation, importantly, with the apt aforesaid untenable condition precedent, rather being visibly borne therein.

13. The learned counsel for the plaintiff, has also concerted, to validate the impugned judgment, on score of the definition of "tenant" occurring in Section 2 (17) of, the HP Tenancy and Land Reforms Act, also including, a, sub tenant. He contends, that, the

plaintiff being hence construable to be a sub-tenant vis-à-vis the suit land. The aforesaid submission, is wholly mis maneuvered, as neither pleadings apposite thereto, are, borne in plaint nor evidence in satiation thereto exist, nor any apt therewith application stood instituted, by the plaintiff before the Revenue Officer concerned, nor in sequel thereto, any apposite order for, the plaintiff being incorporated, as a sub-tenant, under the predecessor in interest, of the defendant being, stood hence rendered.

14. Consequently, the sumum bonum, of, the aforesaid discussion, is, that with the state of Himachal Pradesh, being owner of the suit property, and, with predecessor-in-interest of the defendant, being recorded a "Gair Marusi" thereon, thereupon till the unauthorized dhara raised thereon, is dismantled under a valid order, made, by the statutory authority concerned, thereupto plaintiff, shall retain the possession, of the suit property. For meteing the ends of justice, the plaintiff, is directed to release a sum of Rs. 40,000/- vis-à-vis the defendant, and also dehors the above, it is also open, for the parties to make apt motions before, the revenue Officers concerned, vis-à-vis the plaintiff, being incorporated, in the relevant record(s), as a sub-tenant, vis-à-vis the suit land.

15. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the appellant/defendant, and, against the respondent/plaintiff.

16. In view of the above discussion, the present Regular Second Appeal is allowed. In sequel, the judgments and decrees rendered by both the learned Courts below are set aside, and, the suit of the plaintiff is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Anil Kumar & others .....Appellants/Defendants.

Versus

Shri Y.P. Verma .....Respondent/Plaintiff.

RSA No. 351 of 2007.
Reserved on : 28th June, 2018.
Decided on : 6th July, 2018.

**Code of Civil Procedure,1908-** Section 10- Res sub-judice – Applicability - Earlier suit filed by defendants 1 to 4 against plaintiff found for declaration and injunction - Subsequent suit of plaintiff against defendants being for permanently prohibitory injunction on basis of cause of action accruing subsequent to filing of earlier suit -Matter in both suits not directly and substantially same- Held-If cause of action in two suits is different, principle of res sub-judice not applicable - Subsequent suit can not be stayed ( Para 9)

**H.P. Tenancy and Land Reforms Act** -S.118- Bar of jurisdiction - Held- when matter regarding resumption of land is pending before revenue court, civil court will have no jurisdiction to embark upon legality of such proceedings. (Para 11)

For the Appellants: Mr. Mukul Sood, Advocate.
For Respondent: Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.

The following judgment of the Court was delivered:

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**Sureshwar Thakur, Judge.**

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for permanent prohibitory injunction qua the suit khasra number(s), was, hence decreed.

2. Briefly stated the facts of the case are that the suit land is recorded to be jointly owned and possessed by one Shri Ranjan Sharma, Smt. Asha Devi and others and the plaintiff has purchased the share of Smt. Asha Devi in the suit land, which is joint property of its owners and after purchasing the share of Asha Devi, the plaintiff moved an application for partition of the joint land in the Court of Assistant Collector 1st Grade, Solan, which was allowed and mutation No. 1102 was attested in pursuance thereof. However, such partition proceedings were challenged in an appeal before the Court of Sub Divisional Collector and in appeal the partition proceedings have been set aside and case of partition has been remanded back to the court of A.C. 1st Grade, Solan. Defendants No.1 to 4, have purchased ¼ share in the suit land vide sale deeds No.268 and 271 of 23.05.1995, though, the defendants No.1 to 4, are non agriculturists. The suit land is recorded to be jointly owned and possessed except 195 Sq. meters which has been separately shown only on account of partition which partition has already been set aside and as such revenue entries qua khasra No.2654/263, 2655/263 and 2553/263, measuring 195 sq. meters are wrong, illegal and suit land is still joint. The defendants No.1 to 4 have filed a civil suit against the plaintiff seeking injunction so as to restrain the plaintiff from raising construction on the land comprising Khasra No.2553/263, measuring 48 sq. meters on the plea that there was some family settlement, whereas, no such family settlement has taken place between the parties and the said family settlement is result of concoction and fabrication and even such family settlement has not been acted upon. Defendants No.1 to 4 have no right, title or interest to change nature, raise construction or cut trees from the suit land and even regarding the sale deeds on the basis of which the share in the suit land was purchased by defendants No.1 to 4, the proceedings under Section 118 of the H.P. Tenancy and Land Reforms Act were initiated by the State of H.P., in the court of District Collector, Solan, as the defendants No.1 to 4 are non agriculturists and under the provisions of the aforesaid Act they could not have purchased the share in the suit land and the share purchased by defendants No.1 to 4 have been confiscated in favour of the State of H.P. by the District Collector, Solan, but in appeals the cases have been remanded back. The defendants are now threatening to raise construction the suit land forcibly despite protest of the plaintiff.

