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

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

Code of Civil Procedure, 1908- Limitation Act, 1963- Article 58- Regular Second Appeal- Plaintiff filed a suit for declaration that he is exclusive owner of the suit land and in the alternative for being declared in exclusive possession thereof- plaintiff claiming to be the sole heir of his father, Shri Kirpa Ram- mutation of inheritance however reflected in the name of the plaintiff and Maya and Bheema- defendants contested the suit and averred that Kirpa Ram died in 1962- plaintiff alone was not the sole heir- in fact, Roshani Devi, defendant No.3 had married Kirpa Ram and two daughters, namely, Maya and Bheema were born out of the wedlock- mutation was thus rightly sanctioned jointly in favour of the legal heirs of the deceased Kirpa Ram- both the learned Courts below held against the plaintiff- In Regular Second Appeal held that cause of action of the plaintiff did not arise in the year 1998 when the defendants allegedly started interfering in the suit land- the revenue entries from the year 1962 to 1998 were known to the plaintiff and at the best as per Article 58 of the Limitation Act- he could have challenged the mutation within three years of his attaining majority in the year 1970- suit thus held barred by limitation too. (Para-9)

Title: Lachhman Vs. Keshav & another Page-91

Code of Civil Procedure, 1908- Order 2 Rule 2- Civil Suit filed seeking declaration as exclusive owner of the suit land, with the consequential relief of permanent prohibitory injunction- Plaintiff seeking intestate succession being the sole heir of the deceased Karmu- defendant claiming ownership and possession on the basis of Will dated 27.5.1985- Suit land being a part of the land of the deceased Karmu qua which decree had been obtained by the plaintiff in a previous suit - As per the plaintiff, the Halqa Patwari without any authority of law had sanctioned mutation in favour of defendant on 25.8.1985 on the basis of the aforesaid forged Will, which was also under challenge in the earlier suit- the Learned Trial Court and the 1st Appellate Court had dismissed the suit of the plaintiff – In the Second Appeal the judgments of both the learned Courts below set aside- Suit of the plaintiff decreed to the effect that the plaintiff was owner in possession of the suit land the revenue entry showing defendant as owner in possession were wrong and illegal- Held- that the act of omission of the plaintiff to reflect the Khasra number in the earlier suit has to be an intentional omission, a mere omission is no bar in a subsequent suit on the same cause- the omission to sue has to be an intentional omission and in the knowledge of plaintiff- rigor of Order 2 Rule 2 CPC would be applicable only in case of intentional omission and when the fact is in the knowledge of the plaintiff. (Para-12)

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

proceedings- further held even otherwise proceedings in the suit are essentially different from the proceedings initiated while invoking the extra ordinary writ jurisdiction- thus writ petition held to be maintainable. (Para-10 to 12)

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

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiffs sought to amend the pleadings to incorporate relief of challenging the impugned judgment- held, that in view of proviso appended under Order 6 Rule 17 CPC- amendment cannot be allowed as plaintiffs were aware of the judgment in question, brought by them only on the record in the beginning of the suit- they have not exercised due diligence - no grounds for interference- appeal dismissed. (Para-10 to 11)

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

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

Code of Civil Procedure, 1908- Order 20 Rule 5- Held that if findings returned in respect of any one or more of the issues are sufficient for the decision of the suit, clubbing of the issues does not prejudice the party- further held that there was nothing on record to remand the matter back for re-adjudication afresh, on all issues. (Para-13 to 17)

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

Code of Civil Procedure, 1908- Standard of Proof- Further held that mere admission of document in evidence does not amount to its proof and the standard of proof required in civil cases is dependent upon the balance of probabilities, as opposed to proof beyond reasonable doubt in criminal matters. (Para-49 to 53)

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

Code of Civil Procedure, 1908- Suit for Mandatory Injunction alongwith Permanent Prohibitory Injunction- Held- if the documentary evidence adduced by the plaintiff is infirm and not worth credence oral evidence cannot be a substitute thereof, enabling the plaintiff to prove his case. (Para-10 and 11) Title: Dalbir Singh Pathania & Anr. Vs. Sushil Kumar & Ors. Page-154

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

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Also held that power under Section 151 or under Order XVIII Rule 17 CPC is not intended to be used routinely, merely for the asking - if so used, it will defeat the very purpose of various amendments to the Code to expedite trials. (Para-14)

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

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

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

Code of Criminal Procedure, 1973- Section 397 and 401- Revision- Juvenile Justice (Care and Protection of Children) Act, 2000 (Section 4 & 5) or Juvenile Justice (Care and Protection of Children) Act, 2015 (Section 2 and 7)- Principal Magistrate of the Juvenile Justice Board decided a matter singly - Held bad in the eyes of law, the order passed by the Principal Magistrate was *coram non judis* and thus null and void; both as per the Juvenile Justice Act, 2000 or the newly Amended 2015 Act. Order of the Principal Magistrate quashed and set aside. (Para-5 to 16)

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

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

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

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

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

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

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

Code of Criminal Procedure, 1973- Section 482- Petitioner seeking to set aside the summoning order passed by the Learned Judicial Magistrate under Section 420 of I.P.C.- the respondent who proclaimed that he was in a live-in-relationship with the present petitioner was being threatened by her to commit suicide- thus he preferred a complaint under Sections 499, 500 & 506 of the I.P.C- the Learned Trial Court however summoned the accused/petitioner only under Section 420 of I.P.C- feeling aggrieved, accused/petitioner had preferred the present petition- the Court held that no offence of cheating were made out as there was nothing on record to hold that the person had been put to disadvantage as there was nothing on record to remotely suggest that accused had ever married the complainant/respondent nor there was no promise by the accused/petitioner to marry the complainant/respondent- summoning order quashed and set aside. (Para-11 and 12)

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

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

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

Constitution of India, 1950- Article 14 and 226- **Civil Writ Petition-** Petitioner running a Nursing College – having been refused NOC/permission to start GNM Course- grievance of the petitioner was that the cabinet had approved NOC only in case of colleges at serial No.1 and 3 for running the said course and though, its name figured at serial No.2 and was duly recommended alongwith other two by the Directorate level Evaluation Committee headed by the Director, Medical Education- still NOC not granted – writ petition filed- Held- policy decisions or a cabinet decisions are generally beyond the scope of judicial review but if parameters of Article 14 of the Constitution of India are infringed and decision is not backed by cogent material, or action is arbitrary, the Courts can interfere. (Para-17 and 18)

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

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

Held entitled to the pay parity, as he was performing duties alike the ones performed by other Registrars and any candidate imposed by the High Court, terming the placement as a mere re-designation held to be unreasonable and unconscionable. (Para-7 and 8)

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

Constitution of India, 1950- Article 14- **Civil Writ Petition-** Reasoning is the sole of the decision, whether administrative, policy decision, cabinet decision or a judicial decision- reasons have to be assigned to justify its decision- absence of reasons renders the decision arbitrary and violative of Article 14 of the Constitution- on facts held that since there was no reason assigned for refusing the grant of NOC – order dated 17.2.2017 quashed and the matter was directed to place before the cabinet for re-consideration. (Para -20 to 23)

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

Constitution of India, 1950- Article 226- Civil Writ Petition- Award of the Industrial Tribunal-cum-Labour Court challenged- Held- Labour Court in exercise of its adjudicatory function while deciding a Reference under Section 10 of the Industrial Disputes Act, 1947 has to answer the reference, as made to it by the appropriate Government. It cannot go beyond the reference. Even if the averments made in the claim by the petitioner are not in sync with the reference, the reference so made by the appropriate Government cannot be ignored by the Labour Court. (Para-10 and 11)

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

Constitution of India, 1950- Article 226- Civil Writ Petition- Grant of ACP under the Assured Career Progression Scheme- held that financial upgradation under the ACP scheme shall be available only if no regular promotion during the prescribed period has been availed by employee- if an employee gains promotion within 12 years, then he becomes entitled for second upgradation, which is available only after 24 years- it was also held that in case an employee is conferred the benefit under FR 22(I) at the time of officiating appointment, the benefit of ACP is not permissible. (Para-9 to 11)

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

Constitution of India, 1950- Article 226- Civil Writ Petition- Petitioner seeking regularization- cut off mentioned by way of administrative instructions curtailing the benefit to those who had completed 6 years service as on 31.3.2012- petitioner challenging the imposition of cut off date before the H.P. Administrative Tribunal- Original Application allowed- feeling aggrieved State challenge the same before the High Court- while dismissing the writ petition, High Court held that the cabinet had taken a decision to confer the right of regularization on contract employees on completion of six years of service – any subsequent executive instructions curtailing the benefit of regularization to employees having completed 6 years on 31.3.2013 was illegal and unjust- any instructions in this behalf could not have been passed without the approval of the cabinet- writ petition dismissed. (Para-5 to 7)

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

Constitution of India, 1950- Article 226- Civil Writ Petition- Reduction in pay scale on the basis of audit objection raised qua irregular grant of ACP to the petitioner. Petitioner challenging his re-fixation on a lower scale as a consequence thereto- Central Administrative Tribunal upholding the action of the respondent as the petitioner had already earned a promotion during the said inter regum- held that since the petitioner was found to have gained one promotion and as such, petitioner was rightly held not entitled to the financial upgradation. In the facts and circumstances of the case, petitioner could have gained the second financial upgradation under

the assured career progression scheme on completion of 24 years of service from the date of his appointment as a Reference Assistant on regular basis. Since the petitioner had not put the requisite 24 years, Petitioner held not entitled to the upgradation under the ACP Scheme. Consequently, the finding of the Tribunal upheld- petition dismissed. (Para-10)

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

Constitution of India, 1950- Article 226- Grant of Pension- Petitioner seeking counting of service in the CRPF w.e.f. 10.5.1969 to 31.3.1977 as qualifying service, for pensionery purposes- per the petitioner the CRPF had not paid him pension for the service, he had rendered to the CRPF w.e.f. 10.5.1969 to 30.4.1986- Held - Since the petitioner remained as Army Reservist and he continued to draw pension as such till 31.3.1977, the period rightly not counted as qualifying service- petition dismissed. (Para-5 and 6)

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

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

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

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

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

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

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

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

Constitution of India, 1950- Article 226- Reinstatement of Service- Petitioner removed from the service in pursuance to an FIR lodged for having allegedly committed offences punishable under Sections 376 and 506 of I.P.C. Show cause notice issued to the petitioner under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 for initiating disciplinary action, for having committed offences punishable under Sections 376 and 506 of I.P.C – during the course of disciplinary proceedings the petitioner went missing, who was also declared a proclaimed offender by the Court after charge having been laid against him under Sections 376 and 506 of I.P.C. Disciplinary Authority resorted to the provision of Rule 19 of CCS Rules. Disciplinary Authority proceeded to impose a major penalty, ordering the removal of the petitioner from the service- petitioner having surrendered before the Trial Court on 20.2.2008 came to be acquitted- petitioner thereupon seeking reinstatement. The claim for reinstatement in service dismissed- Holding that the honourable acquittal of the petitioner did not absolve him of the other imputations of misconduct i.e. remaining evidently willfully absent from the duty w.e.f. 28.12.2004 till 12.12.2005, whereupon, he was ordered to be removed from the service- further

held that the petitioner even after surrendering before the Learned Additional District Judge on 22.2.2008 not applying for extension of leave nor explaining his willful absence- no evidence led showing that the petitioner was suffering from mental depression- petition dismissed. (Para-5)

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

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

The Division Bench on re-consideration held that on the facts and circumstances of the case there was no requirement of the Rule that the post ought to have been advertised in the newspaper- as per Rules in vogue post was notified by the Employment Exchange, as was precisely done in the instant case- as such, held that ratio laid down by the Apex Court in ***Hargopal's*** matter was not applicable to the attending facts and circumstances. (Para-9 to 12)

Also held that the eligibility criteria was required to be fulfilled as on the date of requisition and not as on the date of registration of the applicant in the Employment Exchange. (Para-13)

Further held that mere exhibition of efficiency cannot be a ground to raise presumption of malafide or undue haste- allegation of malice, thus, held to be absolutely vague and unspecific- judgment of the Learned Single Bench set aside and quashed- appointment of the appellant was affirmed. (Para-17)

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

Constitution of India, 1950- Article 226- Service- Petitioner seeking selection to the post of Superintendent Grade-I in the Establishment of District and Sessions Judge's Court- rejection of the application- petitioner submitting that Amended Rules of 1996 were not applicable to the petitioner, as he was already working as Superintendent Grade-II, on regular basis at the time of advertisement, which was a feeder post for the Superintendent Grade-I post. In the alternative the petitioner seeking one time relaxation under Rule 7 of Himachal Pradesh Court Act, 1976. Held – amended Rules (1996) inter alia provided for a minimum educational qualification for the post of Superintendent, being graduation or 15 years experience in the feeder post. Held that the minimum qualification provided under the amended Rule creating a classification was founded on an intelligible differentia holding a close nexus with the salutary purpose of ensuring the aspirant possessing the enhanced educational qualification and acumen, for his proficiently performing, the higher responsibilities of the post of Superintendent in the Establishment of District and Sessions Judge Court. (Para-6)

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

Constitution of India, 1950- Article 227- Code of Civil Procedure, 1908- Order 6 Rule 17- Section 41 of the Workmen's Compensation Act, 1923- The adoptive parents of the deceased moving an application under Order 6 Rule 17 CPC seeking amendment in a claim filed under Workmen's Compensation Act- Application allowed by the Learned Commissioner- Insurance Company disputing the maintainability of the application by way of a petition under Article 227- Held- that the application under Order 6 Rule 17 CPC can be considered by the Commissioner, otherwise, than in accordance with the provision of Section 41 of the W.C. Act, if he is satisfied that the interests of the parties will not thereby be prejudiced- particularly keeping in view the requirement of Section 41(1)(b)- petition filed by the Insurance Company dismissed. (Para-4 and 5)

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

Constitution of India, 1950- Article 227- Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- Section 64- National Highways Act, 1956- Section 3H (4)- Petitioners while claiming objection vis-à-vis the land acquired for construction of National Highway laying exclusive claim for the award amount- Land Acquisition Collector however passed an award and issued notices to the petitioners as well as respondent No.1 to receive the compensation for the acquisition. Petitioners filed a Reference under Section 64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which was dismissed as not maintainable- Consequently, petitioners filed a civil suit under Sections 34 to 39 of the Specific Relief Act. Respondents question the jurisdiction of the Civil Court to entertain the suit in view of specific bar under Section 63 of the Rehabilitation and Resettlement Act- Held- that acquisition carried out under the National Highways Act, 1956, having been specified in the 4th Schedule of the Rehabilitation and Resettlement Act, 2013 shall be applicable vis-à-vis determination of compensation as per notification dated 28.8.2015 issued by the Central Government- the apportionment of the amount of the compensation, however, can be challenged before the Principal, Civil Court of original jurisdiction within the limits of whose jurisdiction land is situated, as per Section 3H(4) of the National Highways Act. (Para-4 to 8)

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

Constitution of India, 1950- Articles 15(4) and 16(4)- Appointment- Whether a lady marrying a Scheduled Castes / Scheduled Tribes or OBC Citizen, or one transplanted by adoption or any other voluntary act, ipso facto, becomes entitled to claim reservation and thereupon seeks appointment to government service- Held- No. Considering the earlier judgments passed by the Apex Court in ***Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde, 1995 Supp (2) SCC 549***, ***R. Chandevarappa v. State of Karnataka, (1995) 6 SCC 309***, ***Heikham Surchandra Singh & others v. Representative or "Lois" Kakching, Manipur (A Scheduled Caste Uplift Body) & others, (1997) 2 SCC 523*** and ***State of Tripura & others v. Namita Majumdar (Barman) (Smt), (1998) 9 SCC 217***- held- that let alone the General category candidate who marries a person belonging to a Scheduled Caste or a Scheduled Tribe, even a person belonging to Scheduled Caste or Scheduled Tribe of one State cannot get the benefit of Scheduled Caste or Scheduled Tribe in another State. (Para-21 to 33)

The contention of the person that none was misled when the Scheduled Tribes certificate was tendered to gain employment and as such, the appointment of the petitioner could be saved. Contention- repelled- findings returned by the Authorities while dismissing the petitioner from the service on the basis of false Scheduled Tribe certificate- upheld. (Para-34 and 35)

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

Credibility of Witnesses- contradiction inconsistencies and improvements thereupon- effect- Omission amounting to contradiction creates serious doubt about the truthfulness of the witnesses- the magnitude of contradictions if high and going to the root of the prosecution case and strikes at its very foundation- on facts held contradiction fatal- Revision allowed. (Para-13 to 17)

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

'H'

Hindu Marriage Act, 1955- Section 13- Divorce and Dissertation by petitioner- Marriage between petitioner and respondent solemnized on 12.11.2011- respondent wife withdrew from the company of petitioner without his will and against his consent and without any reasonable cause- Trial Court annulled marriage after appreciation of the evidence on record- petitioner

contracted second marriage before expiry of period of limitation for filing appeal against the verdict of trial Court- it was held that respondent took a false ground for justifying withdrawal from the martial company of harassment that she was ousted from the matrimonial home in the month of July, 2012- further held that it is clear from the oral evidence on record that respondent had no reasonable cause to leave the company of husband and withdrew cohabiting with respondent without his consent and against his will and, as such, deserted the petitioner and also subjected him to mental cruelty- further held relying upon ***Suman Kapur versus Sudhir Kapur, AIR 2009 SC 589*** that petitioner/respondent is entitled to compensate to the tune of Rs.1,00,000/- to meet the ends of justice in view of petitioner having contracted second marriage before expiry of period of limitation- Trial Court has rightly annulled the marriage- no merits in appeal- appeal dismissed. (Para-6 to 9)

Title: Reena Devi Vs. Parmod Kumar Page-173

Hindu Marriage Act, 1955- Section 13- Nullity of marriage and divorce- Premarital illicit relation of wife- ten weeks old pregnancy from respondent No.3 at the time of marriage- the record documents maintained in the Hospital qua hospitalization of the respondent wife after 15 days of the marriage where from it was revealed that wife had ten weeks old pregnancy- Learned Trial Court allowed the petition of divorce- the contention that hospital record does not bear signatures of the wife and as such same does not connect with the respondent wife is rejected- wife had herself admitted that she had terminated her pregnancy at Ghanahatti and failed to disclose the specific time when she conceived- wife also did not adduce any medical evidence to prove that she had conceived after cohabiting with petitioner only- Trial Court has rightly annulled the marriage- no merits in appeal- appeal dismissed. (Para-8 to 10)

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

Hindu Marriage Act, 1955- Section 13- Nullity of Marriage and Divorce- Respondent wife has illicit relation with one 'A'- she was caught alone in matrimonial home with 'A' twice and could not explain the presence of latter- respondent used to pick up quarrels with petitioner and his parents- she did not visit her ailing mother –in- law in the IGMC despite the fact that she was working there as staff nurse- she filed false case against petitioner and his parents under Sections 498-A and 323 of IPC, in consequence of which they were arrested- held relying upon the judgment of the Supreme Court in ***Samar Ghosh versus Jaya Ghosh, (2007)4 SCC 511*** that comprehensive appraisal of the entire matrimonial life of the parties needs to be made and marriage shall be deemed to have irretrievably broken down, if owing to the acute mental pain, agony and sufferings, the parties cannot be expected to live with each other at all- further held that evidence on record clearly shows that marriage of the parties is fully covered in the parameters of the aforementioned authority and, as such, annulment of their marital status is necessary in given circumstances- Court below has rightly annulled the marriage- petition stands dismissed. (Para-8 to 10)

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

'I'

Income Tax Act, 1961- Section 80-IC- "Initial Assessment Year" and "Substantial Expansion"- The relation thereof explained, further held that the legislature has consciously extended the benefit of "initial assessment year" to a unit that completed a substantial expansion – thus, held that substantial expansion undertaken during the period 7.1.2003 to 1.4.2012 was valid and legal- the units were entitled to 100% deduction on profits. (Para-22 to 25)

Thus, appeals were consequently allowed and the order passed by Assessing Officer, The Appellate Authority and the Tribunal were quashed and set aside holding inter alia that undertakings or enterprises which were established and became operational and functional prior to 7.1.2003 and have undertaken the substantial expansion between 7.1.2003 and 1.4.2012

shall be entitled to the benefit of Section 80-IC, for the period for which they were not entitled to the benefit of deduction under Section 80-IB and that units that commenced production after 7.1.2003 and carried out substantial expansion prior to 1.4.2012 would be entitled to the benefit of deduction under Section 80-IC. (Para-50 to 55)

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

Income Tax Act, 1961- Section 80-IC- The question involved was whether undertakings or enterprises established after 7th January, 2003 who carried out "substantial expansion" within the specified window period i.e. 7.1.2003 to 1.4.2012 would be entitled to deduction on profits @ 100%- the Assessing Officer having disallowed the claim of the assessee of granting the deduction @ 100%, for having undertaken "substantial expansion" between the aforesaid time and the same having been affirmed by the Appellate Authority and the Tribunal came to be challenged by the aforesaid appeals- High Court held that in view of provisions of Section 80-IC, (2)(B)(ii) specifically provided that in respect of the State of Himachal Pradesh that the unit which has begun or begins to manufacture or produce any article or thing, specified in the 14th Schedule or commences any operation and "undertake substantial expansion" during the said period, then by the virtue of sub Section (3) it shall be entitled to deduction @ 100%. (Para-18 to 20)

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

'L'

Land Acquisition Act, 1894- Section 18- Held that lands of which sale deeds are considered for determining the market value of the lands sought to be acquired must have proximity in time to the issuance of necessary notification for the acquisition of the concerned land and must also have proximity in the location vis-à-vis the lands brought under acquisition- further held that Learned Reference Court has rightly appreciated the evidence on record- no merits in appeal- appeal dismissed. (Para-3 to 5)

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

'N'

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

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

N.D.P.S. Act, 1985- Section 20- Appeal under Section 374(2) Cr.P.C- Appellant convicted under Section 20 of the Act and sentenced to undergo rigorous imprisonment for a period of six months and pay a fine of Rs.2,000/-- an appeal preferred against the conviction and sentence- conviction passed on the sole testimony of the police officials- no endeavour made to associate independent witnesses- Held that sole testimony of the police official can be relied without any corroboration by other admissible evidence, but provided, it is reliable, trustworthy and cogent. On appreciation of facts held that the testimony of the police officials rendered the genesis of the prosecution version highly doubtful, presence of the police officials on the spot was also shrouded in doubt- Further held that the non-availability of an independent witness, as was proclaimed by the prosecution was also doubtful- Conviction and sentence of the accused set aside. (Para-19 to 30)