3. The defendants contested the suit and filed written statement, wherein, they have pleaded that the suit is liable to be stayed under section 10 of the CPC, as the matter in issue is also directly and substantially in issue in a previously instituted suit pending in the court of learned Sub Judge 1st Class, Solan, which suit is for declaration and permanent injunction for declaring the sale deed vide which the plaintiff has purchased the share in the suit land from Smt. Asha Devi pertaining to land comprising khasra No. 263/1 to be illegal, void as the suit land is owned and possessed by defendants No.1 to 4 on the basis of a registered document of 4.8.1936 which has been acted upon throughout by the parties and their predecessors and said Smt. Asha Devi was having no share in the land comprising in khasra No.263/1. It has been averred that the suit land has been completely partitioned between the predecessors of the parties on the basis of document dated 4.8.1936 accompanied by tatima duly signed by the predecessors of the parties. It has been stated that the plaintiff has purchased firstly 412 sq. meters of land, comprising Khasra No. 244, 245, 246 and 265 which shown in the possession of Smt. Asha Devi but lateron he got a fraudulent sale deed registered qua Khasra No.263 which had been challenged in the previous suit as Smt. Asha Devi was having no title in the land comprising Khasra No.263. It is also averred that the partition which was got fraudulently by the plaintiff by filing proceedings against the dead person has been set aside and the same is pending in the court of A.C. 1st Grade, Solan. It has been stated that the defendants are exclusive owners in possession of the land purchased by them through the sale deeds Nos. 268 to 271 dated 23.5.1995 and it is denied that the defendants are non agriculturists. It is also denied that the suit land is joint. It is admitted that a civil suit has been filed by the defendants No.1 to 4, against the plaintiff which is pending before the learned Sub Judge 1st Class, Solan. It is denied that the deed of partition is manipulated and fabricated document and that question of violation of H.P. Tenancy and Land Reforms Act has no bearing on the present suit which is under consideration before the Collector Solan. It is denied that the defendants are causing any damage to the suit land and threatening to raise construction but stated that during July, 2000 on account of rains the retaining wall of Red Cross road collapsed causing the partial collapse of the house of the defendants regarding which letter was written to the Municipal Committee, Solan but no action was taken by M.C. Solan and thus the defendants had to repair the collapsed retaining wall as it was causing extensive damage to the property of the defendants.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the defendants No. 1 to 4 have no right, title or interest to change the nature and to raise the construction over the suit land, as alleged?OPP.

2. Whether the suit is to be stayed under Section 10 CPC, as alleged? OPD.

3. Whether the defendants are owners in exclusive possession of the land purchased by them through sale deeds No.268, 269, 271, 271 of 23.5.1995?OPD

4. Whether the parties and their predecessors-in-interest had completely partitioned their properties through registered document dated 4.8.1936 accompanied by tatima, as alleged? OPD.

5. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom, by, the defendants/appellants herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 13.08.2007, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the findings of the court below on issue NO.2 that the suit was not liable to be stayed in view of the fact that RSA No.385 of 2006, Vinay Kumar vs. Yoginder Pal, arising out of civil suit No.24/1 of 1994 of the court of Civil Judge Senior Divisions being pending in the High Court and the trial and decision of the courts below has vitiated?

b) Whether in view of the fact that RSA No. 385 of 2006 being pending in the High Court, the findings that it was not open to the trial court and the District Judge to go beyond the adjudication made in civil suit No.241/1 of 1994 are sustainable when in view of the provisions of Section 10 of the CPC, the suit was liable to be stayed?

c) Whether in view of the fact that the proceedings for resumption under Section 118 of the H.P. Tenancy and Land Reforms Act having not been concluded and the defendant being the lawful owner in possession of the property could be precluded from repairing the same?

d) Whether the decree for mandatory injunction could be granted in favour of the plaintiff from restraining the appellants from repairing the property?

**Substantial questions of Law No.1 to 4:**

8. Civil suit No.241 of 1994, inter se, all herebefore also hence analogous parties, was, apparently instituted prior to the institution of the extant suit, before the learned trial Court. Except the factum of the earlier suit, espousing relief, for rendition of a

declaratory decree qua the suit property embodied therein, it, carries thereon suit land, hence, holding analogity vis-a-vis the extantly litigated suit property, and, also excepting the factum, qua, hereat the solitary relief of injunction being asked, for, the lis engaging the parties at contest in the earlier civil suit, and, the extant suit, is, similar.

9. Be that as it may, the aforesaid apt salient analogity, inter se, the previous suit, and, vis-a-vis, the extant suit, (a) except qua the earlier suit, being for rendition, of, a declaratory decree, and, the extant suit being cast, for rendition of a decree for injunction, (b) thereupon, the spirit, vis-a-vis, provisions, borne, in Section 10 of the CPC, is enjoined to be fulfilled, (c) wherewithin a specific interdictory mandate, is encapsulated, against any court proceeding to try a suit, when evidently prior thereto, an apt suit carries, therewithin, an, alike therewith subject matter, or the matter in issue therein, is directly and substantially, in issue, in the subsequently instituted suit, (d) AND the explicit interdictory mandate, borne therein, also essentially requires satiation being begotten, qua (e) of the earlier suit, carrying therewithin a subject matter, directly and substantially, in issue, in the latter suit, as well; (f) causes of action evidently erupting, in contemporaneity with the institution, of, the earlier suit, remaining palpably unembodied therein, whereupon, the further mandate of Order 2, Rule 2 of the CPC, against, the institution of, a, subsequent suit, vis-a-vis, causes of action, hence, erupting, in contemporaneity, vis-a-vis, the institution, of, the earlier suit, would, hence begets its apt attraction. The provisions of Section 10 CPC, and, of, Order 2, Rule 2 of the CPC read as under:-

> **"10. Stay of suit:** No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court."
>
> Provisions of Order 2, Rule 2 CPC reads a under:-
>
> **"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 internationally 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."