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

Negotiable Instruments Act, 1881- Section 138- Accused had issued a cheque for a sum of Rs.21,65,072/- as purchase price of liquor supplied by the respondent- the cheque was dishonoured due to insufficient funds- accused was tried and convicted by the Trial Court- appeal filed in Appellate Court was dismissed- held that contention of the accused that complaint has not been filed by a competent persons stands rebutted from the resolution of the respondent federation lying on record - other requirements of Section 138 of NI Act have been fully complied with – there is presumption under Section 139 of NI Act regarding cheque having been issued for consideration- accused had not rebutted the presumption- Trial Court has rightly convicted the accused- appeal is rightly dismissed- revision stands dismissed. (Para-9 to 11)

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

'R'

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

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

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

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

Regular Second Appeal- Permanent Prohibitory Injunction- Plaintiff filed a suit for permanent prohibitory injunction in respect of the suit land claiming exclusive ownership, purportedly on the basis of a Will- Defendants contesting the suit on the ground that plaintiff was not the sole owner of the suit land, but he was one of the coparcener alongwith defendants and was only entitled to 1/12th of the share in the suit land- the Learned Trial Court decreed the suit of the plaintiff, however, learned Appellate Court accepting the appeal – dismissed the suit of the plaintiff, hence the regular second appeal- High Court held that on the face of no Will or gift deed having been produced on record and the oral testimony also being shrouded in doubt- it has to be held that deceased died intestate and his inheritance had to devolve on all the legal heirs. (Para-12 and 13)

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

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

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

Regular Second Appeal- Suit under Section 38 and 39 of the Specific Relief Act for perpetual and prohibitory injunction- Plaintiff sought a restraint order against the defendant from digging the foundations, raising construction and blocking the path in the suit land- plaintiff also sought a decree for mandatory injunction in the alternative, for restoration of the suit land to its original position- defendant inter alia averred that the suit land was Abadi deh- As per the defendant, the plaintiff was not a co-sharer in the suit land- house was being constructed on the old foundation and there was no path in existence- The Learned Trial Court had dismissed the suit- The Learned First Appellate Court however reversed the findings and decreed the suit- hence the Regular Second Appeal- Held- that in case of easement by way of prescription where parties jointly owned and possessed, the suit land, being a *Deodi* (threshold or entrance to the compound), which is main entrance- no co-sharers can raise any type of construction to block the same- consequently, findings of the learned 1st Appellate Court were upheld. (Para-20)
Title: Mohan Lal Vs. Ramesh Chand Page- 188

Regular Second Appeal- Whether a gift deed can be made in respect of coparcenery/ancestral property- held -that since the suit land was coparcenery property and the land having not been divided a gift deed was not sustainable in the eyes of law. (Para-25 to 27)
Title: Bhupinder Singh (since deceased) through LRs Vs. Bholu & others Page-52

'S'

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989- Section 3(1)(v)- Indian Penal Code, 1860- Section 457- Accused persons harassed the complainant for his being from scheduled caste and forcibly dispossessed him from the shop in his possession owned by the accused persons- Held that failure of the complainant to mention the names of the witnesses in the FIR who apprised him about the incident of dispossession, which had definitely not taken place in his presence and also failure to mention the material facts of the complaint in his pleadings of the civil suit pertaining to same incident created doubt about the correctness of his allegations- thus, prosecution has failed to prove charges against accused persons- conviction set aside- appeal allowed. (Para-12 to 14)
Title: Vijay Kumar and others Vs. State of H.P. Page-181

Specific Relief Act- Section 20- Specific relief of contract- Held that in a suit for specific performance even if the plaintiff proves the issues and establishes his case, it is not that under all circumstances, suit is to be allowed- power is discretionary, more particularly, If the contract is not equal and fair. (Para-54)

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

Specific Relief Act, 1963- Section 39- Permanent Prohibitory Injunction- Plaintiffs assail the agreement entered into Civil Suit No. 136-I/1986 titled as Mangtu Versus Jai Devi saying that neither they were party to and nor they authorized anyone to enter the said agreement and same is, as such, illegal, null and void- they claimed themselves to be tenants alongwith defendants No.13 to 15 under defendants No.1 to 12 except defendant No.6, a widow and further claimed that they have matured their title- held, that plaintiffs have not challenged the judgment, wherein, the agreement/compromise in question had been entered- they could not have challenged the compromise only without assailing the judgment, so relief is not competent. (Para-7 to 9)
Title: Gian Chand & others Vs. Kailasho Devi & Ors. Page- 158

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'V'

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

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

Versus

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

RSA No. 426 of 2008
Date of decision: 31.08.2017

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

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

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

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

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

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

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

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

vitiated, in view of the judgment of this Hon'ble Court in the case of Beli Ram vs. Mela Ram, 2003(1) SLJ 2004?

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

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

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

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

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

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

6. Relief.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ram Chand ....Petitioner.

Versus

State of Himachal Pradesh and another ... Respondents.

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

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

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

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

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral)*

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

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

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

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

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

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

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

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

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

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

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

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

Vs.

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

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

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

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

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

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

The following judgment of the Court was delivered:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Issue No. 1: Yes.

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

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

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

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

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

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

12. Feeling aggrieved, the appellant filed this appeal.

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

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

Substantial questions of law Nos. 1 & 3

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

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

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

Substantial question of law No. 2:

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

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

Substantial question of law No. 4:

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

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

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

Shri Amar Nath .... Petitioner

Versus

Union of India and others .... Respondents

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

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

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

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

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

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

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

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

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

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

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

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

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

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

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

****

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

Bhim Singh ....Petitioner

Versus

State of Himachal Pradesh and others ... Respondents

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

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

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

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Alka Sharma and another .....Appellants

Versus

Roshan Lal Verma ...Respondent

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

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

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

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Court on its own motion ....Petitioner

Versus

State of Himachal Pradesh and others ....Respondents

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

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

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

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

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

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

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

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Versus

Shri Chet Ram and another ...Respondent.

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

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

(Para-10 and 11)

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

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

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, the petitioners have prayed for setting aside of award passed by the Court of learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Dharamshala, in Reference No. 141/2006, dated 26.08.2011, vide which learned Labour Court has granted the following relief in favour of the workman therein i.e. the present respondent No. 1.

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

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

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

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

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

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

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

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

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

3. Relief."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant.

Versus

Ramesh Kumar & others .....Respondents.

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

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

Cases referred:

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

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

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

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

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

... ...

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

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

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

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

27. The Hon'ble Supreme Court in ***T.Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,*** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

28. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while

dealing with an appeal against an order of acquittal:

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***1. An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
>
> ***2. The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.***
>
> ***3. Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.***
>
> ***4. An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.***
>
> ***5. If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court."***

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

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

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

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

Cr. Revision No. 121 of 2006

Husan Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Revision No. 142 of 2006

Ramesh Kumar ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

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

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

(Para-13 to 17)

Cases referred:

Tehsildar Singh vs. State of UP, 1959 SC 1012

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

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

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

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

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Para-12 and 13)

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

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

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ankush alias Shivam ....Petitioner.

Versus

State of Himachal Pradesh. ....Respondent.

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

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

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

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge *(oral).*

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

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

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

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

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

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

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

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

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

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

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

Copy *dasti.*

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

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

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

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

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

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

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

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Relief."

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

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

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

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

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

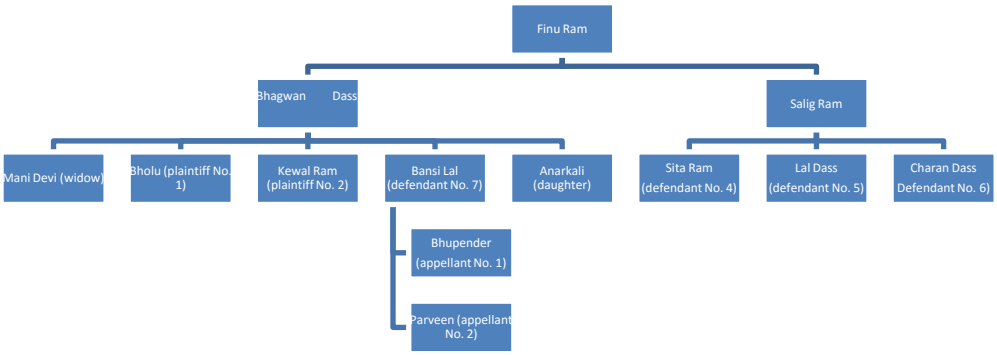
9. Mr. K.D. Sood, learned Senior Counsel appearing on behalf of the appellants has argued that the judgment and decree passed by the learned Court below is without appreciating the fact that the suit land was not properly valued for the purpose of court fee and jurisdiction. He has further argued that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

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

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

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

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



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

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

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

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

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

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

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

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

21. Examination-in-chief of DW-2-Shri Devki Nand was also recorded by way of affidavit. There is recital in the affidavit that deceased Shri Bhagwan Dass and Shri Salig Ram were brothers, but family partition took place inter-se the parties and they used to reside

separately. There is also recital in the affidavit that deceased Shri Bhagwan Dass had allotted the land to his three sons separately during his life time, about 8-9 years ago. There is further recital in the affidavit that sons inherit the property after the death of father, as per the custom of the area and father can alienate the property in any way. In cross-examination, he has stated that Shri Finu Ram was the father of Shri Salig Ram and Shri Bhagwan Dass and he has admitted that Shri Finu Ram had inherited the property from his father. He has also admitted that the suit land is joint inter-se the parties and has not been partitioned.

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

> "***Computation of fees payable in certain suits****-The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-*
>
> *.....*
>
> *(C)* ***For a declaratory decree and consequential relief;*** *to obtain a declaratory decree or order, where consequential relief is prayed;*
>
> *.....*
>
> *Provided further that in suit coming under sub clause (c) in case where the relief sought is with reference to any property such valuation shall not be less than the value of the property calculated in the manner provided by paragraph (v) of this section."*

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

> "**The Second Schedule**
>
> ***(See Section 3)***
>
> ***(Fixed Fees)*** ***.....***
>
> ***13. Plaint or memorandum of appeal in each of the following suits:-***
>
> ***(i).....***
>
> ***(ii).....***
>
> ***(iii) To obtain a declaratory decree where no consequential relief is prayed;"*** ***Nineteen rupees fifty paise.***

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

25. Now, coming to the contention of the learned Counsel for the appellants/defendants that the suit land is a coparcenery property, there is nothing on record to suggest that the land was divided and further there is nothing to come to the conclusion that there was any legal necessity for the *karta* to transfer the property in the name of minors-the sons of Bansi Lal, i.e. the grand sons of the transferee, to the exclusion of the plaintiffs. It has also come on record that general power of attorney was also not given to Bansi Lal for the

purpose of transferring the land in favour of his sons by Bhagwan Dass. So, I find no infirmity with the findings recorded by the learned Court below that the gift deed is not sustainable.

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

> "*The matter can be viewed from yet another angle. Section 123 of the T.P. Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, Section 123 makes transfer by a registered instrument mandatory. This is evident from the use of work "transfer must be effected" used by Parliament in so far as immovable property is concerned. In contradiction to that requirement the second part of Section 123 dealing with gifts of movable property, simply requires that gift or movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that in so far as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property."*

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

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

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

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

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

> *"4. It is also by now settled that the property in which a person acquires interest by birth is called a coparcenery and merely because the right to it is not accepted by the existence of an owner and that the right to it arise from the mere fact of the birth in the family and they become coparceners with the parental*

ancestral property immediately on their birth. This being the indisputable position of the Hindu Law governing the members governed by Mitakshra law, there can be no hesitation to hold that the grand-son who has acquired on his own, a share in the coparcenery property though no doubt through his father, but which is distinct and separate from the rights and interest of his father, has an indefeasible right to challenge an alienation by any other coparcener or by even a manager provided he could succeed in challenging the sale on the permissible legal grounds. Whatever may be the fate of an individual claim or challenge to an alienation in a particular case, depending upon the merits of the case, the right of a coparcener to challenge cannot be defeated merely because his father, a nearest reversioner, is also alive. As indicated earlier, the rights of the father as well as the son are distinct and separate though held in common in the undivided coparcenery property under the Mitakshra Law. Consequently, the conclusion of the learned first appellate Judge is non-suiting the plaintiff on the ground that he has no locus standi to file a suit in the teeth or the existence of his father cannot be sustained in law. The same is hereby set aside.

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

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

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

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

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

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

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

Rajinder Kumar … Petitioner
Versus
State of Himachal Pradesh … Respondent

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

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

Cases referred:
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565,
Sundeep Kumar Bafna versus State of Maharashtra (2014)16 SCC 623
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

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

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

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

2. Sequel to order dated 30.10.2017, ASI Ranjeet Singh, has come present with the record. Mr. P.M. Negi, learned Additional Advocate General has also placed on record status report,

prepared on the basis of investigation carried out by the investigating agency till date. Record perused and returned.

3. Record/status report reveals that aforesaid FIR came to be registered against bail petitioner at the behest of one Rakesh Chandel, who at the relevant time, was Head Master of Government Senior Secondary School, Jahlma, alleging therein that he received one complaint from the mother of the prosecutrix that bail petitioner, who at the relevant time was Security Trainer in the School, made an attempt to outrage modesty of her daughter. Aforesaid Headmaster referred complaint to the Sexual Harassment Committee, which in its report conformed and acknowledged the allegations made by the victim/prosecutrix. Record further discloses that bail petitioner taking advantage of innocence of the prosecutrix /victim made an attempt to outrage her modesty, which factum was subsequently disclosed by the prosecutrix to her friends, who at the relevant time were waiting for her outside the lab. It also emerges from the record that subsequently, aforesaid incident came to be reported by the friends of the victim to the other teachers of the school. After registration of FIR, bail petitioner is in custody since 14.6.2017 i.e. for the last five months.

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

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

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

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

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

9. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion.

It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

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

> "111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.
>
> 112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:
>
> (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
>
> (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
>
> (iii) The possibility of the applicant to flee from justice;
>
> (iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

11. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo

against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

12. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime. Petitioner is local resident of addresses given in memo of parties and shall remain available to face the trial and to undergo imprisonment, if any, which may be imposed on conclusion of the trial.

13. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

14. In view of the aforesaid discussion, petitioner has carved out a case for grant of bail. Since, statements of prosecutrix as well as other material witnesses are yet to be recorded on 28.11.2017, this Court deems it fit to direct the bail petitioner to ensure that he does not enter Village Jahlma, till such time, statements of prosecutrix and other witnesses are recorded by the trial court.

15. In view of above, present petition is allowed and the petitioner is ordered to be enlarged on bail in the aforementioned FIR, subject to furnishing personal bonds in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of learned Chief Judicial Magistrate, concerned with following conditions:

a. He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

b. He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c. He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

d. He shall not leave the territory of India without the prior permission of the Court.

16. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

17. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of present petition alone.

The petition stands accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ.

Hari Krishan @ Krishan ...Defendant-Petitioner.

Versus

Satish Kumar Sharma & others. ...Plaintiffs-Respondents.

CMPMO No.332 of 2016.
Judgment reserved on : 11.8.2017
Date of Decision : November 8, 2017

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

Petition under Article 227 of the Constitution of India filed- dismissed- held that it cannot be said that Court below failed to exercise or committed any illegality or material irregularity- power under Order XVIII Rule 17 can only be exercised by the Court to remove ambiguity or omission, however, such power cannot be invoked to fill up omission in the evidence already led by a witness- it cannot also be used for the purpose of filling up a lacuna in the evidence. (Para-13)

Also held that power under Section 151 or under Order XVIII Rule 17 CPC is not intended to be used routinely, merely for the asking - if so used, it will defeat the very purpose of various amendments to the Code to expedite trials. (Para-14)

Cases referred:

Soma Devi vs. Guin Devi & others, AIR 2003 HP 158

Ram Rati vs. Mange Ram (Dead) through LRs & others, (2016) 11 SCC 296

Bagai Construction vs. Gupta Building Material Store, (2013) 14 SCC 1

K.K. Velusamy vs. N. Palanisamy, (2011) 11 SCC 275

Vadiraj Naggappa Vernekar (Dead) through LRs. vs. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410

For the petitioner	:	Mr. Neeraj Gupta, Advocate, for the petitioner.
For the respondent	:	Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

Defendant's application filed under Order XVIII Rule 17 CPC, praying for re-examining the plaintiffs' witness, as defendant's suggestion of being in possession of the suit property, so put during the course of cross examination, was inadvertently left out from being recorded in the testimony, stands rejected by the trial Court vide impugned order dated 23.6.2016, passed in Civil Suit No. 35-1 of 2015/09, titled as *Satish Kumar Sharma & others vs. Hari Krishan,* (Annexure P-7).

2. Plaintiffs filed a suit seeking declaration qua the status and right & title of the defendant in the suit property. Defendant refuted the allegations, setting up his title.

3. On 21.11.2009, trial Court framed as many as fifteen issues. Record reveals that after a period of three years, on 17.10.2012, plaintiffs examined four witnesses. Thereafter, plaintiff No. 1 Satish Kumar Sharma was examined and his statement runs into 20 pages. It was recorded on 13.7.2015. Further two more witnesses were examined on 13.8.2015, on which date plaintiffs closed their evidence, where after matter was adjourned for 10.9.2015 for examination of defendant's witnesses.

4. Instead of leading evidence on 10.9.2015, defendant moved the application in issue, seeking recall of witness Satish Kumar Sharma, *inter alia,* for the following reason:

> "4. That in order to prove the case, the non-applicant No. 1 namely Satish Kumar stepped into the witness box and appeared as PW-1 on dated 13-07-2015. On 13-7-2015 this witness was cross examined on behalf of the applicant/defendant. Specific suggestions were given to this witness i.e. PW-1 (plaintiff No. 1 Satish Kumar) on behalf of applicant/defendant that as per the family arrangement of partition of the suit land, in between Sh. Geeta Ram predecessor in interest of non-applicant and Sh. Hari Krishan, applicant/defendant is in possession of that part of suit land which is also recorded so and that the possession of the applicant over that part of suit land is

from the time of Sh. Geeta Ram. These suggestions however denied by the non-applicant No. 1/PW-1."

5. Plaintiffs denied the same in the following terms:

"4. That the contents of para 4 are denied as being wrong and frivolous. It is submitted that the reason as assigned by the applicant is nothing but just an afterthought to fill in the lacunas as submitted supra."

6. Having heard learned counsel for the parties as also perused the record, this Court is unable to persuade itself to interfere with the impugned order, so assailed in a petition filed under Article 227 of the Constitution of India. It cannot be said that the court below failed to exercise its jurisdiction or in the exercise thereof, it committed any illegality or material irregularity. Also the order cannot be said to be perverse. Though specifically not pleaded, but defendant finds fault with the trial Court in not correctly recording the statement of the witness. Well aspersions, though oblique, are not well founded and are totally unsustainable.

7. Record reveals that the case is hotly contested. Almost on every date of hearing, learned counsel for both the parties have been appearing.

8. Statement of witness Satish Kumar Sharma (PW-5) sought to be recalled was recorded on 13.7.2015. It is hand written and runs into twenty pages. In fact, cross examination part of the testimony itself runs into sixteen pages. The handwriting is clear, legible and readable. The witness, after reading the statement has signed the same. It is not the case of the defendant that statement of the witness was recorded in a casual manner or not under the direct supervision of the Presiding Officer or in the absence of the learned counsel. As such, this Court is not inclined to accept the contention that suggestion of the defendant of being in possession of the suit land, by virtue of a family settlement, though put to the witness, was inadvertently left out from being recorded. Also, application is not accompanied by affidavit of the learned counsel.

9. That apart, one finds that subsequently on 13.8.2015, two other witnesses of the plaintiffs were examined, when also no objection was raised or matter brought to the notice of the Court by the parties or their counsel.

10. There is nothing on record to establish that certified copies of the statements were either applied for or obtained only with the closure of plaintiffs' evidence.

11. Order XVIII Rule 17 CPC reads as under:

"17. Court may recall and examine witness:

The court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the court thinks fit."

12. Now court cannot exercise such power for filling up lacuna, if any, or correct the mistake of the party. Discretion has to be exercised judiciously. The power is wide and can be exercised at any time prior to the pronouncement of the judgment, but to remove ambiguity or omission. It has to be exercised with great care and in exceptional circumstances and that also only to prevent failure of justice. [*Soma Devi vs. Guin Devi & others,* AIR 2003 HP 158].

13. The basic purpose of Rule 17 is to enable the Court to clarify any position or doubt, and the Court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the Court recalls the witness for the purpose of any such clarification, the Court may permit the parties to assist the Court by examining the witness for the purpose of clarification required or permitted by the Court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. "No prejudice is caused to either party" is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the Court but to be used only sparingly, and in case, the Court decides to invoke the

provision, it should also see that the trial is not unnecessarily protracted on that ground [*Ram Rati vs. Mange Ram (Dead) through LRs & others,* (2016) 11 SCC 296].

14. The power under Section 151 or Order XVIII Rule 17 CPC is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be *bona fide* and where the additional evidence, oral or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering justice, and the Court is satisfied that non production earlier was for valid and sufficient reasons, it may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The Court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the Court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. [*Bagai Construction vs. Gupta Building Material Store,* (2013) 14 SCC 1 and *K.K. Velusamy vs. N. Palanisamy,* (2011) 11 SCC 275]

15. The apex Court in *Vadiraj Naggappa Vernekar (Dead) through LRs. vs. Sharadchandra Prabhakar Gogate,* (2009) 4 SCC 410, observed that:

> "31. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the court's discretion, if it deems fit, to allow such an application."

16. As such, finding no merit in the present petition, the same is dismissed.

17. One finds that the parties have been litigating since the year 2009. As such trial is expedited with a direction that suit be positively decided within a period of one year. Parties are directed to appear before the trial Court on 30th November, 2017. Records be immediately sent back. Registry to take appropriate action.