Nowat, with the apt statutory mandate(s), hence cast in the provisions, borne in Section 10 of the CPC, and, in Order 2, Rule 2 of the CPC, (i) thereupon, it has to be disinterred, from, readings of the earlier instituted plaint, and, of the extant suit, qua, whether both carry similar causes of action, or, matter(s) in issue, in both hold graphic commonality, or, the matters directly and substantial, in issue, in both suits, also hold commonality, (ii) upon making the apposite guaging, from, the apt pleadings, it is evident that the earlier suit bearing Civil Suit No. 241/1 of 1994, was, cast for rendition of a declaratory decree, (iii) whereas, the extant suit, is cast for rendition of decree for permanent prohibitory injunction, (iv) and, when the relief, for permanent prohibitory injunction is espousable, as, and when the purported jeopardising invasions or infringements, vis-a-vis, the rights of the aggrieved plaintiffs, upon, suit khasra No.263, hence, commence, by evident overt acts, standing committed thereon, by the defendants, (v) thereupon, when the subsequent suit, carries a relief contradistinct, vis-a-vis, the reliefs, espoused in the earlier suit, (vi) in sequel, when the matter hereat, was never directly or substantial in issue in the earlier suit, (vii) thereupon, it has to be invincibly concluded, that hence, with, the indispensable ingredients, cast in Section 10 of the CPC, not visibly begetting their apt satiation(s), conspicuously, with no evident display hence emerging, of the matters, directly or substantially, in issue, in both suits, being visibly alike, (viii) thereupon, the Court, seized with the latter suit, being not enjoined to stay, the, further proceedings thereon, (ix) even when RSA No. 385 of 2006, as arose from the verdict pronounced in the earlier suit, was, pending adjudication, and, whereon, a, verdict, stands pronounced by this Court, on 6.7.2018. Besides the purported infringements or invasions, upon, the rights of the plaintiff, vis-a-vis, the suit khasra number, when hence apparently occur, subsequent, to the institution of the earlier suit, and, when the apt invasions are proven to be committed, in, apt derogation of the rights of the plaintiff, hence, any non incorporations thereof,, in the earlier suit, of, the relief of injunction, also does not attract, the, embargo constituted under Order 2, Rule 2 of the CPC, thereupon, the extant suit is rendered maintainable.

10. Be that as it may, the learned counsel appearing for the defendants/appellants herein, has contended, that, upon a valid partition of the suit khasra number hence occurring on 4.8.1936, whereunder, the dismemberment of the hitherto suit property, rather occurred, and possession of parcels, of, the dismembered suit property, was handed over to the hitherto co-owners, (i) yet with the evidence on record making a clear demonstration, of the apt purported partition standing not cogently proven, to hence occur, (ii) hence, on anvil thereof, the defendants, cannot contend that the suit property is validly partitioned nor they can contend, that till a valid partition, occurs of the suit khasra numbers, theirs alike other co-owners, holding any compatible rights, except, with apt consent, to, hence make user thereof. Furthermore, when rather proceedings, vis-a-vis the subsequent partition, vis-a-vis, the suit khasra numbers has yet evidently remained un-consummated, thereupon, for want of culmination, of the partition proceedings, it is deemed fit, to, conclude qua the suit khasra number(s) remaining yet unpartitioned, (i) thereupon, till occurrence, of, dismemberment, of the joint estate, none of the co-owners, in the joint land, hence, holds any right to change the nature, of any portion, of the joint estate, except with the consent of the other co-owners, nor can attempt to change the nature of the suit land, by concerting to raise any construction thereon.

11. So far as the contention of the learned counsel appearing for the defendants/appellant qua the proceedings, for, resumption of the land under Section 118 of the H.P. Tenancy and Land Reforms Act, pending adjudication, before the revenue Courts is concerned, the civil court, has no jurisdiction to embark, upon the legality of the aforesaid proceedings initiated, against, the defendants. Moreover, till the conclusion of the aforesaid proceedings before the revenue Courts concerned, the defendants are co-owners along with the plaintiff, vis-a-vis the suit land, and, without the consent of the plaintiff, the defendants have not right to change the nature of the suit land.

12. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondent/plaintiff, and, against the appellants/ defendants.

13. In view of the above discussion, there is no merit in the present Regular Second Appeal, and, it is dismissed accordingly. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

Records be sent back forthwith.

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

Jallan Cooperative Agriculture Service Society Ltd. ....Petitioner.

Versus

State of H.P. & others ....Respondents.

CMPMO No. 4101 of 2013.
Reserved on : 28.02.2018.
Decided on: 12th March, 2018.

**Himachal Pradesh Co-operative Societies Act, 1968 -** Sections 67 & 93- Dismissal from service for misconduct – Sustainability- Managing Committee of Society ordering dismissal of respondent no. 5 (R-5) for misconduct on basis of enquiry report of Assistant Registrar - Appellate Authority setting aside order on ground of non observance of principles of natural justice and further directing Managing Committee to impose any other penalty other than dismissal in consonance with misconduct proved on record – Petition against – On facts, due notice found to have been issued to delinquent by Managing Committee before ordering dismissal – Held, Society had lost trust and confidence in delinquent - Appellate Authority had no jurisdiction to direct Managing Committee to impose any other penalty other than dismissal from service (Para 3)

**Himachal Pradesh Co-operative Societies Act, 1968 -** Himachal Pradesh Co-operative Societies Rules, 1971 - Rule 45(3) - Approval of Registrar, when required ? - Held, Rule 45(3) requiring approval of Registrar is attracted when delinquent is removed from service by

Society - It has no applicability when official is dismissed from service after due enquiry. (Para 5)

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| For the Petitioners: | Mr. Ajay Sharma, Advocate. |
| For Respondent No.1 to 4:: | Ms. Rita Goswami, Addl. Advocate General with Mr. Y. S. Thakur, Deputy Advocate General. |
| For Respondent No.5: | Mr. Naresh Kumar Sharma, Advocate. |

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

An inquiry conducted by the Assistant Registrar Cooperative Societies, Hamirpur, vis-a-vis various charges of misconduct imputed qua the delinquent/respondent No.5, sequelled adversarial findings against him. The adversarial findings, recorded by the Inquiry Officer, in his report of 16.04.2012, appertain to his embezzling the funds of the society besides his interpolating the records of the society. On receiving the inquiry report, the Managing Committee of the petitioner society, rendered, on 15.03.2003, an order, for the dismissal of the services, of respondent No.5. Preceding, the rendition of the aforesaid order, by the Managing Committee, of the petitioner society, a show cause notice was served upon respondent No.5, copy whereof is appended, as Annexure P-2, with the extant petition, wherafter, as borne on a perusal of Annexure P-3, respondent No.5 meted reply thereto, wherein, he urged, of, no penalty being imposable upon him. However, in Annexure P-3, he did not unveil, the trite grounds, whereupon, he concerted to assail the findings recorded by the Inquiry Officer, rather he proceeded to, in paragraph No.2, of Annexure P-3, merely make a communication, of, the inquiry report prepared on 12.04.2012, not recording findings, of inculpation vis-a-vis any serious mis-conduct, hence, the extant inquiry report being misconceived. The delinquent/respondent No.5, being aggrieved, by the order rendered by the Managing Committee, of the petitioner-society, hence, preferred an appeal therefrom, before the Additional Registrar (Administration) Cooperative Societies, H.P.. Appeal whereof, came to be registered as appeal No.263 of 2013, (i) thereon, the Appellate Authority, ordered, for the reinstatement in service of respondent No.5 herein and also proceeded to quash resolution No.4 of 22.2.2013, (ii) besides reserved liberty, to the Managing Committee, to impose upon respondent No.5, any penalty, excepting penalty(ies) of his dismissal or termination from service. The society concerned is aggrieved therefrom, hence, has preferred the instant petition before this Court.

2. The reasons which prevailed upon the Appellate Authority, for, rendering the impugned order, are harboured upon (a) the order imposing penalty, upon, the delinquent/respondent No.5, lacking in legal sanctity, given its being rendered without preceding thereto, any opportunity of being heard standing afforded to the delinquent. However, the aforesaid reason is per se flimsy, especially when preceding the order of dismissal from service, being, pronounced upon the delinquent/respondent No.5, by the Managing Committee of the Society concerned, (b) it was, as aforestated, rather preceded by a show cause notice, borne in Annexure P-2, being served upon him, (c) notice whereof was replied under Annexure P-3 by respondent No.5. Since, the show cause notice issued vis-a-vis respondent No.5, stood appended, with, copy of resolution No.4 of 11.06.2012 and with a copy, of, inquiry report, (d) besides obviously when thereunder intimation was made vis-a-vis delinquent/respondent No.5, to show cause against the imposition vis-a-vis him, of, penalty of dismissal from service, given the incriminatory findings being recorded against him by the Inquiry Officer vis-a-vis the apposite charges of grave misconduct.

Consequently, issuance besides evident service of show cause notice, borne in Annexure P-2, upon the delinquent official, (e) does mete, the necessary compliance, with the principles of natural justice nor obviously it was open for the Appellate Authority, to conclude that for purported want, of the delinquent official concerned, being heard by the disciplinary authority concerned, (f) nor any show cause notice being served upon him, the resolution rendered by the society concerned, whereby, his services were ordered to be dismissed, hence, wanted in legal sanctity.

3. Added vigour to the aforesaid conclusion, is garnered by the factum, of, the delinquent official concerned, meteing his reply tot he show cause notice, wherein, he omitted to spell out the reasons or his grounds, of, disconcurrence with the adversarial findings recorded vis-a-vis him, by the Inquiry Officer concerned. The omission(s) aforesaid rather are grave and contrarily, render open an inference, of the delinquent official concerned, waiving his right, AND also, of, his rather in an inappropriate manner canvassing, his agitations vis-a-vis the adversarial findings recorded vis-a-vis him, by the Inquiry Officer. Further effect thereof, is that the Appellate Authority, has wandered astray, in concluding, of, no compliance vis-a-vis principles of natural justice standing meted, by the Society concerned, (ii) conspicuously with there occurring no specific mandate, in the apposite statute or the Rules framed thereunder, whereupon the Managing Committee of the Society concerned, stood enjoined, to, preceding its imposing penalty, hence afford a personal hearing to the delinquent official concerned. Even otherwise, the aforesaid succinct reply furnished, by the delinquent official concerned vis-a-vis the show cause notice served upon him, does negate, any espousal of respondent No.5, (iii) of the adversarial findings recorded vis-a-vis him by the Inquiry Officer concerned, being not anvilled upon any evidence or theirs arising from the inquiry officer concerned mis-appreciating, the relevant evidence besides his omitting to appreciate the relevant evidence, germane to the articles of charge, (iv) also, the Appellate Authority, without, delving into the crucial factum, of any misdemeanour standing purportedly, conducted, by the Inquiry Officer concerned, arising, from his misappreciating evidence or his not appreciating the relevant evidence germane to the articles of charge, was, rather precluded, to merely on purported non compliance, by the disciplinary authority, with the principles of natural justice, (v) hence, render any conclusion, that the penalty of dismissal from service, imposed, upon the delinquent in pursuance to adversarial findings recorded against him by the Inquiry Officer, rather merited interference. Moreover, the reasons ascribed, by the Appellate Authority, for, interfering with the order imposing penalty of dismissal, from, service upon the delinquent official, by the competent disciplinary authority, is anvilled upon a charge, bearing similarity with the articles of charge(s), whereon, adversarial findings were recorded by the Inquiry Officer, rather hence pending adjudication before the Additional Sessions Judge, Hamirpur, (vi) thereupon, no reliance being amenable to be placed upon the report furnished, by the Inquiry officer concerned. However, the aforesaid reason is per se specious, especially when no evidence has been placed on record, demonstrative, of, any Court of competent jurisdiction, restraining the Inquiry Officer concerned, from, holding a domestic inquiry against the delinquent official concerned, even when the hereat articles of charge(s), purportedly bore, similarity vis-a-vis charges, framed against the delinquent official, by the competent court of criminal jurisdiction. Consequently, it was not open, for the inquiry officer, to await for rendition of a verdict, by the competent court of criminal jurisdiction, upon, charges vis-a-vis the one(s) in respect whereof, adversarial findings stood recorded by the Inquiry Officer against the delinquent official, adversarial findings whereof stood validly accepted, by the disciplinary authority concerned nor hence the Inquiry report acquires any stain of any want, of, jurisdictional competence vis-a-vis its author. On receiving the inquiry report, the Managing Committee of the petitioner society, rendered, on 15.03.2003, an order, for the dismissal of the services, of respondent No.5. Preceding, the rendition of

the aforesaid order, by the Managing Committee, of the petitioner society, a show cause notice was served upon