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

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

Mamta Goel ... Appellant

Versus

Seema Bisht & others ...Respondents

LPA No. 177 of 2010.
Judgment reserved on: 12.10.2017
Date of Decision: November 8 , 2017

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

The Division Bench on re-consideration held that on the facts and circumstances of the case there was no requirement of the Rule that the post ought to have been advertised in the newspaper- as per Rules in vogue post was notified by the Employment Exchange, as was precisely done in the instant case- as such, held that ratio laid down by the Apex Court in ***Hargopal's*** matter was not applicable to the attending facts and circumstances. (Para-9 to 12)

Also held that the eligibility criteria was required to be fulfilled as on the date of requisition and not as on the date of registration of the applicant in the Employment Exchange. (Para-13)

Further held that mere exhibition of efficiency cannot be a ground to raise presumption of malafide or undue haste- allegation of malice, thus, held to be absolutely vague and unspecific- judgment of the Learned Single Bench set aside and quashed- appointment of the appellant was affirmed. (Para-17)

Cases referred:

Union of India & others vs. N. Hargopal & others, (1987) 3 SCC 308
Excise Superintendent Malkapatnam, Krishna District A.P. vs. K.B.N. Vishweshwara Rao & others, (1996) 6 SCC 216
Nagendra Chandra & others vs. State of Jharkhand & others, (2008) 1 SCC 798
National Fertilizers Limited & others vs. Somvir Singh, (2006) 5 SCC 493
State of Bihar vs. Upendra Narayan Singh & others, (2009) 5 SCC 65
Union of India & others vs. Pritilata Nanda, (2010) 11 SCC 674 [2010 (7) Scale 269
Tungeshwar Nath vs. State of U.P. & others, 2008 (119) FLR 196
Dr. M.V.Nair vs. Union of India & others, (1993) 2 SCC 429
Bhupinderpal Singh & others vs. State of Punjab & others, (2000) 5 SCC 262
Nihal Singh & others vs. State of Punjab & others, (2013) 14 SCC 65
K. Gunavathi vs. V. Sangeeth Kumar & others, (2014) 11 SCC 491
National Thermal Power Corporation, Kahalagaon & others vs. Nakul Das & others, (2014) 9 SCC 385

For the petitioner : M/s. Sunil Mohan Goel and Ashish Jamalta, Advocates, for the petitioner.
For the respondent : Mr. Shashi Shirshoo, Advocate, for respondent No. 1.
Mr. Hamender Chandel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Sanjay Karol, ACJ.

On 6.8.1997, one post of Computer Assistant was notified to be filled up by the Municipal Corporation, Shimla, for which names were requisitioned from the Regional Employment Exchange Officer, Shimla. On 19.8.1997, names of twenty eligible candidates were sponsored in accordance with the single chance rotation norms. On 23.8.1997 candidates were interviewed. Same day, the Selection Committee declared the result and Mamta Goel (appellant herein) who was found most meritorious and suitable, was issued letter of appointment.

2. It is this letter of appointment dated 23.8.1997 (Annexure A-1) which became subject matter of challenge by writ petitioner Seema Bisht (respondent No. 1 herein) by way of CWP(T) No. 4704 of 2008 [OA No. 2153 of 1997], *inter alia,* praying as under:

> "(i) The appointment of the respondent No. 4 may kindly be quashed which is illegal and contrary to the guidelines laid down by the Government for recruitment and also contrary to the provisions of section-4 of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959.
>
> (ii) That the respondents No. 1 & 3 be directed to produce the whole record pertaining to the selection of the respondent No. 4, as Computer Assistant, in the Municipal Corporation Shimla.
>
> (iii) That the respondent No. 1 & 3 may kindly be directed to consider the name of the applicant for the selection of Computer Assistant after quashing the

appointment of the respondent No. 4, on priority basis due to the instances enumerated above in the application."

3. Vide impugned judgment dated 31.8.2010, learned Single Judge quashed such order of appointment. Primarily what weighed with the learned Single Judge was non advertisement of the post in view of law laid down by the Apex Court in *Union of India & others vs. N. Hargopal & others,* (1987) 3 SCC 308; *Excise Superintendent Malkapatnam, Krishna District A.P. vs. K.B.N. Vishweshwara Rao & others,* (1996) 6 SCC 216; *Nagendra Chandra & others vs. State of Jharkhand & others,* (2008) 1 SCC 798; *National Fertilizers Limited & others vs. Somvir Singh,* (2006) 5 SCC 493; *State of Bihar vs. Upendra Narayan Singh & others,* (2009) 5 SCC 65; and *Union of India & others vs. Pritilata Nanda,* (2010) 11 SCC 674 [2010 (7) Scale 269] as also the Division Bench of Allahabad High Court in *Tungeshwar Nath vs. State of U.P. & others,* 2008 (119) FLR 196.

4. The principles laid down by the Apex Court can be culled out as under:

(a) It is not mandatory for the employer to appoint persons sponsored by the employment exchanges;

(b) The field of choice can be enlarged and otherwise applications can be invited from the general public;

(c) Factum of vacancies to be filled up must be given wide publicity by adopting all modes and means;

(d) The selection and appointment of candidates only out of the candidates sponsored by the Employment Exchanges, wherever Rules otherwise provide for advertisement is violative of Articles 14 and 16 of the Constitution of India; and

(e) Article 16 of the Constitution mandates every appointment to public post or office, wherever required, to be made by way of an open advertisement.

5. Applying the aforesaid principles, learned Single Judge held that it was obligatory on the part of the Municipal Corporation, Shimla, to have advertized the post in various newspapers and given wide publicity through other means and modes of communication. Also while choosing the successful candidate, undue haste was shown. By sending a Peon with a peon-book on 11.8.1997, names were got sponsored from the Employment Exchange which was so done on 19.8.1997 and the candidates were interviewed on 23.8.1997 and immediately thereafter, in fact same day, selected candidate was given appointment.

6. The judgment is assailed on the ground that: (i) appointment of the appellant is totally in consonance with the settled principles of law and more specifically the Recruitment and Promotion Rules for the Post of Computer Operator/Assistant (Non-Gazetted) Class-III in Municipal Corporation, Shimla (hereinafter referred to as the Rules); (ii) it was not the requirement of law that the post was to be advertized in newspapers; (iii) the decisions rendered by the Apex Court, so relied upon by the learned Single Judge pertain to the period subsequent to the appointment of the appellant. It was neither the practice nor requirement of law that the post was required to be advertized; and (iv) findings with regard to undue haste are factually incorrect and legally unsustainable.

7. On the other hand Mr. Shashi Shirshoo, learned counsel for the respondent has argued the matter making the following submissions:

(i) That the judgment rendered by the learned Single Judge, is in the line of the decisions rendered by the Hon'ble Supreme Court, warranting no interference; (ii) In any event, the method of selection adopted by the respondent-Corporation was illegal inasmuch as (a) no names were called for from all the employment exchanges within the District as per manual "Hand Book on Personnel Matters, Vol-I (Second Edition), page 176"; (b) no attendance sheet was maintained regarding presence of all the 20 candidates called for the interview for the post in question; (c) in any event, appellant herein was ineligible to have applied for the post in question for the reason that in the year 1992, when she

got herself registered with the employment exchange, she had not acquired the diploma in computer from a recognized institution, a condition essential for the post of Computer Assistant. Even though, post was requisitioned in August, 1997, the date of eligibility is to be reckoned from the date of registration and not thereafter; and (iii) Simply because appellant herein has worked for more than 20 years, she cannot claim any equity, more so, in the light of the judgment rendered by the Apex Court as reported in *Binod Kumar Gupta & others vs. Ram Ashray Mahoto & others,* (2005) 4 SCC 209.

8. At the threshold we may only observe that since 23.8.1997, appellant has been successfully discharging her duties as a Computer Assistant with the Municipal Corporation, Shimla. There is nothing on record indicating lack of competence or dereliction of duty on her part. Soon she is to retire.

9. On 4.7.2012 this Court, after perusing the record observed as under:

> "The Employment Officer, Shimla is present and he has produced the record. It is seen that the employment exchange had forwarded twenty names to the Municipal Corporation, Shimla pursuant to their notification to the requisition on 19.8.1997. The appellant (respondent No. 4) is at serial No. 6 and she had registered with the employment exchange on 14.12.1992, whereas the writ petitioner got registered only on 14.3.1995. It is seen that twenty names forwarded by the employment exchange is only as per the seniority in the employment exchange and none among twenty is junior to the writ petitioner, in terms of the date of registration. It is also pointed out by the employment officer that as per Government instruction dated 16th May, 1994, twenty names against one vacancy are to be forwarded, for a district level vacancy.
>
> Post for further orders on 6.7.2012."

Noticeably, appellant was registered prior in point of time.

10. Rules specifically prescribe age limit for direct recruitment to be reckoned on the first day of the year in which the post is advertized for inviting applications or notified by the Employment Exchanges or as the case may be. Now in the instant case, post was notified sometime in the year 1997.

11. It is not in dispute that the post was not advertized in the newspaper. But then it is not the requirement of the Rule that it ought to have been so done. In fact, from Rule 6 it is apparent that post could be notified by the Employment Exchange(s) and this is precisely what has been done in the instant case. It is under these circumstances, we are of the considered view that the ratio of law laid down by the Apex Court in the decisions referred to by the learned Single Judge (supra), are in-applicable to the attending facts and circumstances. In fact, challenge to the appointment was not on this ground. It was only on account of ineligibility of the appellant. The grievance of the writ petitioner primarily rested on the fact that the Employment Exchange failed to sponsor her name despite the fact that on the date of registration she was fulfilling the criteria which the appellant was not possessing.

12. To contend that eligibility for the post has to be reckoned as on the date of registration with the Employment Exchange and not the date on which the requisition was sent would not be legally correct. We may take note of instructions dated 17.1.1977 (Annexure PC) that of the Government of Himachal Pradesh to the effect that all employing agencies were obliged to make recruitment only through Employment Exchanges. Other sources were to be tapped only if the Exchanges failed to sponsor suitable candidates. These instructions came to be reiterated on 1.8.1983 (Annexure PD). It is only in the year 2000, vide office memorandum dated 9.3.2000 (Annexure PE) the Government clarified that names for filling up the vacancies were to be invited not only from the Employment Exchanges but also directly by way of publication. As per the then prevalent Rules/Instructions all employing agencies in Himachal Pradesh were obliged to make

appointment of only such of those candidates whose names were sponsored by the Employment Exchanges.

13. In the instant case, appellant as on the date of such requisition fulfilled the eligibility criteria. She was a graduate from a recognized university. The desirable qualification of having a Computer Diploma from an institution recognized by the State Government was also there, which she clarified to have acquired as on the date of the requisition [*Dr. M.V.Nair vs. Union of India & others,* (1993) 2 SCC 429 and *Bhupinderpal Singh & others vs. State of Punjab & others,* (2000) 5 SCC 262].

14. In fact, the principles of law laid down by the Apex Court in *N. Hargopal & others,* (supra) to the effect that recruitment through Employment Exchanges advances rather than restricts the rights guaranteed under Articles 14 and 16 of the Constitution stands reiterated by the Apex Court in *Nihal Singh & others vs. State of Punjab & others,* (2013) 14 SCC 65.

15. Similar view stands taken by the Apex Court in *K. Gunavathi vs. V. Sangeeth Kumar & others,* (2014) 11 SCC 491.

16. It is true that the "Hand Book on Personnel Matters, Vol-I (Second Edition)" provides that 20 names from all the Employment Exchanges within the district ought to be sponsored. As per the manual only nine names could have been sponsored from the Regional Employment Shimla and remaining eleven names should have been sponsored by seven Sub Employment Exchanges within the District. Without going into the issue of applicability of these instructions to the post of a statutory body and as to whether the post in question is really a district level post to which sponsorship also was required to be from the Sub Employment Exchanges, we are of the considered view that the challenge even on this ground pales into insignificance, in view of the fact that out of the 20 candidates sponsored by the Regional Employment Exchange, Shimla, name of the appellant was at Sr. No. 6. Since nine names could have been sponsored by the said Employment Exchange, in view of the fact that she fell within the zone of consideration of such nine names, it cannot be said that in any event her name could not have been sponsored.

17. We now deal with the allegation of malafides and undue haste exhibited, if any, by the Corporation in favour of the present appellant. We notice allegations of malice to be absolutely vague and unspecific. It also did not find favour with the learned Single Judge. It is not that the appellant is related to any one of the members of the Selection Committee. It is also not that appellant was not meritorious or of average caliber and competence. It is also not that the appellant was not registered with the Employment Exchange. It is also not that name of the appellant was not sponsored by the said Employment Exchange. It is not that the name of the appellant was surreptitiously included in the list of the candidates to be interviewed. The process of filling up the post was initiated only with the State Government having sanctioned the post in question. It is not that overnight applications were invited and order of appointment issued. As already observed, name of the appellant was registered much prior to the registration of the name of the writ petitioner. It took more than a fortnight for the process to be completed. Mere exhibition of efficiency cannot be a ground sufficient enough, raising presumption of malafides or undue haste. It has come on record that none of the other participating candidates challenged the selection. The reason for petitioners challenge is quite apparent. On contract basis, she was discharging duties of the said post and wanted to be absorbed dehors the Rules, ignoring seniority of other candidates.

18. While relying on the following observation made by the Apex Court in *Binod Kumar Gupta* (supra), learned counsel contends that the appellant cannot claim equity solely for the reason that she had been working on the post in question for the last twenty years:

> "13. ... ... If we allow the appellants to continue in service merely because they have been working in the posts for the last 15 years we would be guilty of condoning a gross irregularity in their initial appointment. The High Court has

been more than generous in allowing the appellants to participate in any fresh selection procedure as may be held and in granting a relaxation of the age limit."

19. We are afraid that the principle enunciated is inapplicable to the attending facts, for (i) appointment of the appellant cannot be said to be dehors the Rules. She was fully eligible and the process of selection cannot be said to be vitiated at all, be it for whatever reason; (ii) Even subsequently the Apex Court in *National Thermal Power Corporation, Kahalagaon & others vs. Nakul Das & others,* (2014) 9 SCC 385 has observed as under:

> "10. It is the submission of the learned counsel appearing for NTPC that having regard to the facts of this case, namely where requirement is confined to class/category of persons (land oustees in the present case), it would not be necessary to bring out advertisements in newspapers and recruitment through the employment exchange and local circulation of notice would be consistent with the principles of Articles 14 and 16 of the Constitution of India. It was argued that the land oustees reside in the village and sub-divisional towns and local circulation of notice in addition to the requisition from the employment exchange was appropriate. Distinction was sought to be drawn between direct recruitment opon to public and recruitment confined to a particular class/category of persons. It was submitted that in the latter category, this Court has held in *Nihal Singh vs. State of Punjab,* (2013) 14 SCC 64, that such a procedure making recruitment through the employment exchanges is consistent with the requirement of Articles 14 and 16 of the Constitution, following the judgment in *Union of India vs. N. Hargopal,* (1987) 3 SCC 308. The learned counsel also relied on the judgment in *Arun Tewari vs. Zila Mansavi Shikshak Sangh,* (1998) 2 SCC 332 where the earlier judgments in *N. Hargopal (supra)* and *K.B.N. Visweshwara Rao,* (1996) 6 SCC 216 were duly considered."
>
> … …
>
> "16. The position which emerges from the aforesaid narration of events is this: the persons who were selected were admittedly eligible to be considered as they were also land oustees. No doubt, the posts were not advertized by publication in the newspapers. Fact remains that only two persons, namely Respondents 1 and 2 made a grievance in this behalf. These two persons have also been considered for the posts under the orders of this Court. However, they have failed in the selection. Others who were selected have already joined the posts. In a matter like this, no useful purpose would be served in carrying out the directions of the High Court to have fresh selection process after issuing advertisements in the newspapers. We may record at this stage that about 70 other persons have also filed IAs supporting the stand of Respondents 1 and 2. However, it is of significance to mention that all these persons had duly participated in the selection process but could not make their mark and failed to get selected. Therefore, these persons have no right to raise any grievance about non-publication of the advertisement in the newspapers."

20. For all the aforesaid reasons, we are of the considered view that the findings returned by the learned Single Judge cannot be said to be in line with the settled principles of law. The material so placed by the Corporation obliging them to call names to fill up the post only from the candidates sponsored from the Employment Exchanges was not considered at all. Findings of undue haste are legally unsustainable and not borne out from the record.

21. As such, for all the aforesaid reasons, we allow the present appeal and quash and set aside the impugned judgment dated 31.8.2010, passed in CWP(T) No. 4704 of 2008, titled as *Smt. Seema Bisht vs. Municipal Corporation & others,* and dismiss the writ petition filed by the private respondent.

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

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

Bhag Chand Sharma ....Petitioner.

Versus

The Hon'ble High Court of H.P. ....Respondent.

CWP No. 4027 of 2015.
Reserved on :25.10.2017.
Decided on:10th November, 2017.

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

Held entitled to the pay parity, as he was performing duties alike the ones performed by other Registrars and any candidate imposed by the High Court, terming the placement as a mere re-designation held to be unreasonable and unconscionable. (Para-7 and 8)

Cases referred:

Central Inland Water Transport Corporation Ltd. vs. Brojo Nath Ganguly and another, (1986)3 SCC 156

Bhupendera Nath Hazarika and another Vs. State of Assam and others, (2013)2 SCC 516

Petitioner in person.

For the Respondent: Mr. C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

The petitioner under Annexure P-1, was designated as Registrar (Administration)-cum- Principal Private Secretary to Hon'ble the Chief Justice, from, his hitherto employment in the Registry of this Court, as Additional Registrar-cum- Principal Private Secretary to Hon'ble the Chief Justice. The conditions of his designation, as Registrar (Administration)-cum- Principal Private Secretary, to Hon'ble the Chief Justice, read as under:

> "(i) This will not be treated as promotion, but only re-designation and he shall draw the pay and allowances admissible to an Additional Registrar only, and;
>
> (ii) He shall have no right to continue to enjoy the designation of Registrar (Administration) and will be re-designated as Additional Registrar as and when any District Judge or Additional District Judge is appointed as fourth Registrar on the establishment of the High Court Registry."

Readings whereof, unfold that the designation of the petitioner, as Registrar (Administration)-cum- Principal Private Secretary, to Hon'ble the Chief Justice, being (a) not reckonable as promotion rather it being merely a simplicitor re-designation and his being only entitled to draw the pay and allowances admissible, to an Additional Registrar; (b) his being entitled to enjoy the apposite re-designation, uptill, the appointment of any District & Sessions Judge/Addl. District & Sessions Judge, as fourth Registrar, on, the Registry of the High Court, whereafter, his being amenable for being re-designated, as Additional Registrar. However, the petitioner upto his seeking voluntary retirement on 21.08.2013, continued to serve in the Registry of this High Court, as Registrar (Administration)-cum- Principal Private Secretary to Hon'ble the Chief Justice.

2. The petitioner under Annexure P-10, made a representation to the Registrar General, of, this Court, wherein, he espoused that given his working as Registrar (Administration)-cum- Principal Private Secretary, to Hon'ble the Chief Justice also his performing duties akin to the one(s) performed by other Registrars drawn from the cadre of District & Sessions Judges, his being hence entitled to parity of pay vis-a-vis the ones drawn by the Registrars, drawn from the cadre of District and Sessions Judges. The aforesaid representation stood under Annexure P-11, hence rejected. The reason as borne in the order rejecting the representation of the petitioner, in representation whereof, he espoused the aforesaid claim, is anvilled upon the factum of his (a) re-designation being conditional (b) besides his accepting all conditions borne in Annexure P-1, whereupon, he stood designated, as Registrar (Administration)-cum- Principal Private Secretary, to Hon'ble the Chief Justice and (c) Acceptance whereof being visible from his joining the duties of the re-designated aforesaid post, (d), thereupon, his being estopped to agitate the aforesaid claim.

3. The petitioner would be entitled to stake a legitimate claim for his being entitled to parity of pay vis-a-vis the pay, drawn by other Registrar(s), drawn from the cadre of District & Sessions Judges/ Addl. District & Sessions Judges, only upon, his initially satiating the conscience of this Court, of, his performing duties alike the one(s) performed by the other Registrar(s), belonging to the cadre of District and Sessions Judges. With Annnexure P-2, revealing, of, (I) the petitioner while serving as Registrar (Administration)-cum- Principal Private Secretary to Hon'ble the Chief Justice,his apparently performing functions akin to the one(s) performed by the other Registrars working in the Registry of the High Court, Registrars whereof stood drawn from the cadre of District & Sessions Judges, therefrom, (ii) the ensuing conclusion is of the petitioner evidently proving his performing functions bearing a close affinity vis-a-vis the duties and functions performed by the other Registrar(s), as, stood, drawn from the cadre of District and Sessions Judges. Fortification vis-a-vis the aforesaid conclusion is garnered, from, the hereinafter extracted relevant portion of Annexure-P-13, Annexure whereof, comprises information supplied to the petitioner under the Right to Information Act, the relevant portion whereof occurring at page 53 of the paper book reads as under:

> "Vide notification dated 26th April, 2010 (Flag 'A'), Hon'ble the Chief Justice in exercise of the powers conferred under Article 229 of the Constitution of India and all other enabling powers in this behalf was pleased to amend Schedule 'A' as under:-
>
> **"Schedule-A**
>
> **OFFICERS DRAWN FROM THE H.P. JUDICIAL SERVICE RULES IN THE CADRE OF DISTRICT JUDGE/ADDL. DISTRICT JUDGE**

Sr. No.	Name of the post	No. of posts	Pay Scale
1.	Registrar General	1	Time Scale/Selection Grade/Super Time Scale in own cadre + Secretariat Allowance
2.	Registrar (Vigilance)	1	-do-
3.	Registrar (Rules)	1	-do-
4.	Registrar (Inspection)	1	-do-

> Note: "Nothwithstanding anything contained in the HP High Court Officers and the Members of the Staff (Recruitment, Conditions of Service, Conduct &Appeal) Rules, 2003 and the Schedule, it will be open to Hon'ble the Chief Justice to appoint one

> Registrar from amongst the Additional Registrars, to be the Registrar Incharge of the Administration of the High Court."