4. a grThe Appellate Authority has also committed ave error, On receiving the inquiry report, the Managing Committee of the petitioner society, rendered, on 15.03.2003, an order, for the dismissal of the services, of respondent No.5. Preceding, the rendition of the On receiving the inquiry report, the Managing Committee of the petitioner society, rendered, on 15.03.2003, an order, for the dismissal of the services, of respondent No.5. Preceding, the rendition of the aforesaid order, by the Managing Committee, of the petitioner society, a show cause notice was served upon aforesaid order, by the Managing Committee, of the petitioner society, a show cause notice was served upon in, after its interfering, with the order imposing penalty of dismissal, from service upon the delinquent official, by the disciplinary authority concerned, its making a direction, upon it, to except imposing a penalty of dismissal from service or termination from service upon him, impose any other penalty. The aforesaid order is in dire contradiction, with earlier therewith aforesaid reasons, (i) wherein rather the Appellate Authority, proceeded to untenably interfere with the adversarial findings recorded by the Inquiry Officer vis-a-vis the delinquent official/respondent No.5. Be that as it may, given the severity of the proven misconduct against the delinquent official/respondent No.5 AND the necessity of existence of perennial, of, trust in him by the society concerned, being a sine qua non, for securing the continuity in service of the delinquent official/respondent No.5, (ii) thereupon, the magnitude of the proven misconduct against the delinquent official, has naturally eroded the trust and confidence, of, the society concerned, in the delinquent official, whereupon, it was grossly improper for the Appellate Authority, to order for retaining, the delinquent official concerned, in service.

5. The learned counsel appearing for respondent No.5, has contended with much vigour, before, this Court that given the mandate, of, the apt portion of the hereinafter extracted sub-rule (3) of Rule 43, of the rules framed under the Himachal Pradesh Cooperative Societies Act, 1968:-

> "Unless other wise provided in the bye-laws, or in the terms of his appointment and subject to the provisions of Section 72 of the Act, any officer of the Society appointed by the managing committee may be removed from his office by the managing committee, subject to approval of the Registrar."

(i) it was imperative, for, the managing committee concerned to receive the concurrence, of, the Registrar concerned, before it proceeded, to impose penalty of dismissal upon him, (ii) whereas, the Registrar concerned, not, meteing his concurrence vis-a-vis the proposal of the society concerned, for dismissing respondent No.5, from service, (iii) thereupon, the mandate of sub-rule 3 of Rule 43, of the Rules framed under the Act aforesaid, is infringed, (iv) whereupon, the order of dismissal from service of the delinquent official hence warrants interference. Significantly, the omission aforesaid in the apt rules, is to safeguard against interference(s) by the apt statutory authority(ies) with renditions, of, the aforesaid order, especially when its per se taking force, is imperative for ensuring elimination of errant official(s) vis-a-vis whom graHowever, in making the aforesaid submission, the learned counsel appearing for respondent No.5, has remained unmindful to the factum, of, sub-rule (3) providing, for, the general body of the society concerned, being the solitary repository, of, jurisdiction, for ordering for removal, from service of the delinquent official concerned, upon the apposite charges standing proved, (v) yet the proposal for removal, from service, to acquire validity, is enjoined, prior to its making, hence meted concurrence by the Registrar of the Cooperative Societies concerned. (vi) However, the peremptoriness, of, compliance

with the aforesaid statutory requirement, arises, only when the apt proposal, is vis-a-vis removal from service, of, the errant official concerned, (vii) whereas, with the society concerned, extantly, ordering for dismissal, from service of the errant official concerned, (viii) obviously, hence, when the parlance, borne by the phrase "dismissal from service" is contradistinct, from, the parlance borne by the phrase "removal from service", (ix) and with the phrase "dismissal from service", not, occurring in the apt sub-rule (3) of Rule 43 of the rules, framed, under the Act, (x) thereupon, no peremptory compliance is enjoined to meted thereto, nor it was incumbent upon the disciplinary authority, to, prior to is ordering, for dismissal from service, of the errant official, to hence seek the concurrence of the Registrar of the Cooperative Societies.ve charge(s) of moral turpitude, stand, evidently proven, hence rendering him to lose the trust of the Society.

6. For the foregoing reasons, the instant petition is allowed and the order rendered by the Additional Registrar (Administration) Co-operative Societies, H.P. at Shimla in Appeal No.264/13 on 24.7.2013 is set aside. All pending applications also stand disposed of.

**********

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

Pradeep Kumar .....Petitioner.

Versus

State of H.P. & others .....Respondents.

Criminal Revision No. 327 of 2017.
Reserved on : 5th May, 2018.
Decided on : 14th May, 2018.

**Code of Criminal Procedure, 1908**- Section 227- Discharge- Validity-Additional Sessions Judge discharging accused of offence under Section 306 read with Section 34 of IPC- Revision against by complainant- Complainant submitting that suicide note opined by expert, FSL, to have been authored by the deceased clearly accusing accused of having instigated accused to commit suicide- Statements of "V" and brother of deceased recorded during investigation also corroborating allegations of instigation by accused- However, allegations averred in suicide note attributing accused employers of deceased taking prompt action against him and "H" in scuffle taking place between them and not initiating any action in similar matters happening between other employees- Held, material on record does not indicate that accused had requisite mens rea of their goading or instigating deceased to commit suicide or they intentionally aided in commission of such act- Ingredients of offence abatement totally lacking- Deceased only ventilating his grievances against disciplinary authorities through suicide note- Statements of "V" and brother of deceased inconsequential- No illegality in order of discharge- Revision dismissed. (Paras 4 to 7)

***Cases referred:***

Netai Dutta vs. State of W.B., (2005)2 SCC 659

State of Kerala and others vs. Unnikrishnan Nair and others, (2015)9 SCC 629

For the Petitioner: Mr. Dalip K. Sharma, Advocate.

For Respondents No. 1: Mr. Hemant Vaid, Addl. Advocate General and Mr. Y.S. Thakur, Dy. A.G.

For Respondents No.2 to 5: Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant criminal revision stands directed, against, the orders recorded on 17.03.2016, by the learned Sessions Judge, Solan, camp at Nalagarh in Case No.7 NL/7 of 2013, whereunder, he discharged the accused vis-a-vis the offences constituted under Section 306 read with Section 34 of the IPC.

2. The learned counsel appearing, for, the petitioner has with much fervor and vehemence, hence, argued before this Court, that the impugned order, is, wanting in legal vigour, (a) especially when the material existing, on record, does prima facie, make, displays of offences being committed, by the accused under Section 306 read with Section 34 IPC, (b) thereupon, rather the learned Sessions Judge concerned, was enjoined to frame, charges, against the accused, under, the aforesaid penal provisions, rather than to discharge them. The learned counsel appearing for the petitioner, has, in support of his submission(s), hence, has placed reliance, upon, certain material existing, on record, material whereof, is, comprised in a suicide note, suicide note whereof stands opined by the FSL concerned, to be authored, by the deceased, contents whereof reads as under:

> "(1) Vipal Vohar, Kaml Chandel, G.M. Sahab, Harender , merit maut ka karan hai, jisme meri koi galati nahi hai.
>
> (2) Gain Singh, Vishavnath ka jhagra hua koi action nahi liya Kamal Chandel ne.
>
> (3) G.M. Sahab aur Susheel Ka Jhagra hua to koi action nhi liya.
>
> (4) Harender ka jhagra hua mere sath hus to turant ation liye, H.R. department apne bandi ka paksh lete hai.".

therein revelations occur (a) of one Vipual Vohar, Kamal Chandel, G.M., and, one Harender, hence, instigating the deceased, to commit suicide; (b) on a scuffle occurring inter se Gain Singh, and, one Vishavnath, no action being taken, by one Kamal Chandel, (c) and, on a scuffle, occurring, inter se G.M., and, one Susheel, also no action being taken, (d) whereas, in a scuffle, ensuing inter se the deceased, and, one Harender, prompt action being taken, against both, by the apt ccused. (e) with Vishavnath in his statement recorded under Section 161, of, the Cr.P.C., rendering corroboration thereto, and, also the brother of the deceased, in his statement recorded under Section 161, Cr.P.C. meteing corroboration thereto, (f) thereupon, immense vigour, being acquired by the suicide note, and, hence the learned Sessions Judge concerned, was enjoined to charge the accused, for the offences committed, under Section 306 read with Section 34 of the IPC.

3. For determining, the vigour of the aforesaid contention, addressed before this Court, by the learned counsel appearing for the petitioner, it is imperative to bear in mind, the provisions borne in Section 107, of, the IPC, provisions whereof stand extracted hereinafter:-

> "**107. Abetment of a thing**.—A person abets the doing of a thing, who—
>
> First — Instigates any person to do that thing; or

> Secondly —Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly — Intentionally aids, by any act or illegal omission, the doing of that thing."

and upon prima facie satiation thereof hence emerging, thereupon, this court, would be constrained, to, reverse the orders pronounced, by the learned Sessions Judge concerned. The intricate besides the gravest nuance, borne in the afore extracted provisions, occurring in Section 107 of the IPC, and, meteing (s), of, satiation(s) vis—vis ingredients thereof, importantly by the afore referred material, is also imperative, is of, (a) the mens rea of the accused, to actuate or prompt, the deceased to commit suicide, (b) intentional aiding, by any act or illegal omission(s) by each of the accused, in the act, of, the deceased, hence, committing suicide.

4. Nowat, bearing in mind, the innate subtle nuance, of, the afore extracted provisions occurring in Section 107 of the IPC, and, blending them vis-a-vis the contents, of, the suicide note, (a) wherein incriminatory ascriptions are made by the deceased vis-a-vis the accused, comprised, in the accused, taking prompt action against him, and, one Harender, upon a scuffle occurring inter se him and the latter, (b) whereas, theirs omitting to take an alike action against other employees, cannot per se rear any inference of, (c) thereupon, the accused/employers, of, the deceased carrying in their respective minds, the imperative peremptory mens rea, of, hence theirs goading and prompting or instigating the deceased, to commit suicide, (d) nor also it can be said that the disciplinary action visited, by the accused, upon, one Harender, and, upon the deceased, (d) and, the omission(s) on the part of the employers, to not visit, any, alike action, upon other derelicting employees also constituting or holding therewithin elements, of, theirs intentionally aiding by any purported willful commission(s) or omission(s), in hence, the deceased, rather committing suicide nor it can be held, of, theirs purportedly instigating the deceased to commit suicide. Even though, the suicide note, is, prepared in proximity to the deceased committing suicide, and, hence the imperative principle of proximity inter se its preparation, and, the ultimate act, of the deceased hence committing suicide, is, thereupon satiated, (e) yet in garb of the suicide note, importantly, when the peremptory ingredients aforesaid, for enabling criminal inculpation(s), of, the accused vis-a-vis the commission of suicide, by the deceased, remains, rather grossly unsatiated by the apt suicide note, hence no firm inference qua prima facie, the order impugned, warranting reversal can be hence erected, (f) rather it appears, of, the deceased therein only ventilating, grievance(s), against, the disciplinary authority concerned. Even though, any disciplinary measure(s) initiated by the disciplinary authority concerned vis-a-vis the delinquent employee(s), (g) may, when is accompanied by prima facie, gross entrenched malafide(s) on the part of the employers, besides is entwined with vice(s) of intentional harassment, and, maltreatment, of, the deceased/errant official, concomitantly, thereupon, may grip, the disciplinary action initiated, against the employee, by the disciplinary authority, to be vitiated, (h) also hence an inference would spur, of its initiation, carrying the requisite mens rea, of, hence it being intentional also it fostering, the deceased, to, commit suicide. However, hereat, there is no material placed, on record, (i) qua in the visiting, of, disciplinary measures, against, the deceased, by the disciplinary authority, it carrying, any element, of, it being prima facie gripped with entrenched intentional malafides or malice, and, only, for perpetuation, of, harassment and illtreatment upon him, (ii) or its initiation being spurred, for ensuring, despite no material existing on record, in personification, of, his proven derelictions, hence, his victimization, or wreaking founded vendetta upon the deceased. In absence of the aforesaid material, it appears, of the disciplinary measures, visited, upon the deceased, by his employer being