(I) the aforesaid "note" occurring in Shedule-A, wherewithin Hon'ble the Chief Justice is enabled to, other then out of four Registrars borrowed from the cadre of District & Sessions Judges/Addl. District & Sessions Judges, also hence appoint, one Registrar from amongst the Additional Registrars, (ii) wherefrom the apt sequitur, is, of the appointment of the petitioner in the establishment of the High Court, as Registrar (Administration)-cum-Principal Private Secretary, being within, the domain of the apposite "Note", (iii) hence, with his manning the aforesaid post, otherwise to be manned by judicial officers, drawn from the cadre of District & Sessions Judges/Addl. District & Sessions Judges, thereupon, a right being egendered in the petitioner to validly claim, of his performing duties akin to the Registrars, belonging tot he cadre of District & Sessions Judges. The rejection, of, the representation of the petitioner is anvilled upon the afore-extracted apposite conditions, being accepted by him, acceptance whereof, is comprised in his subsequent to his appointment made under Annexure P-1, (i) his proceeding to join the duties appertaining to the post of Registrar (Administration)-cum- Principal Private Secretary, to Hon'ble the Chief Justice. Moreover, the rejection of the representation of the petitioner, is hinged upon the factum of his thereupon being estopped to claim the benefit of parity(s) of pay vis-a-vis the pay drawn by Registrar(s) belonging to the cadre of District and Sessions Judges, parity whereof, is harboured upon his performing duties alike the ones performed in the Registry, of this Court by Registrar(s) drawn from the cadre of District & Sessions Judges/ Addl. District & Sessions Judges. In aftermath, validity(ies) thereof are also enjoined to be firmly determined.

4. The test, for determining the contentious issue with respect to the relevant conditions embodied in Annexure P-1, of, the petitioner, upon, his joining the post of Registrar (Administration)-cum- Principal Private Secretary to Hon'ble the Chief Justice, his thereupon accepting them, besides qua his being concomitantly estopped to assail the validity(ies) thereof, hence being unreasonable, given their imposition upon him, being engendered by the superior bargaining power(s), of the employer, is squarely embedded, in a authoritative judicial pronouncement, rendered by the Hon'ble Apex Court in ***Central Inland Water Transport Corporation Ltd. vs. Brojo Nath Ganguly and another, (1986)3 SCC 156***, relevant paragraphs whereof read as under:

> "88. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognized, at 1 least in certain areas of the law of contracts, that there can i be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, i section 138(2) of the German Civil Code provides that a, transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages . . . which are obviously disproportionate to the performance given in return." The position according to the French law is very much the same.
>
> 89. Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality

before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

5. Also the aforesaid view is firmly reiterated in a decision recorded by the Hon'ble Apex Court, in ***Bhupendera Nath Hazarika and another Vs. State of Assam and others, (2013)2 SCC 516,*** relevant paragraph(s) whereof read as under:-

"61. Before parting with the case, we are compelled to reiterate the oft- stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept.

62. Almost a quarter century back, this Court in Balram Gupta V. Union of India 1987 Supp. SCC 288 had observed thus (SCC p.236, para 13)

> "13.....As a model employer the Government must conduct itself with high probity and candour with its employees."

In State of Haryana V. Piara Singh (1992)4 SCC 118, the Court had clearly stated:(SCC p.134, para 21)

> "21.....The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16".

63. In State of Karnataka V. Uma Devi (3) (2006) 4 SCC 1 (SCC P.18, para 6) the Constitution Bench, while discussing the role of state in recruitment procedure, stated that if rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules, for the State is meant to be a model employer.

64. In Mehar Chand Polytechnic V. Anu Lamba (2006)7 SCC 161 (SCC p.166, para 16) the Court observed that public employment is a facet of right to equality

envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.

65. We have stated the role of the State as a model employer with the fond hope that in future a deliberate disregard is not taken recourse to and deviancy of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretized. We say no more."

6. A close reading thereof, unfolds, of the State being enjoined to emulate the role of a model employer, unbereft of, despite its holding a superior bargaining power vis-a-vis the employee, its rather proceeding, to, through executive fiats ingrained with pervasive exploitative tendencies, impose unfettered *carte blanche* condition(s) upon him, fiats whereof are erosive of the trite validatory rubric of good conscience and equity. The State as a model employer would befittingly, be construable to cast itself in the role of an enviable model employer, (i) upon its refraining, from, given its holding a paramount bargaining power, impose upon its employee, exacting conditions of service, conditions whereof openly bespeak of theirs being unconscionable and arbitrary, (ii) elements whereof ingraining, the contract of employment, would surge forth, upon the employer evidently snatching all valid right(s) of the employee(s), predominantly appertaining vis-a-vis his legitimate entitlements qua the emoluments/salary accruable vis-a-vis the posts, whereon, they/he perform duties. Upon application of the aforesaid tests vis-a-vis the conditions aforestated, scribed, below Annexure P-1, hence render (iii) open a conclusion no other than the one, of, thereupon the respondent through its empowered superior bargaining power vis-a-vis the petitioner also by sheer executive fiat, its hence, settling upon him exacting conditions, whereby, he stood deprived of the natural incidents of salary AND of the benefits vis-a-vis the apposite post, whereon, he rendered service(s) in the establishment of the High Court. In aftermath, in the respondent imposing the apposite ill conditions, upon the petitioner, render it to be construable, to its hence not casting itself in the pristine besides enviable role of a model employer. The apt sequitur thereof, is, dehors the petitioner subsequent, to, issuance of Annexure P-1, proceeding to join the duties of the post referred therein, his acceptance, not, being construable to beget any inference (a) of his waiving his rights, to receive pay/emoluments, incidental to the post whereon he rendered employment in the establishment of the High Court, nor the aforesaid condition, obviously operating as an embargo, nor forestalling him to claim the benefits of the emoluments/salary, appertaining to the post whereon, he stood appointed under Annexure P-1.

7. Be that as it may, even if, this Court, upon anvil of the extracted relevant expostulation of law, laid, by the Hon'ble Apex Court, has concluded of the aforesaid conditions, scribed, in Annexure P-1, not operating, as an estoppel against him nor upon his accepting them, his being construable to waive, his legitimate right(s) vis-a-vis all valid claim(s) vis-a-vis pay/salary admissible qua the apposite post. (i) It is also incumbent, for, firming up the aforesaid conclusion, to allude to the judgments rendered by the Hon'ble Apex Court, reported in (2013)4 SCC 152, (1982) 1 SCC 618, (1988) 3 SCC 354, (1986) 1 SCC 637, (1991) 1 SCC 619, (1988)1 SCC 122, (2014) 1 SCC 150 and (2014) 13 SCC 588, wherein it stands expostulated that upon an employee evidently rendering duties, against a post, his being entitled, to pay, appertaining thereto also his being entitled to draw pay, at par, with other co-employees, who render alike function vis-a-vis him. Since, this Court has made the aforesaid conclusion, of, the petitioner performing duties alike the one(s) performed by other Registrars in the Registry of this Court, who

stand drawn, from the cadre of District and Sessions Judge, hence, with his evidently rendering duties alike them, he is obviously entitled to parity of pay scale(s) vis-a-vis them, (i) since the time of his manning the office as Registrar (Administration)-cum-Principal Private Secretary i.e. from 30.11.2010 till his standing voluntarily retired, i.e. on 21.08.2013, (ii) reason being, of, all the aforesaid judgments of the Hon'ble Apex Court, foisting in the petitioner a valid right to stake parity of pay with all co-employees, especially when he alike them also performed duties in the Registry of this Court, as, Registrar (Administration)-cum-Principal Private Secretary, to Hon'ble the Chief Justice.

8. For the foregoing reasons, the instant petition is allowed and the order rejecting the representation of the petitioner is set aside. Consequently, the respondent is directed to accord pay to the petitioner equal vis-a-vis other Registrars working in the establishment of the High Court, who stand drawn from the cadre of District & Sessions Judges/Addl. District and Sessions Judges, from 1.12.2010 to 20.8.2013 and his pension be fixed accordingly. The aforesaid exercise be completed within two months from today, failing which the petitioner shall entitled to interest at the rate of 6% per annum upon the aforesaid benefits from the date of the petition till realisation. All pending applications also stand disposed of.

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

Dalip Thakur ....Petitioner.
Versus
High Court of H.P. ....Respondent.

CWP No. 3200 of 2016.
Reserved on :25.10.2017.
Decided on:10th November, 2017.

Constitution of India, 1950- Article 226- Service- Petitioner seeking selection to the post of Superintendent Grade-I in the Establishment of District and Sessions Judge's Court- rejection of the application- petitioner submitting that Amended Rules of 1996 were not applicable to the petitioner, as he was already working as Superintendent Grade-II, on regular basis at the time of advertisement, which was a feeder post for the Superintendent Grade-I post. In the alternative the petitioner seeking one time relaxation under Rule 7 of Himachal Pradesh Court Act, 1976. Held – amended Rules (1996) inter alia provided for a minimum educational qualification for the post of Superintendent, being graduation or 15 years experience in the feeder post. Held that the minimum qualification provided under the amended Rule creating a classification was founded on an intelligible differentia holding a close nexus with the salutary purpose of ensuring the aspirant possessing the enhanced educational qualification and acumen, for his proficiently performing, the higher responsibilities of the post of Superintendent in the Establishment of District and Sessions Judge Court. (Para-6)

For the Petitioner: Mr. N.S. Chandel, Advocate.
For the Respondent: Ms. Suita Sharma, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

The petitioner herein, is an aspirant to the post(s) of Superintendent, Grade-I existing upon the establishments of District and Sessions Judges, posted in Himachal Pradesh.

In pursuance to a circular, issued on 5th July, 2016, for filling up post(s) of Superintendent, Grade-I, in the establishments of District and Sessions Judges, posted in Himachal Pradesh, the petitioner herein made an application, for his being considered for selection besides appointment thereto. However, in pursuance to his making an application, no call letter was served upon petitioner, for eliciting his participation in the apposite viva voce. Subsequent thereto, yet prior to his instituting the instant petition, the petitioner made a representation vis-a-vis the Registrar General, High Court of H.P., for his being considered for selection besides appointment to the post of Superintendent, Grade-I, occurring in the establishment(s) of District and Sessions Judges, posted in Himachal Pradesh. The aforesaid representation, stood, as borne by Annexure-II of 23/24.12.2016, hence rejected. Since, the grounds meted in the rejected representation of the petitioner are parameteria vis-a-vis the grounds meted in the extant writ petition, especially qua thereupon direction(s) being meted to the respondent, for his being considered for selection besides appointment to the post(s) of Superintendent, Grade-I, existing or as may occur in the establishments of District and Sessions Judges, posted in Himachal Pradesh, thereupon, dehors the petitioner not challenging the order rejecting his representation, this Court would yet proceed, to dwell upon the efficacy(ies) of the grounds meted in the writ petition, given theirs bearing congruity vis-a-vis the grounds meted in his rejected representation addressed to the respondent. Before dwelling upon the efficacy of the grounds meted in the writ petition, specifically the one appertaining, to validity besides application vis-a-vis him, of the apposite Rules, of 1996, it is apt to extract the hereinafter relief(s) prayed in the writ petition:-

> "(a) That the amendment of rules of 1996 are not applicable to the petitioner. Even otherwise note below Rule-iii of Himachal Pradesh Court Act, 1996, protects the petitioner as he is already working as Superintendent Grade-II, on regular basis at the time of the advertisement of the post of Superintendent in the office of District and Sessions Judge in the State of Himachal Pradesh by the respondent.
>
> b) That if this Hon'ble Court does not find favour with the submission of prayer (a), one time relaxation under rule -7 of Himachal Pradesh Court Act, 1976 may kindly be granted to the petitioner.
>
> c) That the respondent may kindly be directed to allow the petitioner to participate in the interview to be held from 26.12.2016 to 28.12.2016."

The record bears out the factum of the relief occurring, at clause (c) standing granted vis-a-vis him, by this Court under an order rendered on 26.12.2016 in CMP No. 10654 of 2016, whereby, this Court permitted the petitioner, to participate in the relevant selection process, thereupon, any pronouncement thereon is unnecessary, it being rendered infructuous also a pronouncement vis-a-vis the reliefs occurring at clauses (a) & (b), is merely an academic exercise, for making an endeavour for settling a binding interpretation upon the apposite Rules of 1996.

2. As borne out on a reading of Annexure P-4, the relevant Rule 4, stood amended by a notification of 22nd August, 1983, comprised in substitution(s) thereto, in the hereinafter extracted manner, being effected, vis-a-vis the apposite Rule 4 of the apposite Rules :-

> "The existing rule 4 of the Rules shall be substituted as under:-
>
> (i) The High Court shall maintain a panel of candidates accepted for appointments as Superintendents. This list shall ordinarily contain such number of candidates as can be absorbed within two years.
>
> (ii) The post of Superintendent to the District and Sessions Judge shall be a selection post and shall form a State Cadre.
>
> (iii) The minimum educational qualification for the post of Superintendent will be graduate or 15 years experience in the feeder post. However, preference will be given to those candidates who are law-graduates.
>
> (iv) For the purpose of drawing panel of candidates referred to in sub-rule (I) above, the High Court will call for the recommendations of all the District and

> Sessions Judges in Himachal Pradesh. Each District & Sessions Judge will sponsor to the High Court the names of only two candidates working in his Sessions and Civil Division after selecting them on the basis of merit-cum-seniority from amongst the ministerial staff carrying a scale of 570-10180 or its revised scale. Where as District & Sessions Judge is not recommending the names of the Senior Most officials, he shall also send their full particulars along with detailed reasons for not recommending them. The Annual confidential Dossiers and service records of the sponsored candidates as well as those who are senior to them will also be sent to the High Court while making recommendations.
>
> (v) The High Court shall hold a qualifying test which the officials sponsored by the District & Sessions Judges shall be eligible to appear. The High Court may also allow an official who has not been sponsored but is senior to the sponsored candidates of the Division to appear in the test. The syllabus for the qualifying test shall be prescribed by the Hon'ble Chief Justice and his companion Judges. The confidential reports of those candidates who successfully qualify the test will be taken into consideration. The overall merit of the candidates being equal in any case due regard will be given to the seniority and for this purpose, the seniority would be taken into account in the grade of Rs.570-1080 or its revised scale according to length of service in that scale."

The aforesaid amendment, carried, in the year 1983 vis-a-vis Rule 4 of the apposite Rules, enjoined upon the aspirants concerned vis-a-vis the posts of Superintendent(s), existing in the establishments, of District and Sessions Judges, posted in Himachal Pradesh, to (i) at the relevant stage peremptorily hold a graduate degree or (ii) in alternative thereto, they were, enjoined to hold 15 years experience in the feeder category, carrying a pay scale of Rs.570-1080 or its revised scale. Subsequent thereto, as borne by Annexure P-5, of 20th January, 1996, another amendment was effected vis-a-vis sub rules (iii) and (iv) to Rule 4 of the apposite Rules. The hereinafter extracted sub rules (iii) and (v) in supplantation, of the hitherto sub rules (iii) and (v), of Rule 4 of the apposite Rules, were hence, brought in the statute book:-

> "(iii) The superintendent Grade-II in the courts subordinate to the High Court with a minimum educational qualification of graduates from a recognized university shall form a feeder category for the post of Superintendents.
>
> Note:- However, this sub rule shall not apply to those candidates who have already been appointed as such on regular basis.
>
> (iv) The selection to the post of Superintendents will be made either on the basis of service record or on the basis of oral and/or written examination as may be prescribed by the High Court."

3. Apparently the extantly prevailing sub rules (III) & (IV), of Rule 4 of the Apposite Rules, hence, abrogate the earlier therewith imperative conditions, (i) of the aspirants to the post of Superintendent, holding, a graduate degree or (ii) in alternative thereto, theirs holding 15 years experience in the feeder category, carrying a pay scale of 570-1080 or its revised scale, (iii) rather nowat the aspirants are compulsorily required, to, at the time contemporaneous vis-a-vis the occurrence of vacancy, hence, hold a graduation degree from a recognized university also the aspirant concerned is obliged to hold thereat the apposite feeder post, of Superintendent Grade-II, in the courts subordinate to the High Court, (iv) also the aforesaid post of Superintendent Grade-II in the courts subordinate, to the High Court, is constituted to be the solitary feeder category, for enabling the aspirants concerned, to aspire for, for selection besides for appointment, to the post of Superintendent in the establishments of District and Sessions Judges, posted in Himachal Pradesh. Nonetheless, a proviso thereto, is comprised in a note appended there underneath, wherein, (v) it is ordained of the mandate of amended sub rule (iii) of Rule 4 of the apposite Rules of 1996 remaining inoperative vis-a-vis those candidate(s), who stand prior thereto appointed on a regular basis, in the feeder category concerned.

4. The learned counsel appearing, for the writ petitioner, contends that the substituted sub rule (iii) of Rule 4 of the apposite Rules of 1996, rules whereof stand borne in Annexure P-5, working hardship vis-a-vis the petitioner given (I) its substituting the earlier therewith apposite sub rule(s) carried in the notification of 1983, wherein, the aspirants were required, to, at the time contemporaneous to the arising of the apposite vacancy(ies), besides were statutorily obliged to possess (a) graduation degree or (b) in the alternative thereto, were, enjoined to hold 15 years experience in the feeder category, holding a pay scale of 570-1080 or its revised scale, whereas, (c) abrogation of the condition alternative, to the primary condition appertaining to the aspirant concerned holding a graduation degree from, a recognized university, has encumbered upon petitioner, who evidently does not hold the peremptory educational qualification, ordained in the substituted sub rule (iii) of Rule 4, of the apposite Rules 1996, as borne in Annexure P-5, with hence an onerous hardship, of his further promotions in the hierarchy of service, being obviously frustrated, (II) he contends that the prescription in Annexure P-5, of the apt relevant cut off date, being recknonable on 20.01.1996, for thereupon the clout of the proviso to sub rule (iii) of Rule 4, of the apposite Rules of 1996, holding sway, whereunder, the primary obligation cast, in the amended sub rule (iii) to Rule 4, of the apposite Rules, upon the aspirant concerned, comprised in his imperatively possessing a graduation degree, is per se arbitrary also it creates an unreasonable classification, (III) besides its being not founded upon any intelligible defferentia nor its holding any nexus with the apposite feeder category of Superintendent(s) Grade-II, being necessarily thereafter being enjoined to hold a graduation degree vis-a-vis the ouster from its play qua the earlier therewith regularly appointed candidate(s) vis-a-vis the post of Superintendent Grade-II, in the courts subordinate to the High Court.

5. The prescriptions, occurring, in the amended sub rule (iii) of Rule 4 of the germane besides apposite Rules, of, (a) the aspirant(s) concerned, subsequent to 1996, upon occurrence of vacancies, of, Superintendent in the establishments of District and Sessions Judges, posted in Himachal Pradesh, being primarily enjoined, to hold a graduation degree from a recognized university, (b) whereas, in the earlier therewith aforesaid apposite Rules, holding operation from 1983 upto 1996, not casting, any peremptory obligation upon the aspirant concerned, to necessarily hold a graduation degree, (c) rather with the aspirant concerned, holding, an alternative thereto statutory condition, comprised in his holding 15 years experience, in the feeder category, holding, a pay scale of 570-1080 or its revised pay scale, also hence rendering him eligible, for his being considered for selection besides appointment to the post of Superintendent in the establishment of District & Sessions Judges, posted in the Himachal Pradesh, cannot be, construed to be carrying (d) any visible trait(s) of arbitrariness, emphatically, when the mandated prescription(s), of the aspirant concerned, being enjoined (e) to primarily hold the aforesaid enhanced educational qualification, is founded besides is imminently rested upon the principle of necessity, of, holding thereof by him, being an indispensable norm, for enabling him, (f) to, upon his being appointed, to a responsible promotional post, of Superintendent in the establishments of District and Sessions Judges, posted in Himachal Pradesh, to hence efficiently discharge all the higher responsibilities of the promotional post. More so, when his primarily holding an enhanced educational qualification would also sharpen his requisite acumen, for his proficiently discharging the higher duties of a Superintendent, in the establishments of District and Sessions Judges, posted in Himachal Pradesh.

6. Be that as it may, the further contention addressed before this Court by the learned counsel, for the petitioner that (I) with the clout, of the note, appended underneath sub rule (iii) of Rule 4 of the apposite Rules of 1996, besides its operating as a proviso thereto, being singularly relaxed vis-a-vis, prior to 20.01.1996, regularly appointed Superintendent Grade-II, in the courts subordinate to the High Court, carrying an obvious concomitant effect, of thereupon, hardship working vis-a-vis Superintendent(s) Grade-II, appointed thereafter AND (II) of the prescription therein, of the cut off date being 20.01.1996, hence creating an unreasonable classification inter se prior thereto regularly appointed Superintendent(s) Grade-II in the courts subordinate to the High Court, vis-a-vis Superintendent(s) Grade-II, appointed subsequent

thereto. (III) Also the classification being arbitrary and also its not being founded upon any intelligible defferentia, holding any nexus vis-a-vis the purpose, of, recruitment besides selection, to the post of Superintendent in the establishments of District and Sessions Judges, posted in Himachal Pradesh, thereupon, the proviso to sub rule (iii) of the apposite Rules of 1996, being permeated with a stain of discriminatoriness, rendering it to be also not applicable vis-a-vis the petitioner, rather his alike the relaxing benefit(s) thereof purveyed vis-a-vis Superintendent Grade-II, appointed on a regular basis prior to 20.01.1996, being entitled to likewise meteings thereof vis-a-vis him. However, the aforesaid submission is also not tenable, the reason for discounting it, is founded upon (a) the engraftment of the relevant aforesaid proviso, AND with its relaxing the rigor of apposite sub rule (iii) of Rule 4 of the apposite Rules of 1996, vis-a-vis candidates regularly, prior thereto, appointed as Superintendent(s) Grade-II, in the courts subordinate to the High Court, being engendered by grave thoughtfulness also by extreme circumspection besides with great wisdom backing it. The salient guiding wisdom behind the aforesaid classification, created, in the apposite afore extracted proviso, is embodied in the superintendent(s) Grade-II, appointed prior to 21.01.1996, against substantive posts also on a regular basis thereon, while, being hence constituted as a feeder category, in the earlier therewith Rule(s), for selection besides appointment, to the apposite post of Superintendent in the establishments, of District and Sessions Judges, posted in Himachal Pradesh, (b) importantly given the earlier therewith rules, prescribing upon the aspirant concerned to hold pay scale(s) alike the one(s) carried, by the aspirants manning the post of Superintendent Grade-II, existing in the courts subordinate to the High Court, (c) being not beset with any hardship, despite theirs being borne in the relevant stream or feeder category vis-a-vis the promotional post, (d) merely on account of theirs, not, holding the imperative peremptory minimal educational qualification of being graduates from a recognized university. With the aforesaid innate wisdom, whereon, the apposite afore extracted proviso to sub rule (iii) to the apposite Rules of 1996, is embedded, thereupon (e) benefits thereof cannot be construed to be extendable nor its amplitude can be made extendable vis-a-vis all subsequent thereto aspirants concerned, who though hold the apposite feeder post(s) in the courts subordinate to the High Court, theirs being alike, prior to 20.01.1996, regularly appointed Superintendents Grade-II, being also meted the relaxing fiat, of the apposite proviso. (f) With the aforesaid innate wisdom backing the incorporation of the proviso vis-a-vis sub rule (iii) of Rule 4 of the apposite Rule of 1996, (g) thereupon, the classification created therein inter se the Superintendent Grade-II, appointed prior thereto on a regular basis in courts subordinate to the High Court and those, AND vis-a-vis those, who stood appointed subsequent thereto, as Superintendent(s) Grade-II, in the courts subordinate to the High Court, obviously, (h) is founded upon an intelligible differentia also it holds a close nexus with the salutary purpose, for its statutory engraftment therein, purpose whereof as aforestated, is to ensure the aspirant possessing the enhanced educational qualification and acumen, for his proficiently performing, the higher responsibilities or working(s) appertaining to the promotional post of Superintendent, in the establishments of District and Sessions Judges, posted in Himachal Pradesh. (i) The further reason for making the aforesaid conclusion, is founded upon the factum of since 1996 thereafter upto the occurrence of the relevant vacancy(ies), the aspirant(s) concerned, though being enabled, to acquire the primary compulsory educational qualification, yet despite, the existence(s) of relevant Study Rules or despite prevalence, of correspondence courses, upon availments whereof, the aspirants concerned, may overcome the shortcomings in his/their educational qualification. (j) Nonetheless, the apposite failures of the aspirants concerned, cannot, empower them to claim benefits of the relaxing proviso of sub rule (iii) of the apposite Rules. (k) Conspicuously when the Superintendent(s) Grade-II, who stood appointed in the aforesaid capacity on a regular basis prior to 1996, given the immediacy of promulgation, of the amended, Rules of 1996, hence, not holding any opportunity, to enhance their educational qualification(s) also when hence any prompt implementation upon them of the amended rules, would work hardship vis-a-vis their promotional prospects, (L) whereas the subsequent thereto regularly appointed Superintendent(s) Grade-II, despite holding an opportunity to enhance their educational qualification, yet theirs failing, failure whereof is not amenable for any condonation.