founded, upon, sound and tangible material, and, hence being free, from, any trait(s) of intentional apt mens rea, (ii) more so, when one Vishavnath, in his statement recorded under Section 161 of the Cr.P.C., metes corroboration thereto. Since, Harender also was meted punishment alike the one meted to the deceased, whereas, apparently with Harender rather not taking, the ultimate step of his committing suicide, whereas, rather only, the deceased taking the ultimate step, of committing suicide, and, with Harender also being arrayed as an accused, (iii) whereas, upon a reading of the aforesaid statement, the aforesaid Harender along with the deceased, was, equally responsible, for, the scuffle which ensued inter se them, (iv) thereupon for the proven misdemeanor, committed by the deceased, in respect whereof, he was meted a minimal punishment, it appears rather that, he has taken the ultimate step, of his committing suicide, commission, of, suicide whereof,by him, appears to be a step in dis-concurrence with the proven misdemeanor, and, also is disproportionate vis-a-vis the minimal punishment meted upon him. The effect, of Harender, not taking the ultimate step to commit suicide, whereas, he alike the deceased, was meted an alike punishment, also reiteratedly hence begets an inference, qua the legality of the disciplinary action visited, upon, both by the disciplinary authority, besides eliminates any inference, of, any rearing(s) of any disciplinary measures, vis-a-vis both, rather carrying entrenched vice(s), of, victimization or vendetta, reared against both, by the employer nor the visiting of disciplinary action, by the disciplinary authority, upon, both is gripped, with the apt incriminatory mens rea, nor thereupon, any inentional actuatory instigation, stood, purveyed to the deceased.

5. Even though, the brother of the deceased, has, in his statement recorded under Section 161 of the Cr.P.C., hence has made echoings, therein, of given the perenniality, of, perpetration, of maltreatment or illtreatment, upon the deceased by the latter's employer, hence, carrying a traumatic effect on his psyche, hence, leading him to commit suicide. However, the statement of the brother, of, the accused, is recorded, with a year elapsing, since, the deceased committing suicide, thereupon, the belated recording of the statement, of, the brother of the deceased, hence engenders an inference of it, hence, carrying stains of invention or concoction, rendering it to be unbelieveable, (i) and even otherwise, with, the suicide note authored, by the deceased rather holding proximity, with the commission, of, suicide by the deceased, thereupon, with its holding a degree, of, purported evidentiary worth higher vis-a-vis, the evidentiary worth, of, the belatedly recorded, statement of the brother of deceased, (ii) AND with this Court, negating the effect of the suicide note, thereupon, also the statement of the brother of the deceased, is ridden of its apt evidentiary worth, if any.

6. The aforesaid inference, derived, by this Court marshals immense strength, and, vigour from a judgment, of the Hon'ble Apex Court, rendered, in a case titled as ***Sate of Kerala and others vs. Unnikrishnan Nair and others***, reported in ***(2015)9 SCC 629***, the relevant paragraph No.9 to 17 whereof are extracted hereinafter:-

> "9. To appreciate the rivalised submissions in the obtaining factual matrix, it is necessary to understand the concept of abatement as enshrined in Section 107 IPC. The said provision reads as follows:-
>
> "107. A person abets the doing of a thing, who –
>
> First – Instigates any person to do that thing; or
>
> Secondly – Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

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

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

Explanation 2 – Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

10. The aforesaid provision was interpreted in Kishori Lal v. State of M.P, (2007)10 SCC 797, by a two-Judge Bench and the discussion therein is to the following effect:- (SCC p.799, para 6)

> "Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in IPC. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107.Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. "Abetted" in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence."

11. In Analendu Pal Alis Jhantu v. State of West Bengal, (2005)2 SCC 659 dealing with expression of abetment the Court observed:-

> "The expression "abetment" has been defined under Section 107 IPC which we have already extracted above. A person is said to abet the commission of suicide when a person instigates any person to do that thing as stated in clause Firstly or to do anything as stated in clauses Secondly or Thirdly of Section 107 IPC. Section 109 IPC provides that if the act abetted is committed pursuant to and in consequence of abetment then the offender is to be punished with the punishment provided for the original offence. Learned counsel for the respondent State, however, clearly stated before us that it would be a case where clause Thirdly of Section 107 IPC only would be attracted. According to him, a case of abetment of suicide is made out as provided for under Section 107 IPC."

12. As we find from the narration of facts and the material brought on record in the case at hand, it is the suicide note which forms the fulcrum of the allegations and for proper appreciation of the same, we have reproduced it herein-before. On a plain reading of the same, it is difficult to hold that there has been any abetment by the respondents. The note, except saying that the respondents compelled him to do everything and cheated him and put him in deep trouble, contains nothing else. The respondents were inferior in rank and it is surprising that such a thing could happen. That apart, the allegation is really vague. It also baffles reason, for the department had made him the head of the

investigating team and the High Court had reposed complete faith in him and granted him the liberty to move the court, in such a situation, there was no warrant to feel cheated and to be put in trouble by the officers belonging to the lower rank. That apart, he has also put the blame on the Chief Judicial Magistrate by stating that he had put pressure on him. He has also made the allegation against the Advocate.