7. The learned counsel appearing for the petitioner has further placed reliance upon a common judgment of this Court, rendered, in CWP Nos. 1712 of 1993, titled as Mohan Dass versus District & Sessions Judge & Ors and in CWP No. 2053 of 1995, titled as Smt. Savita Sharma versus District and Sessions Judge & Ors., to contend that the relaxation purportedly meted vis-a-vis the petitioners therein qua the enjoined statutory necessity, of theirs possessing the apposite qualification(s), thereupon, at par therewith, the petitioner be accorded an alike relaxation vis-a-vis the rigor of sub rule (iii) to Rule 4 of the apposite Rules of 1996, especially for want of his, not possessing the primarily enjoined educational qualification, of his holding a graduation degree from a recognized university. However, the aforesaid contention is also rudderless, as, in the verdict pronounced in the aforesaid writ petitions, this Court was not seized with the interpretation, of the aforesaid Rules nor was seized with the apposite herewith espoused relaxation(s) being meted vis-a-vis the petitioner in respect of the rigor of sub rule (3) of Rule 4 being relaxed, by meteing vis-a-vis him, the benefit of the proviso appended therewith.

8. Lastly, the learned counsel appearing for the petitioner has contended that the direction(s) be rendered upon the respondent, to relax the rigor of sub rule (iii), to Rule 4 of the apposite Rules of 1996, yet the aforesaid direction, cannot, be also pronounced, as no relaxing discretion(s) stand engrafted in the relevant Rules, also when the sequitur whereof, would be of occurrence of conflict with the peremptory mandate of sub rule (iii) of Rule 4 of the apposite Rules of 1996, conflict therewith is obviously to be avoided.

9. For the foregoing reasons, there is no merit in the instant petition which is accordingly dismissed. All pending applications also stand disposed of.

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

Durga Devi .....Appellant/Plaintiff.
Versus
Nihal Dass & another .....Respondents/Defendants.

RSA No. 370 of 2005.
Reserved on : 01.11.2017.
Decided on:10th November, 2017.

Code of Civil Procedure, 1908- Order 2 Rule 2- Civil Suit filed seeking declaration as exclusive owner of the suit land, with the consequential relief of permanent prohibitory injunction- Plaintiff seeking intestate succession being the sole heir of the deceased Karmu- defendant claiming ownership and possession on the basis of Will dated 27.5.1985- Suit land being a part of the land of the deceased Karmu qua which decree had been obtained by the plaintiff in a previous suit - As per the plaintiff, the Halqa Patwari without any authority of law had sanctioned mutation in favour of defendant on 25.8.1985 on the basis of the aforesaid forged Will, which was also under challenge in the earlier suit- the Learned Trial Court and the 1st Appellate Court had dismissed the suit of the plaintiff – In the Second Appeal the judgments of both the learned Courts below set aside- Suit of the plaintiff decreed to the effect that the plaintiff was owner in possession of the suit land the revenue entry showing defendant as owner in possession were wrong and illegal- Held- that the act of omission of the plaintiff to reflect the Khasra number in the earlier suit has to be an intentional omission, a mere omission is no bar in a subsequent suit on the same cause- the omission to sue has to be an intentional omission and in the knowledge of plaintiff- rigor of Order 2 Rule 2 CPC would be applicable only in case of intentional omission and when the fact is in the knowledge of the plaintiff. (Para-12)

For the Appellant: Mr. Vipul Sharda, Advocate vice Mr. Sunil Mohan Goel, Advocate.
For Respondent No.1: Mr. K.S. Kanwar, Advocate.
Respondent No.2 already proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit for rendition of a declaratory decree in respect of hers being entitled to be declared as exclusive owner of the suit property, with, consequential relief of permanent prohibitory injunction being rendered qua thereto, was, under concurrent pronouncements recorded thereon by both the learned Courts below, hence, dismissed.

2. Briefly stated the facts of the case are that the plaintiff filed a suit claiming therein relief of declaration to the effect that she is owner in possession of land comprised in khata No.1021/2, Khatauni No.1787, khasra No.2321, measuring 1-14-0 bighas as described in copy of jamabandi for the year 1991-92, situated in phati and kothi Naggar, Tehsil and District Kullu, H.P. and as such collusive revenue entries showing defendant No.1 as owner in possession of the suit land are wrong, illegal and not binding upon the plaintiff with consequential relief of injunction restraining the defendant from claiming any right, title or interest over the suit land. It is averred that one Karmu son of Shri Moti resident of village Kutbai (Naggar), husband of plaintiff was owner in possession of the suit land. Shri Karmu died on 24.6.1985. The plaintiff being his widow is the sole heir of deceased Karmu and as such has succeeded to the suit land on the basis of intestate succession, hence, she is owner in possession of the suit land. The defendants on the basis of some forged and fictitious will dated 27.05.1985 set up by him in connivance with the revenue officials, got mutation numbers 4152 and 4153 dated 25.8.1985 of phati Nakthan and Naggar attested and sanctioned in their names. However, the suit land was not included in the aforesaid, mutation and the mutation in respect of the suit land was not attested and sanctioned in the name of the defendant on the basis of the alleged will set up by them. It is further alleged that the plaintiff had filed a civil suit No.186/85 wherein he had claimed herself as owner in possession of the property and estate of deceased Karmu and had also challenged the aforesaid mutations. The aforesaid civil suit was dismissed by the learned Sub Judge 1st Class, Kullu on 24.09.1987. However, in the civil appeal No.306/87-76/88, the said judgment and decree passed by the learned Sub Judge 1st Class, Kullu was set aside by the learned District Judge, Mandi, Kullu and Lahul Spiti vide judgment and decree dated 10.9.1990 and she was declared owner in possession of the suit property in the said civil suit and the will set up by the defendants was rejected and mutations were declared null and void. In Regular second appeal No.483 of 1990, the judgment and decree passed by the learned District Judge, Mandi, Kullu and L& S was affirmed and maintained by the High Court on 20.8.1991. It is further averred that in the month of February 2001, the plaintiff obtained parcha jamabandi of suit land in order to raise crop loan from the bank and on obtaining such parcha jambandi, she was surprised to know that Patwari Halqa without any authority of law incorporated red entries in the remarks column showing therein that mutation No.4192 had been attested and sanctioned in respect of the suit land in the name of defendants and the said wrong revenue entries were carried out in subsequent jamabandies wrongly. The plaintiff made further inquiries and obtained the relevant documents and came to know that at the time when the previous suit was filed by the plaintiff, the suit land was not included in the said suit because no mutation with respect to the suit land was attested in the name of defendants and further that Patwari Halqua had not issued parcha jamabandi of the suit land although the same was demanded by the plaintiff of the entire property left by Karmu. In the said suit the defendants did not raise any objection as the suit land was not included in the same. The plaintiff came to know about the aforesaid wrong and collusive revenue entries in the first week of August, 2001 and asked the defendant to get the entries corrected but without any result and they started causing unlawful interference in the ownership and possession of the plaintiff.

3. Defendant No.1 contested the suit and filed written statement, whereas, defendant No.2 has not contested the suit and he was proceeded against ex-parte. Defendant No.1 in his written statement taken preliminary objections, inter alia locus standi, maintainability, limitation, valuation and the suit filed by the plaintiff is barred by the provisions contained in Order 2, Rule 2 and Section 11 of the CPC. On merits, it is admitted that Karmu died on 24.6.1985, but rest of the claim set up by the plaintiff has been termed as wrong and incorrect. It has been pleaded that on the death of Karmu the suit land came in the possession of defendant No.1 on the basis of Will dated 27.3.1985 which was duly executed by Karmu deceased on the basis of which mutations of inheritance were sanctioned. The suit land has been correctly entered in the ownership and possession of defendant No.1. The suit land was not the subject matter of Civil suit No.189/85 and subsequent Civil Appel No.306/87-76/88 and RSA No. 483/90 of which the plaintiff had full knowledge and notice but the plaintiff intentionally omitted to sue in respect of the suit land in the said civil suit. Hence, the matter was directly and substantially in issue in the previous suit, which is directly and substantially in issue in the present suit, hence, the suit is barred under the provisions of Order 2, Rule 2 and Section 11 of the CPC.

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

1. Whether the plaintiff is the owner in possession of the suit land, as alleged? OPP.
2. Whether the plaintiff is entitled to on the injunction as prayed for? OPP.
3. Whether revenue entries are wrong and illegal, as alleged? OPP
4. Whether the plaintiff has locus standi to sue? OPP.
5. Whether the suit is not maintainable in the present form? OPD.
6. Whether the suit is time barred? OPD.
7. Whether the suit is hit by Order 2, Rule 2 and Section 11, CPC as alleged, if so its effect? OPD.
8. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD.
9. Whether late Karmu executed a valid Will dated 27.03.1985 in favour of the defendants, as alleged? If so its effect?OPD.
10. Whether the plaintiff has a cause of action? OPP.
11. Relief.

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

6. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court wherein she assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 17.07.2006, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether a suit can be said to be barred by Section 11 of Civil Procedure Code when the suit property that is the subject matter of the case was not involved earlier in any case through the parties to the case might have been involved earlier in litigation qua some other property?

b) Whether the Courts below have erred in coming to the conclusion that the suit filed was barred by provisions of Order 2, Rule 2 of the Civil Procedure Code when there is nothing on record to suggest that the plaintiff had

willfully or otherwise omitted the subject matter of the present case from the earlier suit as the plaintiff was not aware of the revenue entires which were challenged in subsequent suit?

c) Whether the learned Courts below have erred in not appreciating that Order 2, Rule 2 of the CPC does not require that when several causes of action arises from one transaction the plaintiff should sue for all of them in one suit?

d) Whether the learned Courts below have totally misread and mis appreciated the facts of the case and evidence on record?

Substantial questions of Law No.1 to 4.

7. Uncontrovertedly, the plaintiff is the widow of deceased Karmu. Uncontestedly, during his life time, the aforesaid Karmu, was, the exclusive owner in possession of the suit land, borne in the extant suit also the extant suit land is partially similar vis-a-vis the one borne in the previous suit bearing Civil Suit No. 180/1985 besides the parties at contest hereat are analogous vis-a-vis the previously litigating parties. However, in the earlier suit, bearing C.S. No. 180 of 1985, the suit khasra numbers, in respect whereof the apposite relief of declaration, is now sought by the plaintiff, remained omitted to be included therein. In the previously instituted suit, wherein, the parties at contest hereat were analogous vis-a-vis the litigants therein, the plaintiff espoused the hereinafter extracted reliefs:-

"The plaintiff be declared as owner in possession of the land:

(A) (i) ½ share of land measuring 3-11-0 bighas, comprised under khasra Nos. 707, 813, khata Khatauni No. 661 min/1437, incorporated in the jamabandi for the year 1970-71of phati Nathan, Kothi Naggar, Tehsil and District Kullu

(ii) full share of land measuring 1-4-0 bighas, comprised under khasra No.709, khata khatauni No.661 in/1438, incorporated in the jamabandi for the year 1970-71 of phati Nathan, Kothi Naggar,

(iii) ½ share of land measuring 2-6-0 bighas, comprised under khasra No.711 and 710, khata khatauni NO.661 min/1439, incorporated in the jamabandi for the year 1970-71 of phati Nathan, kothi Naggar, Tehsil and District Kullu,

(iv) owner in possession of three storeyed slate roofed house, having 3 rooms along with verandahs in its surrounding three sides measuring 16 x 16 hath, situated on phati abadi, surrounded from North House of Pushpa, East orchard & road, west Sharshi of Pushpa, South Khal of Plaintiff, in phati and kothi Naggar, Teshil and District Kullu

(v) ½ share of khal measuring 19x 19 hath, situated in Phati Abadi, surrounded from North-House of plaintiff, East Orchard & Road, west-Sharhi of plaintiff and South-path, in Phati and Kothi Naggar, Tehsil and District Kullu, H.P.

(vi) full share of land measuring 0-4 biswas, comprised under khasra No.2329 and 2331, khata khatauni No.812 min/1589, incorporated in the jamabandi for the year 1976-77 of phati Naggar Kothi Naggar, Tehsil and District Kullu

B. Tenant in possession as Pujari of Devta Takar Nar Singh of Naggar of land;-

I) ½ share of land measuring 3-5-0 bighas, comprised under khasra No.2323, khata khatauni No.812 min/1584, incorporated in the jamabandi for the year 1976-77 of phatai and Kohi Naggar, Tehsil and District Kullu.

ii) ½ share of land measuring 19-19-0 bighas, out of total land measuring 20-5-0 bighas, comprised under khata Khatauni No.812min/1585, comprised under khasra No.1904, 2326, 2425, 2424, 2426, 1905, 2306, 2307, 2319, 2322, 2325, 2328, 2332 and 2300, incorporated in the jamabandi for the year 1976-77 of Phati and Kothi Naggar, Tehsil and District Kullu, H.P. (to be called hereinafter as suit land), being inherited by the plaintiff from her husband Shri Karmu

> deceased as his widow and that the plaintiff is not bound by the mutation Nos. 4192 and 4193, attested by the A.C. 2nd Grade, Kullu on 25.8.1985, of Phati Naggar, with respect to the property situated in Phati Naggar, on the basis of alleged Will purported to have been executed by Shri Karmu deceased on 27.5.1985, in favour of defendants with consequential relief of injunction restraining the defendants from causing any sort of interference with the same."

The defendants therein propounded, the Will of aforesaid Karmu. However, under a decision recorded upon Civil Suit No. 180 of 1985, verdict whereof is borne in Ex.D-5 & Ex. D-6, the learned trial Court hence dismissed the aforesaid suit. Nonetheless, the learned First Appellate Court allowed Civil Appeal No. 306 of 1987/76 of 1988 preferred before it by the aggrieved plaintiff AND hence, under Ex. D-7, decreed the plaintiff's suit, whereby, the Will of deceased Karmu as propounded by the defendants, was invalidated. The verdict borne in Ex. D-7, stood, affirmed by this Court, under, its verdict recorded upon RSA No.483 of 1990. Consequently, the verdict rendered in the previous suit has attained conclusive binding effect, predominantly, with respect to the Will of deceased Karmu, as propounded by the defendants being declared to be a fictitious document.

8. Both the learned Courts below declined vis-a-vis the plaintiff, the apposite declaratory relief, with respect to the extant suit khasra numbers, on anvil, of theirs attracting the mandate of Order 2, Rule 2, of the CPC, provisions whereof stand extracted hereinafter:-

> **"2. Suit to include the whole claim.-** (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

Attraction(s) whereof, occurred, (i) upon anvil of, conclusive verdicts being pronounced by Courts of law, in the earlier suit inter se analogous parties thereat vis-a-vis contesting parties hereat, (ii) besides on anchor of the plaintiff not including in the previous suit, the extant suit khasra numbers, as now stand included in the extant suit, (iii) whereas, hers being statutorily enjoined to also include therein the extant suit khasra numbers , (iv) besides with hers not seeking leave of the court, to subsequently sue in respect of the extant suit khasra numbers, thereupon, both the learned Courts below concluded, of the plaintiff (a) intentionally relinquishing, for espousal, in the earlier suit, any relief vis-a-vis the extant suit khasra numbers; (b) her omission to include the extant suit khasra numbers in the previous suit, now estopping her, to, in respect thereto hence claim the apposite declaratory decree.

9. Before proceeding to make any pronouncement upon the validity(ies) of attraction vis-a-vis the extant suit,, the mandate of the provisions borne in Order 2, Rule 2 of the CPC, it is imperative to allude, to the apposite explicatory averments borne in paragraphs No.4,5 and 6 of the plaint, whereupon the plaintiff, stood hence precluded to, in the earlier suit, include therein the extant suit khasra numbers, paragraphs whereof read as under:-

> "4. That now in April, 2001, the plaintiff obtained the parcha jamabandi of the suit land in order to raise the crop loan from the bank and when she obtained the copy of the jambandi of the suit land, she was surprised that the patwari halqua without any authority of law, had given the red entries in the remarks column of the jamabandi, showing therein that the mutation NO.4192, has been attested and sanctioned and then names of the defendants with respect to the

suit land also, and on the basis of such wrong red entries the names of the defendants were carried out in the subsequent jamabandies and subsequently the name of the defendant No.1 was wrongly carried out in the subsequent jamabandi. The plaintiff made further enquiry and obtained the relevant papers and documents and came to know that at the time when the previous suit was filed by the plaintiff, the suit land was not included in the previous suit, as because no mutation with respect to the suit land was attested in the names of the defendants, and further that the patwari halqua had not issued the parcha jamabandi of the suit land, though the parcha jamabandies were demanded with respect to the entire property left by Shri Karmu husband of the plaintiff. Further there was no objection on the part of the defendants that the suit land is not included in the aforesaid civil suit.

5. That when the plaintiff came to know about the aforesaid wrong and collusive revenue entries, she requested the defendants to get the wrong entries correct, but the defendants instead admitting the claim of the plaintiff since the fist week of August, 20-01, started causing unlawful interference in the ownership and possession of the plaintiff concerning the suit land and threatening to dispossess the plaintiff therefrom, for which the defendants have got no right.

6. That mutation No.4192, there was no reference of the suit land and the suit land was never mutated by the revenue officer in the name of the defendants and moreover in the aforesaid civil appeals decided by the learned District Judge, as well as by the Hon'ble High Court of Himachal Pradesh, the aforesaid courts have rejected the Will set up by the defendants and have held the plaintiff as the sole heir of the deceased Shri Karmu and set aside the mutation No.4192, and as such the Patwari halqua had wrongly carried entries of ownership and possession in the name of the defendants and then in the name of the defendant No.1, which entries are collusive, wrong, illegal, against law and facts and as such the plaintiff is not bound by the same."

A circumspect reading of the apposite afore extracted averments, reveal, (i) of the plaintiff being precluded to in the earlier suit, hence include the extant suit khasra numbers, exclusion whereof springing from (ii) no mutation in respect of the extant suit khasra numbers being attested by the Revenue Officer vis-a-vis the defendants AND vis-a-vis the extant suit khasra numbers; (iii)) the Patwari halqua, not, issuing revenue records apposite to the extant suit khasra number(s), despite, hers making demand(s) thereof, upon the Patwari and (c) the defendants in their written statement instituted to the previous suit, not, making any espousal of theirs holding any right vis-a-vis the extant suit khasra numbers. Testifications were rendered by the plaintiff in proof of the aforesaid averments cast in the extant suit. The defendant(s) for succoring their contentions reared in their written statement (a) of the plaintiff thereat, holding, the apposite knowledge in respect of the extant suit khasra number, knowledge in respect whereof, held, by the plaintiff, arising from theirs holding possession of the suit khasra numbers, (b) did not adduce any affirmative evidence thereon, except their counsel putting suggestions to the plaintiff, of hers not holding possession of the suit khasra numbers, rather theirs holding possession thereof, suggestion whereof stood denied by her; (c) apart therefrom, the defendants for succoring the aforesaid contentions reared by them, in their written statement, did not adduce, any affirmative evidence thereon, rather their counsel after tendering certified copies, of, the previous conclusive verdicts recorded upon the previous suit, hence closed their evidence.

10. The aforesaid extracted averments, cast, in the plaint and omission(s) of the defendants, in adducing cogent evidence, in display of theirs holding possession, of the extant suit khasra numbers, does gain, the hereinafter inferences (a) of the plaintiff holding possession of the suit khasra numbers; (b) hers proving of the defendant(s) in the first week of August, 2001, hence making unlawful interference(s) besides invasions, upon the suit khasra number(s), for unsettling her possession vis-a-vis the extant suit khasra numbers.