13. In Netai Dutta (supra), a two-Judge Bench, while dealing with the concept of abetment under Section 107 I.P.C. and, especially, in the context of suicide note, had to say this: (SCC p.661, paras 6-7)

> "6. In the suicide note, except referring to the name of the appellant at two places, there is no reference of any act or incidence whereby the appellant herein is alleged to have committed any wilful act or omission or intentionally aided or instigated the deceased Pranab Kumar Nag in committing the act of suicide. There is no case that the appellant has played any part or any role in any conspiracy, which ultimately instigated or resulted in the commission of suicide by deceased Pranab Kumar Nag.
>
> 7. Apart from the suicide note, there is no allegation made by the complainant that the appellant herein in any way was harassing his brother, Pranab Kumar Nag. The case registered against the appellant is without any factual foundation. The contents of the alleged suicide note do not in any way make out the offence against the appellant. The prosecution initiated against the appellant would only result in sheer harassment to the appellant without any fruitful result. In our opinion, the learned Single Judge seriously erred in holding that the First Information Report against the appellant disclosed the elements of a cognizable offence. There was absolutely no ground to proceed against the appellant herein. We find that this is a fit case where the extraordinary power under Section 482 of the Code of Criminal Procedure is to be invoked. We quash the criminal proceedings initiated against the appellant and accordingly allow the appeal."

14. In M. Mohan (supra), (2011)3 SCC 626, while dealing with the abatement, the Court has observed thus: (SCC p.638, paras 44-45)

> "44. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.
>
> 45. The intention of the Legislature and the ratio of the cases decided by this court are clear that in order to convict a person under section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide."

15. As far as Praveen Pradhan (supra), (2012)9 SCC 734, is concerned, Mr. Rao, has emphatically relied on it for the purpose that the Court had declined to quash the F.I.R. as there was a suicide note. Mr. Rao has drawn out attention to paragraph 10 of the judgment, wherein the suicide note has been reproduced. The Court in the said case has referred to certain authorities with regard to Section 107 I.P.C. and opined as under: (SCC p.741, paras 18-19)

"18. In fact, from the above discussion it is apparent that instigation has to be gathered from the circumstances of a particular case. No straight-jacket formula can be laid down to find out as to whether in a particular case there has been instigation which force the person to commit suicide. In a particular case, there may not be direct evidence in regard to instigation which may have direct nexus to suicide. Therefore, in such a case, an inference has to be drawn from the circumstances and it is to be determined whether circumstances had been such which in fact had created the situation that a person felt totally frustrated and committed suicide. More so, while dealing with an application for quashing of the proceedings, a court cannot form a firm opinion, rather a tentative view that would evoke the presumption referred to under Section 228 Cr.P.C.

19. Thus, the case is required to be considered in the light of aforesaid settled legal propositions. In the instant case, alleged harassment had not been a casual feature, rather remained a matter of persistent harassment. It is not a case of a driver; or a man having an illicit relationship with a married woman, knowing that she also had another paramour; and therefore, cannot be compared to the situation of the deceased in the instant case, who was a qualified graduate engineer and still suffered persistent harassment and humiliation and additionally, also had to endure continuous illegal demands made by the appellant, upon non-fulfillment of which, he would be mercilessly harassed by the appellant for a prolonged period of time. He had also been forced to work continuously for a long durations in the factory, vis-à-vis other employees which often even entered to 16-17 hours at a stretch. Such harassment, coupled with the utterance of words to the effect, that, "had there been any other person in his place, he would have certainly committed suicide" is what makes the present case distinct from the aforementioned cases considering the facts and circumstances of the present case, we do not think it is a case which requires any interference by this court as regards the impugned judgment and order of the High Court."

16. We have quoted in extenso from the said judgment and we have no hesitation in stating that the suicide note therein was quite different, and the Court did think it appropriate to quash the proceedings because of the tenor and nature of the suicide note. Thus, the said decision is distinguishable regard being had to the factual score exposited therein.

17. Coming to the case at hand, as we have stated earlier, the suicide note really does not state about any continuous conduct of harassment and, in any case, the facts and circumstances are quite different. In such a situation, we are disposed to think that the High Court is justified in quashing the proceeding, for it is an accepted position in law that where no prima facie case is made out against the accused, then the High Court is obliged in law to exercise the jurisdiction under Section 482 of the Code and quash the proceedings. [See V.P. Shrivastava v. Indian Explosives Limited and Others]

18. Before parting with the case, we are impelled to say something. Mr. Bhushan, learned counsel appearing for the respondent No. 1 & 2 has drawn our attention to a facet of earlier judgment of the High Court wherein it has been mentioned that at one time the deceased was pressurised by some superior officers. We have independently considered the material brought on record and arrived at our conclusion. But, regard being had to the suicide note and other

> concomitant facts that have been unfurled, we are compelled to recapitulate the saying that suicide reflects a "species of fear". It is a sense of defeat that corrodes the inner soul and destroys the will power and forces one to abandon one's own responsibility. To think of self-annihilation because of something which is disagreeable or intolerable or unbearable, especially in a situation where one is required to perform public duty, has to be regarded as a non-valiant attitude that is scared of the immediate calamity or self-perceived consequence. We may hasten to add that our submission has nothing to do when a case under Section 306 IPC is registered in aid of Section 113A of the Evidence Act, 1872.
>
> 19. In the result, we do not perceive any merit in the appeal and the same stands dismissed accordingly."

Furthermore the aforesaid inference also gathered strength, from, a pronouncement recorded, by the Hon'ble Apex Court, in case titled as ***Netai Dutta vs. State of W.B.***, reported in ***(2005)2 SCC 659***.

7. For the reasons aforesaid, the material as discussed hereinabove, does not prima facie, withstand the test, of, the ingredients borne, in the apposite provisions borne in Section 107 of the IPC, thereupon, no prima facie case, is made out, against the accused, for the commission of offence(s), punishable under Section 306 of the IPC read with Section 34 IPC. Consequently, there is no merit in the instant petition and it is dismissed accordingly. In sequel, the impugned order is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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