11. Be that as it may, with all the apposite explication(s) meted by the plaintiff in the extant suit being hence proven, whereupon she stood precluded, to in the earlier suit, hence, include the extant suit khasra number(s), (i) thereupon, it is to be determined, upon an incisive reading of the apposite provisions, occurring in Order 2, Rule 2, of, the CPC, qua whether attraction of mandate(s) thereof vis-a-vis the extant suit, being valid or not. (ii) Both the learned Courts below, *per se ipso facto,* on anvil of inter se analogity of contesting parties in the previous suit vis-a-vis the contesting parties hereat also upon anchor of the plaintiff, excluding, the extant suit khasra numbers, in her previous suit, (iii) made a conclusion of hers, being in respect thereof hence precluded, to institute the extant suit. (iv) However, the aforesaid conclusion is drawn, on a gross mis-appraisal, of the mandate borne in the provisions of Order 2, Rule 2, of the CPC besides spurs from a gross ignorance, of the apposite proven aforesaid apposite explications purveyed in the extant suit, by the plaintiff, explication whereof rather attract (v) the innate implied principles, whereupon, the rigor of the mandate of provisions of Order 2, Rule 2 of the CPC, stands relaxed.

12. The omission of the plaintiff, to, in the earlier suit, sue in respect of the extant suit khasra numbers, whereupon, she is concluded to hence in respect(s) thereof, stand precluded, to institute the extant suit, ought to be a proven intentional omission. Even though, the apt hereinafter coinage occurring in the opening line of, sub rule 2 of Order 2, Rule 2 of the CPC, of, "plaintiff omits to sue in respect of", does not, make any open candid bespeaking, of the apposite omission, of the plaintiff, necessitating proof of its hence intentionally spurring, yet the apposite omission(s) of the plaintiff are enjoined to be evidently proven to be intentional, (ii) given the subsequent thereto, coinage, borne therein "intentionally relinquishes, any portion of his claim" warranting its being read not in isolation from earlier thereto portion of sub rule 2 to Order 2, Rule 2 of the CPC. (iii) In sequel upon a cumulative reading, of, the coinage *"where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim"*, does beget a conclusion of with the word "intentional" occurring prior to "relinquishes" being also intended by the legislature, to also being transposed into earlier thereto coinage "omits to sue in respect of". (iv) Unless the aforesaid harmonious reading, is purveyed, to the aforesaid coinage(s) existing in sub rule 2 of Order 2, Rule 2 of the CPC, thereupon, it would sequel, a harsh onerous interpretation being purveyed thereto, (v) thereupon, despite, the plaintiff not evidently holding knowledge in respect of her entire claim, the exacting rigor(s) thereof being encumbered upon her, whereupon, gross injustice would accrue vis-a-vis the plaintiff. Since, with evidently proven, tangible explication(s) standing purveyed by the plaintiff in respect of her omission(s) to, in th earlier suit, hence claim relief in respect of the extant suit khasra numbers, (vi) thereupon, when her omission(s) are also obviously not ingrained, with any element of hers holding knowledge(s) in respect thereof, (vii) concomitantly with hers hence, not, intentionally making the relevant omission(s), thereupon, it was inapt for the learned Courts below, to apply the rigor of the mandate enshrined in the provisions of Order 2, Rule 2 of the CPC, (viii) especially when the area of the suit khasra numbers is minimal also when the defendants are unable to, for the aforesaid reason(s) unflinchingly, prove qua theirs holding possession, of the suit khasra numbers, rather with the plaintiff, proving of hers holding possession of the suit khasra number and hers also proving of the defendants making unlawful interference upon them, (ix) predominantly, also when all the aforesaid fact(s) were camouflaged by the defendant(s) in their written statement, instituted to the previous suit. (x) Paramountly also for disabling, the defendants, from making any untenable displacements of the vigour of conclusive previous renditions pronounced by Courts of law, whereupon, their espousal, for, vindicating their claim(s) with respect to the property of, one, Karmu, on anvil of theirs holding his testamentary disposition, stood hence invalidated. (xi) Thereupon, any declining of relief vis-a-vis-a-vis the plaintiff by unlawfully attracting vis-a-vis her extant suit, the mandate of Order 2, Rule 2 of the CPC, would, rather unbeffitingly perpetuate gross injustice upon her. Accordingly, all the substantial questions of law are answered in favour of the plaintiff/appellant and against the defendants/respondents.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are not based upon a proper

and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have excluded germane and apposite material from consideration.

14. In view of the above discussion, the instant appeal is allowed and the impugned judgments and decrees rendered by both the learned Courts below are set aside. Consequently, the suit of the plaintiff is decreed to the effect that she is owner in possession of land comprised in khata No.1021/2, Khatauni No.1787, khasra No.2321, measuring 1-14-0 bighas as described in copy of jamabandi for the year 1991-92, situated in phati and kothi Naggar, Tehsil and District Kullu, H.P. and the revenue entries showing defendant No.1 as owner in possession of the suit land are wrong, illegal and not binding upon the plaintiff. Further, the defendants are restrained from interfering or claiming any right, title or interest over the suit land. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Lachhman ....Appellant/Plaintiff.
Versus
Keshav & another .....Respondents/Defendants.

RSA No. 470 of 2004.
Reserved on : 01.11.2017.
Decided on: 10th November, 2017.

Code of Civil Procedure, 1908- Limitation Act, 1963- Article 58- Regular Second Appeal- Plaintiff filed a suit for declaration that he is exclusive owner of the suit land and in the alternative for being declared in exclusive possession thereof- plaintiff claiming to be the sole heir of his father, Shri Kirpa Ram- mutation of inheritance however reflected in the name of the plaintiff and Maya and Bheema- defendants contested the suit and averred that Kirpa Ram died in 1962- plaintiff alone was not the sole heir- in fact, Roshani Devi, defendant No.3 had married Kirpa Ram and two daughters, namely, Maya and Bheema were born out of the wedlock- mutation was thus rightly sanctioned jointly in favour of the legal heirs of the deceased Kirpa Ram- both the learned Courts below held against the plaintiff- In Regular Second Appeal held that cause of action of the plaintiff did not arise in the year 1998 when the defendants allegedly started interfering in the suit land- the revenue entries from the year 1962 to 1998 were known to the plaintiff and at the best as per Article 58 of the Limitation Act- he could have challenged the mutation within three years of his attaining majority in the year 1970- suit thus held barred by limitation too. (Para-9)

For the Appellant: Mr. Manohar Lal Sharma, Advocate.
For the Respondents: Mr. G.D. Verma, Senior Advocte with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit for rendition of a declaratory decree in respect of his being entitled for being declared to be exclusive owner of the suit property or in the alternative his being declared to be in exclusive possession thereof, stood, under concurrent pronouncements recorded thereon by both the learned Courts below, hence, dismissed.

2. Briefly stated the facts of the case are that the plaintiff is owner in possession of the suit land, which he had inherited from his father Sh. Kirpa Ram, who died in the year 1962, leaving behind the plaintiff as sole legal heir. It is claimed that Smt. Roshani Devi, defendant No.3 was legally wedded wife of late Sh. Jaunsar, who was the real brother of his father Kirpa Ram. Consequently, the defendants, who are son, daughter and widow of his uncle Jaunsar, have no right, title or interest in the suit property, which was owned by his father kirpa Ram. It is averred that Roshni Devi-defendant No.3, from the loin of her husband Jaunsar, gave birth to three daughters, namely, Manglan Devi, Maya and Bheema and two sons Keshav and Narinder, who all except Keshav, Manglan Devi and Narinder, jointly inherited the property of Jaunsar. Consequently, it is claimed that mutation of inheritance of property of Kirpa Ram was wrongly sanctioned in favour of the defendants along with the plaintiff in equal shares. Plaintiff was minor at the time of sanctioning of the mutation and he had no knowledge of wrong mutation of his father Kirpa Ram. Now, the defendants, on the basis of wrong mutation, started unlawful interference over the suit land owned and possessed by the plaintiff and are bent upon to take forcible possession of it, without any right, title or interest.

3. The defendants contested the suit and filed written statement, wherein, it is averred that Kirpa Ram died in the year 1962 and plaintiff alone was not the sole legal heir of Kirpa Ram, at the time of his death. It is averred that Roshni Devi, defendant No.3 was married to Jaunsar and two daughters Maya and Bheema were born out of the wedlock. After death of his brother Jaunsar on 25.1.1958, Kirpa Ram solemnised customary marriage of "Jhanjara" with Roshni Devi. Defendants No.1 and 2 were born from the wedlock of Roshni Devi and Kirpa Ram. Thus, it is averred that they have, as such, rightly, succeeded to the property of Kirpa Ram along with the plaintiff. The mutation was rightly sanctioned, which was in the knowledge of the plaintiff. Plaintiff is now estopped to challenge the same. The parties are in peaceful possession as per their share in the suit land. Further, it is claimed that the suit is hopelessly time barred, as filed beyond the period of three years from the date of attaining age of majority. Objections qua act and conduct, valuation, jurisdiction, cause of action, non joinder of necessary parties and maintainability were also taken.

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

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

1. Whether the plaintiff is sole legal heir of deceased Kirpa Ram and entitled to succeed his property exclusively, as alleged?OPP.

2. If issue No.1 is proved, whether the plaintiff is the sole owner in possession of suit land, as alleged? OPP

3. Whether the mutation of suit land sanctioned in favour of the defendants is wrong, illegal, null and void and not binding upon the rights of plaintiffs, as alleged? OPP.

4. Whether the defendants makes unlawful interference in the ownership and possession of plaintiff over suit land, as alleged? OPP.

5. Whether the suit is not maintainable in the present form, as alleged? OPD

6. Whether the suit is time barred, as alleged?OPD.

7. Whether the plaintiff is estopped to file the present suit by his act and conduct, as alleged?OPD.

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom

by the plaintiff/appellant before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court wherein it assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 15.03.2005, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the two courts below were justified in holding the suit as time barred when the cause of action arose in 1998 and the suit brought in the year 1999?

Substantial question of Law No.1.

8. The predecessor-in-interest of the parties at contest, one Kirpa Ram died in the year 1962. During his life time AND after demise of his legally wedded wife, he contracted a customary marriage with his brother's widow, one, Smt. Roshani Devi. In pursuance thereto, upon occurrence of demise of Kirpa Ram in the year 1962, reflections in pedigree table, borne in Ex.P-2, occurred, with display(s) therein, of, defendant No.3 being the widow of Kirpa Ram besides, of, co-defendants No. 1 and 2, being respectively the son and daughter of deceased Kirpa Ram. Earlier thereto, on demise of Kirpa Ram, mutation qua his estate was attested, wherein, rightsin equal shares, were conferred vis-a-vis the plaintiff and the defendants. Since, this Court is enjoined to make a pronouncement, only upon, the substantial question of law, whereon, the instant appeal stands admitted, thereupon, validity(ies) of reflections occurring in the apposite order, of mutation, comprised in Ex.P-5, as also, the reflections occurring in the pedigree table borne in Ex. P-2, nor the validity(ies) of the customary marriage contracted by deceased Kirpa Ram with the widow of his brother Jaunsar, namely, one Roshani Devi, is not enjoined to be either dwelt upon and nor any adjudication is required to be pronounced thereon. Moreover, the suit property, in pursuance to the apposite order of mutation, comprised in Ex.P-5, stands reflected in the jamabandis apposite, to the suit land to be jointly held by the parties at contest. (i) Reflections occurring therein when hence enjoy a rebuttable presumption of truth, (ii) whereas, cogent evidence, for displacing the presumption of truth enjoyed by the revenue entries apposite, to the suit property, remaining unadduced, (iii) thereupon, conclusivity is to be imputed to all the reflections borne therein, whereunder, the suit property is reflected to be jointly owned by the parties at contest. The further sequel thereof is of the claim of the plaintiff of his holding exclusive ownership and possession thereof, also getting concomitantly scuttled.

9. Be that as it may, the apposite order, of mutation stood attested in the year 1962, whereat, the plaintiff, who claims reversal thereof, was a minor. (i) However, upon his attaining majority in the year 1970, he yet thereat did not within three years commencing therefrom, hence assail the aforesaid order(s), by his instituting an apposite civil suit, in the civil court concerned, (ii) though, his being imperatively enjoined, by the mandate of Article 58 of the Limitation Act, to, within three years from the date of accrual of cause of action vis-a-vis him, hence, institute a suit, seeking therein a declaratory decree, for setting aside the apposite order of mutation. Even if, the rule embodied in Article 58 of the Limitation Act, (iii) for a suit seeking, a declaratory decree for setting aside the apposite order of mutation AND for setting aside the relevant revenue entries, whereby, the right of the aggrieved vis-a-vis the suit land stood hence infringed, being imperatively brought within three years, since the making of the apposite revenue entries, is not a rule of inflexible rigor,(iv) nor accrual(s) thereat of cause(s) of action, cannot, also be an inflexible rule, for an apposite suit being within three years therefrom, being mandatorily instituted, (v) rather with evidence bespeaking, of absence of knowledge in the aggrieved concerned, with respect to their relevant makings, besides accruals, imminently relaxing the rigor of the rule, (vi) besides obviously with acquisition of knowledge(s) thereof, arising, only from proven overt act(s) of interference(s) being made by the offending litigants concerned, thereupon, empowering the aggrieved, to also, within three years therefrom, impugn

the relevant orders, of mutation also to impugn the occurrence of relevant entries in the revenue record(s) concerned.

10. The learned counsel appearing for the plaintiff contends, of, with the interference(s) upon the suit land, being made by the co-defendants in the year 1998, thereupon, his being awakened vis-a-vis the apposite order, wherefrom, he contends (i) that the mandate of the apposite Article 58 of the Limitation Act, whereby, he stands validly empowered, to, upon his being being firmly consciously enlivened qua accrual of cause(s) of action, awakenings whereof stand engendered by evident alleged overt invasion(s) made upon the suit land, by the co-defendants, invasion whereof were evidently made in the year 1998, to hence within three years thereafter, institute the apposite suit. However, the aforesaid submission, is seeped in an entrenched illusion, comprised in the factum, (ii) of the revenue entries occurring in the relevant revenue records, since the year 1962 upto 1998, making a visible display of the suit property being reflected to be jointly owned and possessed by the parties at contest,(iii) entries whereof, for reasons aforestated, acquire conclusivity besides when the plaintiff, does not, challenge the disaffirmative findings recorded on the pertinent issue, appertaining to his exclusively possessing the suit land, (iv) thereupon, with his acquiescing, of his jointly holding the suit property with the co-defendants, (v) thereupon his failure, to since the making of the revenue entries, hence, assail them within three years therefrom, cannot, enable him to merely, upon purported interferences being made by the co-defendants upon the suit land in the year 1998, hence, espouse of his thereat becoming awakened in respect thereto, (vi) imminently, when since the making of the entries upto the date of the institution of the suit, his acquiescing qua his jointly enjoying the suit property vis-a-vis them. Moreover, with yet the joint suit property being undismembered, thereupon when the litigating parties, hence, hold thereon unity of title besides community of possession, (vii) thereupon, the effect, if any, of interference(s) by the co-defendants, upon jointly held suit property, is rendered insignificant, in hence construing, of, assumingly upon the aforesaid interference(s) hence constituting any cause of action, for the plaintiff belatedly instituting a suit for setting aside, the apposite order of mutation borne in Ex.P-5.

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

12. In view of the above discussion, there is no merit in the instant appeal, which is accordingly dismissed. The impugned judgments and decrees are maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Oriental Insurance Company .....Petitioner.

Versus

Santosh Devi & others .....Respondents.

CMPMO No. 464 of 2011.
Reserved on : 24th October, 2017.
Date of Decision: 10th November, 2017.

Constitution of India, 1950- Article 227- Code of Civil Procedure, 1908- Order 6 Rule 17- Section 41 of the Workmen's Compensation Act, 1923- The adoptive parents of the deceased moving an application under Order 6 Rule 17 CPC seeking amendment in a claim filed under

Workmen's Compensation Act- Application allowed by the Learned Commissioner- Insurance Company disputing the maintainability of the application by way of a petition under Article 227- Held- that the application under Order 6 Rule 17 CPC can be considered by the Commissioner, otherwise, than in accordance with the provision of Section 41 of the W.C. Act, if he is satisfied that the interests of the parties will not thereby be prejudiced- particularly keeping in view the requirement of Section 41(1)(b)- petition filed by the Insurance Company dismissed.

(Para-4 and 5)

For the Petitioners: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

For Respondents No.1 to 6: Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Claimants No. 1 to 4, namely, Smt Santosh Devi, Master Naveen Thakur, Master Shubham Thakur and Master Mohit Thakur, were, in the initially instituted claim petition before the learned Commissioner, therein described to be respectively the widow and the minor sons of deceased employee Inder Singh, who therein was described to be begotten from the loins of one Surat Singh. Co-claimant No.5 was described to be the widow of one Surat Singh, son of Uday Singh, whereas, co-claimant No.6 was described therein to be the father of the deceased employee.

2. The aforesaid deceased Inder Singh, during the course of his holding employment under respondent No.1, suffered his demise, in an accident involving the ill fated vehicle, whereon, he stood engaged as a driver. Obviously, his demise occurred, during the course of his performing, employment under respondent No.1. Consequently, upon demise of deceased employee Inder Singh hence occurring, during the course of his performing employment under respondent No.1. (i) Thereupon, the claimants, instituted a claim petition, before the learned Commissioner concerned, wherein, they claimed compensation against the respondent(s) impleaded therein, on anvil of theirs being jointly and severally liable, for liquidating the compensation amount(s), as may, come to be determined by the Commissioner concerned. However, (ii) after adduction of evidence by the contesting parties upon the relevant issues, an application cast under the provisions of Order 6, Rule 17 of the Code of Civil Procedure (hereinafter referred to as the CPC), (iii) was instituted, before the Commissioner concerned, wherein, its leave was sought for incorporating in the claim petition, the hereinafter extracted averments:-

> "1(A) That the deceased late Sh. Inder Singh was natural son of Sh. Heera Singh, son of Sh. Uday Ram, who was given in adoption by Sh. Heera Singh to his brother Sh. Surat Singh and his wife Smt. Jalmo Devi (the petitioners No.5 and 6, who were issueless), as such, the deceased Inder Singh was an adopted son of the petitioners No.5 and 6, to this effect Adoption deed was executed and registered on 03.04.1991 in the Office of Sub Registrar (Tehsildar), Tehsil Renuka ji at Sangrah, District Sirmour, H.P."

It was averred in the aforesaid application, that, the necessity of its institution being a sequel to (i) reflections occurring in the driving licence of deceased employee Inder Singh, qua his being fathered by Heera Singh, whereas, in the initially instituted claim petition, the name of the father, of, deceased Inder Singh being displayed as one Surat Singh. The application was contested by the Insurance Company, by its filing a detailed reply thereto. It was vigorously contended in the reply filed, to the application by the counsel for the Insurance Company, of the application being not maintainable, it being instituted belatedly also despite the aforesaid factum being within the knowledge, of the petitioner at the stage of theirs instituting the claim petition, (ii) thereupon, their omission to disclose the facts, as sought to, with the leave of the Court, hence, introduced in

the claim petition, attracting the rigor of the mandate of the proviso, to Order 6 Rule 17 of the CPC, provisions whereof stand extracted hereinafter:-

> "**17. Amendment of Pleadings.-** the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

In the aforesaid proviso to Order 6, Rule 17 of the CPC, it is mandated that where "in spite of due diligence", the fact(s) in respect of whose incorporation, the leave of the Court, is sought, were yet thereat undiscoverable, thereupon, alone the apposite leave, for their incorporation being meted vis-a-vis the applicant concerned, (iii) whereas, with visible display(s) occurring in the application, of deceased employee Inder Singh, being given in adoption by his natural father, Heera Singh, vis-a-vis, his brother Surat Singh, thereupon, with the aforesaid reflections, being hence initially within the knowledge of the claimants, hence, warranted their inclusion in the initially instituted claim petition, (iii) whereas, the learned Commissioner, upon, considering the rival contentions of the parties at contest, allowing the application, has hence committed an illegality. The Insurance Company/petitioner herein, is aggrieved therefrom, hence, it has instituted the instant petition before this Court.

3. The learned Senior Counsel appearing for the petitioner herein, contended, of the application, cast under the provisions of Order 6, Rule 17 of the CPC, before the learned Commissioner, being, neither institutable nor maintainable before him, (i) given Rule 41 of the Workmen's Compensation Rules, 1924, provisions whereof stand extracted hereinafter:-

> "**41. Certain provisions of Code of Civil Procedure, 1908 to apply**.-- Save as otherwise expressly provided in the Act or these rules the following provisions of the first Schedule to the Code of Civil Procedure, 1908, namely, those contained in Order V, Rule 9 to 13 and 15 to 30; Order IX; Order XII, Rules 3 to 10; Order XVI, Rules 2 to 21; Order XVII, and Order XXIII, Rules 1 and 2, shall apply to proceedings before Commissioners, in so far as they may be applicable thereto:
>
> Provided that: -
>
> (a) for the purpose of facilitating the application of the said provisions the Commissioner may construct them with such alternations not affecting the substance as may be necessary or proper to adapt them to the matter before him;
>
> (b) the commissioner may, for sufficient reasons, proceed otherwise than in accordance with the said provision, if he is satisfied that the interests of the parties will not thereby be prejudiced."

moreso, substantive provisions thereof expressly, (i) excepting the apposite provisions of the CPC specifically engrafted therein, hence, excluding other provisions thereof, vis-a-vis proceedings launched under the Workmen's Compensation Act, 1923 (hereinafter referred to as the Act), AND also their diktat and vigor, (ii) where amongst, the unincluded provisions therein, of, the Code of Civil Procedure, are the one(s) borne in Order 6, Rule 17 CPC, (iii) thereupon, with express inclusion therein, of, the enumerated therein provisions of the Code of Civil Procedure, excepting the bones borne in Order 6, Rule 17 of the CPC, (iv) render(s) the provisions of Order 6, Rule 17 of the CPC, being construable, to, theirs being statutorily excluded from the ambit of apposite Rule 41, thereupon, the Commissioner holding, no, jurisdiction to pronounce the orders, impugned before this Court, (v) especially when they stood rendered, upon, an application cast under the provisions of Order 6, Rule 17 of the CPC, application whereof, was reiteratedly, not maintainable before him.

4. The aforesaid submission addressed by the learned Senior Counsel appearing, for the petitioner/Insurance Company, has immense vigour, thereupon, inevitable corollary thereof, is (a) of the further submission addressed by him, before this Court, of, the mandate of the proviso occurring below Order 6, Rule 17 of the CPC, for reasons aforestated, remaining unaccomplished, thereupon, the affirmative impugned pronouncement, made, by the learned Commissioner upon Misc. Appl. No. 310/6 of 2011 on 9.11.2011, warranting interference, also not acquiring any formidable weight; (b) given for attracting clout thereof, it was imperative for the petitioner, for hence, excluding vis-a-vis claimants, the rigor of the mandate of proviso to Order 6, Rule, 17, CPC, to unveil emanation(s), from the substantive provision, of, apposite Rule 41 of the Workmen's Compensation Rules, of occurrence of inclusion therein, of, the provisions of Order 6, Rule 17 of the CPC, (b) whereas, contrarily with the apposite Rule, of the Workmen's Compensation Rules, rather for reasons aforestated. hence excluding, from its domain, the provisions of Order 6, Rule 17 CPC, also renders unattractable both the substantive provisions of 6, Rule 17 AND also the mandate of the proviso appended there underneath. Even if, this Court, forms the aforesaid inference, yet before recording any clinching pronouncement with respect to the validity or invalidity of the impugned pronouncement recorded by the learned Commissioner, it is also imperative to bear in mind clause (b) of the proviso appended underneath, the apposite Rule 41 of the Workmen's Compensation Rule, clause whereof reads as under:

> "(b) the commissioner may, for sufficient reasons, proceed otherwise than in accordance with the said provision, if he is satisfied that the interests of the parties will not thereby be prejudiced."

5. The aforesaid clause, of, the apposite proviso, occurring underneath Rule 41, of, the Workmen's Compensation Rules, enables the Commissioner concerned, to, for sufficient reasons, proceed otherwise than in accordance with the substantive provisions occurring in Rule 41, of the Apposite Rules, 'only' upon his being satisfied that the interest of the parties will not thereby be prejudiced. Upon deep delvings into the innate nuance of the apposite clause, of the apposite proviso appended underneath Rule 41, of the apposite Rules, for hence uncovering its intrinsic spirit, it stands disinterred (i) that the words "proceed otherwise than in accordance with the said provision" being amenable, to, a construction of (i) theirs being carved as an exception vis-a-vis the mandate of the substantive provisions occurring in Rule 41 of the apposite Rules, (ii) thereupon, the effect of the substantive provisions of Rule 41, of, the apposite Rules, not including therein, the provisions borne in Order 6, Rule 17, CPC, non inclusion thereof, not restricting the Commissioner concerned, to upon his being satisfied that the interest of the parties will not thereby be prejudiced, hence, proceed to render a verdict (iii) without *stricto senu*, meteing reverence to the provisions of Order 6, Rule 17 of the CPC, rather for recorded sufficient reasons, only for safeguarding the interest(s) of justice, (iv) besides for ensuring that unless a valid judicious pronouncement, is made upon the apposite application preferred before him, hence, grave prejudice would accrue to the parties at contest. (iii) Reiteratedly, dehors non inclusion of Order 6, Rule 17 of the CPC in the substantive provision(s), of, the Rule 41, of the apposite Rules, to without making any strict compliance with the rigors of the provisions borne in Order 6, Rule 17 of the CPC, record an appropriate judicious pronouncement(s) upon the relevant application, cast before him. Consequently, even if, the claimants inappropriately nomenclatured, their apposite application preferred before the learned Commissioner, to be, one under the mandate of Order 6, Rule 17 of the CPC, yet any misdenomination therein of the apposite provisions, cannot, for aforesaid reasons, per se, render construable the orders recorded thereon, to be infirm, nor per se thereupon, the apposite application is rendered not maintainable.

6. Be that as it may, the aforesaid determination would not per se obtain any formidability, unless, all the ingredients stipulated in clause (b) of the proviso occurring underneath Rule 41 of the apposite Rules, comprised in (a) there being sufficient reasons; (b) in his making the pronouncement; (c) his ensuring justice being done and (d) the interest of the parties to lis, hence, being precluded, to beget any prejudice, beget evident satition. For determining whether deference, was, meted vis-a-vis the ingredients borne in clause (b) of the

proviso occurring underneath Rule 41 of the apposite Rules, “dehors”, the Commissioner making the pronouncement, within the purported domain of the provisions borne in Order 6, Rule 17 of the CPC, the imperative factum of (i) the apposite post postmortem report, carrying, the parentage of the deceased, as one Surat Ram; (ii) the apposite abstract(s) of the Parivar Register, displaying, of adoption of the deceased employee, being made by the brother of his putative father, (iii) whereupon, with identity of the deceased employee being prima facie established, (iv) whereas, the Insurance Company not adducing any evidence or material personificatory, of the deceased employee's identity, not, bearing any affinity with all the reflections, occurring, in the postmortem report or in the apposite abstracts, of the pariwar register, especially qua his adoptive father, being not Surat Ram, (v) whereas, the aforesaid factum being also displayed in the memo of parties occurring in the earlier instituted claim petition, corollary whereof, is of (vi) unless the aforesaid clarificatory factum was permitted to be incorporated in the claim petition, thereupon, contradictory thereto, reflections occurring in the driving licence of deceased employee Inder Singh, especially his being reflected therein to be fathered by his putative father, Heera Singh, would sequel befallment, of grave injustice besides imperative prejudice, upon the claimants, comprised in theirs being deprived to upon his demise, hence canvass a claim for compensation vis-a-vis them. Fakeness, if any, of the driving licence, spurring from the reflections occurring therein, specifically with respect to his being fathered by his putative father, may not, subject to an appropriate appraisal being meted thereto vis-a-vis verdict(s) of the Hon'ble Apex Court, wherein, it is expostulated, that, meteing(s) of satiation vis-a-vis the mandate of Section 3 of the Act, being a sine qua non for awarding of compensation, upon an application preferred within its domain, (vii) In aftermath, the factum of the deceased employee, not, at the time contemporaneous to the ill fated mishap involving the vehicle whereon he was engaged as driver, hence, not purportedly possessing any valid driving licence to drive it, may not be a relevant factum for resting the fate of the apposite application.

7. For all the foregoing reasons, the instant petition is dismissed and the impugned order is maintained and affirmed. However, the insurance company is at liberty, to yet delink the identity of the deceased vis-a-vis the one reflected in the memo of parties, by adducing cogent evidence. No order as to costs. All pending applications also stand disposed of.

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BEFORE HON’BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Tilak Raj ....Petitioner.

Versus

High Court of Himachal Pradesh & another. ....Respondents.

CWP No. 6114 of 2011.
Reserved on :25.10.2017.
Decided on:10th November, 2017.

Constitution of India, 1950- Article 226- Reinstatement of Service- Petitioner removed from the service in pursuance to an FIR lodged for having allegedly committed offences punishable under Sections 376 and 506 of I.P.C. Show cause notice issued to the petitioner under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 for initiating disciplinary action, for having committed offences punishable under Sections 376 and 506 of I.P.C – during the course of disciplinary proceedings the petitioner went missing, who was also declared a proclaimed offender by the Court after charge having been laid against him under Sections 376 and 506 of I.P.C. Disciplinary Authority resorted to the provision of Rule 19 of CCS Rules. Disciplinary Authority proceeded to impose a major penalty, ordering the removal of the petitioner from the service- petitioner having surrendered before the Trial Court on 20.2.2008

came to be acquitted- petitioner thereupon seeking reinstatement. The claim for reinstatement in service dismissed- Holding that the honourable acquittal of the petitioner did not absolve him of the other imputations of misconduct i.e. remaining evidently willfully absent from the duty w.e.f. 28.12.2004 till 12.12.2005, whereupon, he was ordered to be removed from the service- further held that the petitioner even after surrendering before the Learned Additional District Judge on 22.2.2008 not applying for extension of leave nor explaining his willful absence- no evidence led showing that the petitioner was suffering from mental depression- petition dismissed. (Para-5)

For the Petitioner: Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate.
For the Respondent: Mr. Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

Through the instant writ petition, the petitioner prays for quashing of Annexure P-12, and of Annexure P-14, whereunder, the petitioner's espousal for restoration in service claimed under Annexure P-11, was declined respectively, by the District and Sessions Judge, Bilaspur and thereafter in an appeal, borne in Annexure P-13, carried therefrom before the High Court, the latter proceeded to affirm the rendition occurring in Annexure P-12.

2. Annexure P-8, unfolds, the apt imputation(s) of misconduct vis-a-vis the delinquent/petitioner herein. The apt imputations of misconduct, embodied therein read as under:

> " 1. Whereas you are appointed as Chowkidar on temporary basis and posted as such in the Court of Civil Judge (Sr. Division)-cum-Addl. Chief Judicial Magistrate, Ghumarwin, under this office, office order No. DSJ/BLP/EC/2001-25, dated 10th April, 2001 and you were working as such in the said court w.e.f. 19th April, 2001. On 3.11.2002 at abut 11 a.m., while you were working as Chowkidar in the Court of Civil Judge (Sr. Division)-cum-All. Chief Judicial Magistrate, Ghumarwin had committed rape on one Miss Anurag d/o Sh. Surtia Ram, Caste Brahamn, village Gehra, Tehsil Ghumarwin, District Bilaspu and for which case FI.R. No.211/2002 of offence under Sections 376, 506 IPC was registered against you in police station, Ghumarwin. The above act amounts to an offence of moral turpitude on your part, which is highly unbecoming of a public servant.
>
> 2. And whereas you had proceeded on compensatory leave and casual leave w.e.f. 20th December, 2004 to 27th December, 2004 and you were due to report for your official duty on 28th December, 2004. You had neither reported for duties on 28.12.2004, nor you had submitted any application for leave. You are wilfully absent from your duties w.e.f. 28th December, 2004 onwards, which is also highly unbecoming of your part being public servant and is vilation of sub rule (1) (iii) of Rule 3 under Central Civil Services (Conduct) Rules, 1964.
>
> c) That the respondent may kindly be directed to allow the petitioner to participate in the interview to be held from 26.12.2016 to 28.12.2016."

3. In pursuance to FIR No.211/2002 being loged against the petitioner for his committing offences punishable under Sections 376 and 506 of the IPC, he was arrested on 3.11.2002, whereafter he was placed under suspension w.e.f. 3.11.2002. However, on his being released on bail, he reported for duty on 22.5.2003. Under an order recorded on 27.09.2003, the suspension visited vis-a-vis the petitioner/delinquent, was hence revoked. The delinquent/petitioner was sanctioned compensatory casual leave w.e.f. 20.12.2004 to 27.12.2004 and was enjoined to report for duty on 28.12.2004 at 9.45 a.m. However, the petitioner did not report for duties, on 28.12.2004 nor he submitted any application for meteing(s), of, extension of

leave. In sequel, it was also imputed vis-a-vis the petitioner qua his remaining willfully absent from duty w.e.f. 28.12.2004. Consequently, an apposite approval was meted by the learned District and Sessions Judge, Bilaspur, for, a notice being issued upon him, for his purveying the reason(s) for precluding the disciplinary authority, from, under Rule 14 of the Central Civil Services (Calssification, Control and Appeal) Rules, 1965, hence initiating action against him. The bailiff of the Court of Civil Judge(Sr. Division)-cum-ACJM, Ghumarwin, made, a visit vis-a-vis the abode of the delinquent/petitioner, whereupon, upon a communication, made, in writing by the father of the delinquent/petitioner, he made a report of his missing therefrom. Thereafter, the disciplinary authority, hence, adopted the statutory mechanism contemplated in sub rule (9)(2) appended below Rule 19 of the Central Civil Services (Control, Classification and Appeal) Rules, 1965, provisions whereof are extracted hereinafter:-

> " 2. After careful consideration, it has been decided that in such cases the competent disciplinary authorities may take the following actions;-
>
> (a) A certificate should be obtained from the local police authorities to the effect that the whereabouts of the officials concerned are not known. This certificate would be placed on record in the concerned file.
>
> (b) A brief statement of allegations and charges should be prepared and kept on the file.
>
> (c) The disciplinary authority should himself record on the file the fact that the whereabouts of the officials concerned are not known and that the police authorities have also certified to that effect and therefore, it is not reasonably practicable to hold the inquiry contemplated under Rule 14 of the C.C.S (C.C.A) Rules, 1965. The disciplinary authority can then take recourse to rule 19 (ii) of C.C.S. (C.C.A.) Rules, 1965 wherein enquiry has to be dispensed with. Reasons for not holding enquiry should then be recorded in writing and the disciplinary authority should issue orders imposing such penalty as it deems fit. The allegations and charges have to be briefly discussed in the punishment order. Normally, in such cases the punishment that could be meted out would be either removal or dismissal from service."

4. In compliance with the provisions occurring therein, a copy of the order rendered by the learned Additional Sessions Judge, whereby, the delinquent/petitioner was declared a proclaimed offender AND a copy of notice issued vis-a-vis the delinquent/petitioner under Section 82 of the Cr.P.C. as also, a copy of police report filed before the trial Court under the provisions of Section 173 of the Cr.P.C., was ordered to be procured. The aforesaid material, for hence satiation thereto being begotten, was purveyed, by the learned trial Court, to the disciplinary authority. Also, with its being unveiled therein, of, the learned Additional Sessions Judge concerned being seized with a report instituted under the provisions of Section 173 of the Cr.P.C., by the Investigating Officer concerned, with echoings therein of the delinquent/petitioner committing offences under Sections 376 and 506 of the IPC, hence, amended imputation(s) of misconduct, embodying the aforesaid misconduct, was ordered to be framed against the delinquent/petitioner. An amended show cause notice, embodying therein, the aforesaid imputation(s) of misconduct vis-a-vis him, was ordered to be served upon the delinquent/petitioner. The aforesaid amended imputations of misconduct ordered to be served upon the delinquent/petitioner, yet, given the absence of the delinquent, from his abode, it, as ordered, was hence, affixed, by the process server concerned, on the outer door of the abode/premises of the petitioner. Since, in pursuance thereto, the delinquent/petitioner did not appear before the Inquiry Officer concerned, thereupon, it was concluded, of, his being amenable for being charge sheeted for his committing the aforesaid misconduct(s). Copy of the charge sheet, could not be personally served upon the delinquent, thereupon, it was affixed by the process server concerned, upon, the outer door of his premises. Given, the delinquent absconding and his being declared, a proclaimed offender, under valid orders in respect thereof, being pronounced by the learned Additional District Judge, Ghumarwin, (i) thereupon, on anvil of the provisions,

vested, in the disciplinary authority concerned by Rule 19 (ii) (9) of Central Civil Services (Classification, Control and Appeal) Rules, 1965, (ii) whereupon it stood empowered to dispense with the holding of a regular enquiry upon evident satiation(s) thereof vis-a-vis the delinquent, (iii) thereupon, with obviously satiation thereof being meted, constrained the disciplinary authority concerned, to, hence make a valid ex-parte conclusion, of the imputations of misconduct vis-a-vis the delinquent, comprised in his remaining absent from duty w.e.f. 28.12.2004 till 22.12.2005 being proven, (iv) whereupon it proceeded to impose upon him a major penalty, of his being ordered to be removed from service.

5. However, subsequent thereto, the delinquent surrendered on 20.02.2008, before the trial Court concerned. On his surrendering before the learned trial Court, he was charged for his committing an offence punishable under Sections 376 and 506 of the IPC. On conclusion of the trial of the case, the learned Additional Sessions Judge, Ghumarwin, pronounced an order of acquittal upon the delinquent/petitioner. Uncontrovertedly, the aforesaid order of acquittal pronounced upon the petitioner/delinquent by the learned Additional Sessions Judge, Ghumarwin, led him to address an application comprised in Annexure P-11, to the District & Sessions Judge, Bilaspur, whereunder he sought relief of his being ordered to be reinstated in service. The aforesaid application was rejected under Annexure P-12 and the aforestated rejection order was also, under Annexure P-14, hence affirmed by the High Court. The order of acquittal pronounced upon the delinquent/petitioner by the learned Additional Sessions Judge, Ghumarwin, does, on its close reading, unveil, of it being founded upon the prosecutrix turning hostile, thereupon, the ensuing sequel, is of the petitioner/accused/delinquent being beset with a humiliation, of, his may be, being maliciously prosecuted. Moreover, (I) the order of the acquittal pronounced upon the accused/delinquent/petitioner, being founded, upon reasons not tantamounting, of theirs being construed, to be of hence the learned Additional Sessions Judge concerned, upon his traversing through the apposite evidence vis-a-vis the charge, existing on record, concluding of it being infirm and inconsistent, (ii) thereupon, it affording vis-a-vis the accused/petitioner/delinquent, the benefit of doubt, (iii) rather it appears, of, with the prosecutrix reneging from her previous statement recorded in writing, hence, prevailing upon the learned Additional Sessions Judge concerned, to pronounce an order of acquittal, upon, the accused/petitioner/delinquent, (vi) thereupon, it can be befittingly concluded that the acquittal of the delinquent/petitioner being construable to be an honourable acquittal. However, yet on the basis of his honourable acquittal aforesaid, the petitioner/delinquent, cannot make any valid espousal vis-a-vis his being reinstated in service, for the reasons, (i) though one of the imputations of misconduct vis-a-vis the accused, is comprised in his committing offences punishable under Sections 376 and 506 of the IPC, yet dehors the aforesaid infirmity ingraining one of the imputations of misconduct, encumbered upon the petitioner/delinquent, would not, per se render also likewise infirm, the other imputations of misconduct entailed upon the delinquent, comprised in his remaining evidently willfully absent from duty w.e.f. 28.12.2004 till 22.12.2005, whereupon, he was ordered to be removed from service. The reason as purveyed in Annexure P-12, vis-a-vis the aforesaid imputations of misconduct, being formidably proven, does evidently, personify of the petitioner, not, attending his duties on 28.12.2004, rather upto his surrendering before the learned Additional District Judge on 20.02.2008, his neither applying for extension of leave before the authority concerned, contrarily, rather his being declared a proclaimed offender. He concerts to validate his absence from duty w.e.f. 28.12.2004 upto 20.02.2008, whereat he surrendered before the Addl. Sessions Judge, Ghumarwin, on anvil (a) of his suffering from mental depression. The aforesaid ground reared in Annexure P-11, for his hence proceeding, to remain absent from duties, appears to be an afterthought besides a clever stratagem, given his not appending therewith, any apposite medical certificate issued by the competent doctor and (b) his neither at the time contemporaneous to the expiry of the leave sanctioned vis-a-vis him, nor his in the interregnum, since expiry thereto upto 20.02.2008, whereat he surrendered before the trial Court concerned, purveying any application, wherewith, an apposite medical certificate, stood appended, personificatory of his being beset with a mental ailment or depression, thereupon, his being precluding to attend his duties.

6. Reinforcingly, the absence of the aforesaid material, galvanizes, a clinching conclusion of (i) the prolonged period of absence, of the delinquent, from, his duties w.e.f. 28.12.2004 uptill 20.02.2008, whereat he surrendered before the learned trial Court , remaining unexplained also thereupon, the inordinate prolonged duration thereof, (ii)not warranting any meteing(s) of leniency vis-a-vis the delinquent besides its duration being not amenable, of, its being extenuated on any ground whatsoever (iii) rather the imposition of penalty of removal, of the petitioner/delinquent, from service, being construable to be validly imposed upon him, dehors making of the afore conclusion by this Court, of, the order of acquittal pronounced upon the delinquent/petitioner, being construable to be his honourable acquittal vis-a-vis the charges framed against him.

7. For the foregoing reasons, there is no merit in the instant petition which is accordingly dismissed. All pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Nokh Ram .... Petitioner

Versus

Union of India and others .... Respondents

CWP No. 9592 of 2011.
Reserved on : 30.10.2017.
Date of decision: 13.11.2017.

Constitution of India, 1950- Article 226- Civil Writ Petition- Reduction in pay scale on the basis of audit objection raised qua irregular grant of ACP to the petitioner. Petitioner challenging his re-fixation on a lower scale as a consequence thereto- Central Administrative Tribunal upholding the action of the respondent as the petitioner had already earned a promotion during the said inter regum- held that since the petitioner was found to have gained one promotion and as such, petitioner was rightly held not entitled to the financial upgradation. In the facts and circumstances of the case, petitioner could have gained the second financial upgradation under the assured career progression scheme on completion of 24 years of service from the date of his appointment as a Reference Assistant on regular basis. Since the petitioner had not put the requisite 24 years, Petitioner held not entitled to the upgradation under the ACP Scheme. Consequently, the finding of the Tribunal upheld- petition dismissed. (Para-10)

For the petitioner: Ms. Ranjana Parmar, Sr. Advocate with Ms. Rashmi Parmar, Advocate.

For the respondents : Mr. Ashok Sharma, ASGI with Ms. Srishti Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this writ petition, the petitioner has challenged the order passed by learned Central Administrative Tribunal, Chandigarh Bench in OA No. 984-HP of 2010, dated 3.8.2011, vide which learned Tribunal has dismissed the original application filed by the present petitioner.

2. Brief facts necessary for adjudication of the present petition are that an original application i.e. OA No. 984-HP of 2010 was preferred by the present petitioner before the learned

Tribunal wherein the petitioner had *inter alia* prayed for quashing of order Annexure A-1 appended with the original application dated 22.12.2006, vide which, pay scale of Rs. 6500-10,500 granted to him was reduced to Rs. 5500-9000. Reliefs prayed by the petitioner in the original application are quoted herein below.

> *"i) That the impugned order Annexure A-1 may kindly be quashed and set aside and the respondents may kindly be directed to re-fix the pay of the applicant forthwith alongwith all consequential benefits.*
>
> *Or*
>
> *ii) In the alternative the respondents may kindly be directed to release the First Assured Career Progression under the relevant Scheme to the applicant, which has fallen due to him in the year 2000 with all consequential benefits.*
>
> *iii) That the respondents may be directed to produce the entire record pertaining to this case before this Hon'ble Tribunal.*
>
> *iv) That the present original application may very kindly be allowed with costs.*
>
> *v) That any other and further reliefs which this Hon'ble Tribunal deems just and fit in the facts and circumstances of the case may also be granted in favour of the applicant and against the respondents."*

3. The following facts are not in dispute. Petitioner initially joined the service of the respondents as a Mali on temporary basis on 01.03.1973 and thereafter, he was appointed as a Peon in July 1975, again on temporary basis under a specific scheme called the Source Book Scheme. Petitioner thereafter was appointed on ad-hoc basis as an LDC on 31.07.1985 on a pay scale of Rs. 260-400. In the year 1986, the respondent-Institute invited applications for the post of Library Assistant and Reference Assistant (Sanskrit) and Reference Assistant (Arabic). Petitioner applied for the post of Library Assistant. He was offered the post of Reference Assistant on ad-hoc basis in the pay scale of Rs. 1400-2300. The ad-hoc appointment of the petitioner as such was without specifying the particular language in which he so stood appointed as Reference Assistant which as per the respondent- Institute was done as the petitioner was not possessing essential qualification for being appointed as Reference Assistant as he did not possess the requisite degree either in Sanskrit or Arabic language. Petitioner served as Reference Assistant on ad-hoc basis without his services being so regularized till 01.12.1993. Thereafter he was promoted to the post of Professional Assistant w.e.f. 01.12.1993 in the pay scale of Rs. 1640-2900 and under FR 22(c), his pay was fixed Rs.1760 w.e.f. 02.12.1993. Thereafter vide office memorandum dated 24th December, 2002, the service of the petitioner was deemed to be treated regularized as Reference Assistant w.e.f. 30.04.1987 in the pay scale of Rs. 1400-2300 revised to Rs. 4500-7000, further revised to Rs. 5000-8000 w.e.f. 01.07.1990. Vide same office memorandum, the services of the petitioner were further ordered to be regularized as Professional Assistant w.e.f. 10.10.1992 in the pay scale of Rs. 1640-2900, revised to Rs. 5500-9000 w.e.f. 01.01.1996. He was also given the first upgradation under the Assured Career Progression Scheme (ACP) in the pay scale of Rs. 6500-10500 w.e.f. 19.10.2000 vide office memorandum dated 24.12.2002.

4. The records demonstrate that an audit objection was raised qua irregular grant of ACP to the petitioner, as is evident from Office Memorandum dated 29th August, 2006 (appended with the original application as Annexure A-6). It was mentioned in the said objection that as per Assured Career Progression Scheme for the Central Government Employees introduced vide Government of India Memorandum No. 35034/1/97-Estt. (d) 9.8.99, if an employee already had got one regular promotion after direct recruitment, he shall qualify for the second financial upgradation only on completion of 24 years of regular service under ACP Scheme. It was further mentioned in the said audit objection as under:-

> *"During test check of records it was noticed that Sh. Nokh Ram Professional Assistant had already got one promotion from Library Assistant i.e. from 1400-3200 to 1610-2900 on 2.12.1993 as per information supplied by the Dy. Secretary*

(Admn.) Sh. Nokh Ram was entitled to be treated as direct recruit from 30.04.1987 (the entire in the service book have been taken w.e.f. 12.12.86 which needs to also be corrected. Obviously the official was not entitled for the second financial upgradation w.e.f. 1.12.2000. This has resulted in overpayment of Rs. 19210 as detailed below.

Period	Due	Drawn	Dif BP	Dif DA	Total
	5500-175-9000	6500-200-10500			
2.12.2000-21.12.2000	6725	7100	362	148	510
1.1.2001-30.6.2001	6725	7100	375	161	536
1.7.2001-30.11.2001	6725	7100	375	169	544
1.12.2001-31.12.2001	6900	7300	400	180	580
1.1.2002-30.6.2002	6900	7300	400	196	596
1.7.2002-30.11.2002	6900	7300	400	208	608
1.12.2002-31.12.2002	7100	7500	400	208	608
1.1.03-31.3.03	7100(subject to charge of DA w.e.f. 1.7.03)	7500	400	220	620

Month	*Total and overpayment*
30 days	*510*
6 months	*3216*
5 months	*2720*
1 month	*580*
6 months	*3576*
5 months	*3040*
1 months	*608*
8 months	*4960*
Total	*19260*

In reply to audit memo No. 17 it was stated by the institute that according to letter OM No. 35034/1/97-Estt. (D) (Vol-iv) dated 10.02.2000 the official was entitled for personal up gradation. The reply of the institute was not tenable as the

official was entitled of the second financial up gradation if he was not direct recruit on the post of reference Assistant/Library Assistant only on completion of 21 years of regular service as direct and as such recovery as stated above may be recovered under intimation to audit."

5. A Special Committee of Controller of Accounts and Director of Finance was constituted by the department of Higher Education, Ministry of Human Resource Development, Government of India, which agreed with the observations of the audit. This led to issuance of Annexure A-1, dated 22.12.2006, which was impugned by way of original application before the learned Tribunal by the present petitioner. Learned Tribunal while dismissing the original application so filed by the present petitioner *inter alia* held as under:-

> *"It may be pointed out here that the ACP Scheme was introduced on recommendations of the 5th CPC to deal with the problem of stagnation as a measure of safety net. The ACP scheme envisages grant of two financial step-ups on completion of 12 and 24 years of service to an employee, who has no promotional avenues or has not earned any promotion. Condition No. 5.1 of the scheme provides that "**Two financial upgradations under the ACP scheme in the entire Government service career of any employee shall be counted against regular promotions** (including in situ promotion and fast-track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial upgradations under the ACP Scheme shall be available only if no regular promotions during the prescribed periods (12 and 24 years) have been availed by an employee. If an employee has already got one regular promotion he shall qualify for the second financial upgradation only on completion of 24 years of regular service under the ACP scheme. In case two prior promotions on regular basis have already been received by an employee, no benefit under the ACP Scheme shall accrue to him."*
>
> *The question would arise whether the applicant has already earned two promotions since he joined service as a temporary Mali and reached to the post of Professional Assistant while remaining in the same department and if not, whether he was entitled to the benefit of the ACP Scheme. No doubt, he joined as a Mali, but was subsequently appointed as a Peon (Group 'D'). Thereafter, he was appointed as an LDC. This could surely be a promotion for him from a Group D to Group C post. Further, he is shown to have been promoted as Reference Assistant in the Service Book, which post was upgraded as Professional Assistant on 2.12.93. So, According to us, applicant had already earned more than two promotions and no benefit of ACP could be given to him. The impugned order Annexure A-1 has, therefore, rightly been passed and calls for no interference at the hands of this court."*

6. Mrs. Ranjana Parmar, learned Senior Counsel appearing for the petitioner has argued that order passed by the learned Tribunal is not sustainable in the eyes of law, as not only the said Tribunal erred on facts in coming to the conclusion that the petitioner during his course of employment with the respondent-institute had gained two promotions, but also erred in not appreciating that the right of the petitioner to receive benefits under Assured Career Progression Scheme was to be construed from his joining the office as Reference Assistant at the first instance and further taking into consideration the fact that his subsequent promotion to the post of Professional Assistant was no promotion in the eyes of law as the pay scale of both the said posts stood merged in a single pay scale. No other point was urged.

7. On the other hand, Mr. Ashok Sharma, learned Assistant Solicitor General of India while defending the order passed by the learned Tribunal argued that the order which was passed by the respondent-Institution while revising the pay scale of the petitioner was a valid order as the same was done by the respondent-institution on the basis of report of a Special

Committee which was constituted by the Ministry of Human Resource Development, Department of Higher Education, Government of India, to examine cases of audit objections on account of wrong implementation of Assured Career Progression Scheme in Indian Institute of Advanced Studies, Shimla. In the course of his contention he also referred to the said report which is on record alongwith the reply filed by the respondents to the original application.

8. We have heard learned counsel for the parties and also gone through the records of the case as well as the order passed the learned Tribunal.

9. A perusal of the records of the case demonstrates that Ministry of Human Resource Development, Department of Higher Education, Government of India had constituted a Special Committee of Controller of Accounts and Director (Fin.) to examine the cases of audit objections on account of wrong implementation of ACP in the office of Indian Institute of Advanced Studies, Shimla. This Committee submitted its report dated 26.10.2006, which is on record. Qua the present petitioner, the Committee has held as under:

> *"(10)* ***Shri Nokh Ram, Professional Assistant****:*
>
> *Shri Nokh Ram was initially appointed as unskilled Mali (Rs. 70-85) w.e.f. 1.3.73. He was subsequently designated as Peon (Rs. 70-85) w.e.f. 15.7.75 and promoted as LDC (Rs. 260-400) w.e.f. 31.7.85. He was appointed as Library Assistant (Rs. 425-700) on ad-hoc basis w.e.f. 12.12.86 and again appointed as Reference Assistant on ad-hoc basis in the same scale of pay w.e.f. 1.5.87. His appointment as Reference Assistant was subsequently regularized w.e.f. 1.5.87. He was subsequently promoted as Professional Assistant (Rs. 1640-2900) w.e.f. 2.12.93. He was granted first financial upgradation to the scale of pay of Rs. 6500-10500 w.e.f. 1.12.2000.*
>
> ***Audit observation****: Since he got already two promotions he was not eligible for financial upgradation under ACP Scheme.*
>
> ***Observation of the Committee****: Committee agrees with the observations of the Audit. Further, even if the appointment as Reference Assistant is considered as direct recruitment, since Shri Nokh Ram got one promotion to the post of Professional Assistant, he will be eligible for 2nd financial upgradation under ACP scheme on completion of 24 years of service from the date of his appointment to the post of Library Assistant/Reference Assistant on regular basis. Since he did not 24 years of service as on 1.12.2000, he was not eligible for 2nd upgradation from 1.12.2000. Thus, the upgradation given w.e.f. 1.12.2000 is not admissible."*

10. Now, we find that this report of the Special Committee was not assailed by the petitioner before the learned Tribunal. The report of the Committee is dated 26.10.2006, whereas the original application was filed before the learned Tribunal in the year 2010. A perusal of the order passed by the learned Tribunal demonstrates that there is also a reference to an earlier original application filed by the present petitioner, which was withdrawn by him without seeking liberty to file fresh on the same cause. However, we are not making any further reference of the same and we are adjudicating the present petition purely on merits. It is a matter of record that petitioner was initially appointed as unskilled Mali on 1.3.1973 and designated as Peon on 15.7.1975. It is also not in dispute that thereafter he was promoted as an LDC w.e.f. 31.7.1985. It is also not in dispute that in the year 1986, the respondent-institute invited applications for the post of Library Assistant and Reference Assistant (Sanskrit and Reference Assistant (Arabic). Petitioner who applied for the post of Library Assistant was offered the post of Reference Assistant on ad-hoc basis on the pay scale of Rs.1400-2300. He continued to serve as such till he was promoted to the post of Professional Assistant w.e.f. 1.12.1993. This was followed by office memorandum dated 24.12.2002 vide which services of the petitioner were ordered to be regularized as Reference Assistant w.e.f. 30.4.1987 and further regularized as Professional Assistant w.e.f. 10.10.1992. Now even if we take the case of the petitioner from the date on which he was regularized as Reference Assistant, as the learned Counsel for the petitioner wants us to,

then also, we find that after his appointment as Reference Assistant against which post he stood regularized w.e.f. 30.4.1987, he was promoted to the post of Professional Assistant w.e.f. 10.10.1992. This factual position could not be disputed by learned Senior Counsel for the petitioner during the course of arguments. It is in this background that as petitioner was found to have gained one promotion to the post of Professional Assistant w.e.f. 2.12.1993 after his appointment against the post of Reference Assistant w.e.f. 1.5.1987, that the Committee found merit in the audit objection to the effect that the petitioner was not entitled to the said financial upgradation and he could have gained only second financial upgradation under Assured Career Progression Scheme on completion of 24 years of service from the date of his appointment as Reference Assistant on regular basis. It is not in dispute that as on 1.12.2000, the petitioner had not put 24 years of service from the date of his initial appointment as Reference Assistant. Learned Senior Counsel for the petitioner also could not dispute the fact that first upgradation under ACP Scheme could not be granted to an employee who had gained one promotion within stipulated period, i.e. 12 years from the date of his appointment. However, according to her, the promotion of the petitioner to the post of Professional Assistant was no promotion in the eyes of law as the pay scale of post of Reference Assistant and Professional Assistant stood merged into a single pay scale. The genesis of said plea is neither borne out from the averments made in the original application nor the said contention could be substantiated during the course of arguments on the strength of any document. In this background, according to us, there is no infirmity with the act of the respondent-institute which withdrew the upgradation granted to the petitioner under the ACP Scheme on the ground that the petitioner was not eligible for the grant of said upgradation as he had gained a promotion to the post of Professional Assistant from the post of his appointment i.e. Reference Assistant. Similarly, the findings returned by the learned Tribunal to the effect that the petitioner having gained promotion in the course of employment was not eligible to the benefits of ACP Scheme on completion of 12 years service, can also not be faulted with. Though the learned Tribunal has taken into consideration the earlier promotions that were conferred upon the petitioner by the respondent-institute, however, even if we did not refer to the promotions which were conferred upon the petitioner earlier, even then, the petitioner was ineligible for conferment of benefits of upgradation under Assured Career Progression Scheme w.e.f. 01.12.2000, as from the date of his appointment as Reference Assistant, the first upgradation could have been conferred upon him after 12 years from the date of his appointment as Reference Assistant and that too in case he has not gained promotion within the said time period of 12 years, which is not the case here. The petitioner as Reference Assistant was promoted to the post of Professional Assistant w.e.f. 10.10.1992 i.e. within 12 years from the date of his initial appointment as Reference Assistant.

In view of above discussion, we do not find any merit in the present petition nor do we find any infirmity with the order of the learned Tribunal and the same is accordingly dismissed. Pending miscellaneous application(s), if any, also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Vijaylakshmi ...Appellant.

Versus

State of H.P. & others ...Respondents.

CWP No.3310 of 2016

Date of Decision: November 13, 2017

Constitution of India, 1950- Articles 15(4) and 16(4)- Appointment- Whether a lady marrying a Scheduled Castes / Scheduled Tribes or OBC Citizen, or one transplanted by adoption or any

other voluntary act, ipso facto, becomes entitled to claim reservation and thereupon seeks appointment to government service- Held- No. Considering the earlier judgments passed by the Apex Court in ***Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde, 1995 Supp (2) SCC 549***, ***R. Chandevarappa v. State of Karnataka, (1995) 6 SCC 309***, ***Heikham Surchandra Singh & others v. Representative or "Lois" Kakching, Manipur (A Scheduled Caste Uplift Body) & others, (1997) 2 SCC 523*** and ***State of Tripura & others v. Namita Majumdar (Barman) (Smt), (1998) 9 SCC 217***- held- that let alone the General category candidate who marries a person belonging to a Scheduled Caste or a Scheduled Tribe, even a person belonging to Scheduled Caste or Scheduled Tribe of one State cannot get the benefit of Scheduled Caste or Scheduled Tribe in another State. (Para-21 to 33)

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

(Para-34 and 35)

Cases referred:

Indra Sawhney & others v. Union of India & others, 1992 Supp (3) SCC 217

Nityanand Sharma & another v. State of Bihar & others, (1996) 3 SCC 576 (Two Judges)

Indra Sawhney & others v. Union of India & others, 1992 Supp (3) SCC 217

Heikham Surchandra Singh & others v. Representative or "Lois" Kakching, Manipur (A Scheduled Caste Uplift Body) & others, (1997) 2 SCC 523 (Two Judges)

State of Tripura & others v. Namita Majumdar (Barman) (Smt), (1998) 9 SCC 217

N.E. Horo v. Smt. Jahanara Jaipal Singh, (1972) 1 SCC 771 (Two Judges)

Sobha Symavathi Devi v. Setti Gangadhara Swamy & others, (2005) 2 SCC 244 (Three Judges)

Meera Kanwaria v. Sunita & others, (2006) 1 SCC 344 (Two Judges)

Anjan Kumar v. Union of India & others, (2006) 3 SCC 257 (Two Judges)

Ashok Kumar Thakur v. Union of India & others, (2008) 6 SCC 1 (Five Judges)

Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and another Vs. Union of India and another, (1994) 5 SCC 244

Kumari Madhuri Patil & another v. Addl. Commissioner, Tribal Development & others, (1994) 6 SCC 241

U.P. Public Service Commission, Allahabad v. Sanjay Kumar Singh, (2003) 7 SCC 657

S. Pushpa & others v. Sivachanmugavelu & others, (2005) 3 SCC 1

Subhash Chandra & another v. Delhi Subordinate Services Selection Board & others, (2009) 5 SCC 458

Sanjeev Kumar & another v. State of Bihar & others, (2016) 13 SCC 105

Chairman and Managing Director FCI & ors. v. Jagdish Balram Bahira & ors., (2017) 8 SCC 670

Manju v. State of H.P. & others, AIR 2007 HP 74

For the Appellant	Mr. Neeraj Maniktala, Advocate.
For the Respondents	Mr. M.A. Khan and Mr. Anup Rattan, Additional Advocate Generals, with Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2. Mr. Ashok Sharma, ASGI, with Ms Sukarma Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

It is not in dispute that either by birth or upbringing, petitioner does not belong to a Schedule Tribe category. She is a Brahmin, born in the State of Uttar Pradesh. Also, her

upbringing is not in a socially or culturally backward set up. It is also not in dispute that Scheduled Tribe certificate was obtained by her solely on the strength of her having married a person who belonged to a Scheduled Tribe category.

2. In the present petition, the sole question, which arises for consideration, is as to whether a lady, who otherwise does not belong to a Scheduled Tribe, on account of her marriage to a person belonging to a Scheduled Tribe, so notified within the State of Himachal Pradesh, acquires the status of that of her husband, i.e. Scheduled Tribe, for the purpose of claiming benefits as envisaged under Article 16(4) of the Constitution of India or not.

3. While the issue is no longer res-integra, for it stands settled by Hon'ble Supreme Court of India in its several decisions, but however, since repeatedly it keeps on cropping, not only with regard to ladies who otherwise do not belong to a Scheduled Tribe but marry a person belonging to a Scheduled Tribe, but also with regard to ladies, who do not belong to a Scheduled Caste but marry a person belong to a Scheduled Caste, we endeavour to reiterate the law, as stands laid down by the Hon'ble Supreme Court of India.

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

> "(a) That the order Annexure P-8 passed by the Naib Tehsildar Holi may kindly be declared illegal and quashed and set aside as the Caste/Tribe Certificate was issued to the petitioner after all the due verification by the authorities and on the basis of the law holding the field as laid down by the Hon'ble Apex Court.
>
> (b) That the enquiry by Respondent No. 3 that the caste/tribe certificate submitted by the petitioner was false, may kindly be declared as arbitrary and against the law as laid down.
>
> (c) Record of the case may be called for the kind perusal of this Hon'ble Court."

5. Case of the petitioner is that she was married to one Shri Prem Chand, resident of Village Gusal, Panchayat Holi, District Chamba in the year 1972, belonging to Gaddi Rajput Tribe. By virtue of her being married to a person belonging to a Scheduled Tribe category, she applied to the authorities for the issuance of a Scheduled Tribe certificate, which was issued to her on 20.03.1985 by the Executive Magistrate, Sub Tehsil Holi, District Chamba. On the strength of the said certificate, petitioner joined as a Primary Teacher under the Kendriya Vidyalaya Sangathan in the year 1986. In the year 2011, i.e. after putting in more than 25 years of service, she was chargesheeted vide memorandum dated 28.02.2011 to the effect that she had gained appointment by submitting a false caste certificate against the post reserved for a Scheduled Tribe category. Petitioner denied the allegations by maintaining that the Scheduled Tribe certificate was rightly issued in her favour by the authorities concerned. In the meanwhile, on 23.12.2014, petitioner received a communication from the office of Naib Tehsildar, Sub Tehsil Holi, calling her for verification/cancellation of the said Scheduled Tribe certificate issued to her. She responded to the same explaining that the certificate stands rightly issued in her favour by the authorities after carrying out all necessary verifications. Despite this, vide order dated 01.01.2015, her Scheduled Tribe certificate was cancelled by the authorities on the ground that by birth she did not belong to a Scheduled Tribe category, for she hailed from an upper caste family in Roorkee (U.P.), therefore, issuance of Scheduled Tribe certificate in her favour was illegal. In view of the tribal certificate issued to the petitioner being declared as illegal in the eyes of law, she was dismissed from service on 18.2.2015. Statutory appeal filed by her also stands rejected.

6. Feeling aggrieved, petitioner has filed the present petition praying for the reliefs reproduced supra.

7. In the reply so filed to the petition, stand taken by the respondents is that the tribal certificate issued in favour of the petitioner rightly stands cancelled, for by birth she did not

belong to a Scheduled Tribe category and as such could not have gained the status of a Scheduled Tribe by simply marrying a person, belonging to a Scheduled Tribe category. In support of this stand, respondent-State has relied upon various notifications issued by the Government of India as well as the respondent-State from time to time.

8. We have heard the learned counsel for the parties and have also carefully perused the records of the case.

9. The Preamble of the Constitution of India is the epitome of the basic structure built in the Constitution guaranteeing justice - social, economic and political - equality of status and of opportunity with dignity of person and fraternity. To establish an egalitarian social order, the trinity, the Preamble, the Fundamental Rights in Part III and the Directive Principles of State Policy in Chapter IV of the Constitution delineate the socio-economic justice.

10. Social justice is the comprehensive form to remove social imbalances by law, harmonising the rival claims or the interests of different groups and/or sections in the social structure or individuals by means of which alone it would be possible to build up a welfare State. The ideal of economic justice is to make equality of status meaningful and life worth living at its best removing inequality of opportunity and of status - social, economic and political.

11. Social democracy means a way of life which recognises liberty, equality and fraternity as principles of life. They are the trinity. One cannot diverse one from the other. Without equality, liberty would produce supremacy of the few over the many. Equality without liberty would denude the individual of his initiative to improve excellence. Without fraternity, liberty and equality would not nurture as their natural habitat. Social and economic justice is a constitutional right enshrined for the protection of the society. The right to socioeconomic justice in the trinity, the Preamble, Fundamental Rights and Directives is to make the quality of life of the disadvantaged people meaningful. Equal protection in Article 14, therefore, requires affirmative action by the State to those unequals by providing facilities and opportunities.

12. Part-XVI of the Constitution carves out special provisions, relating to certain classes. Articles 341 and 342 therein deal with the power of the State to specify the castes, races or tribes, which for the purposes of the Constitution are deemed to be Scheduled Castes or Scheduled Tribes, in relation to the respective State/Union Territory.

13. Article 366 (24) & 366 (25) defines the terms “Scheduled Castes” and “Scheduled Tribes”. It reads as under:

> “(24) “Scheduled Castes” means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution.”
>
> “(25) “Scheduled Tribes” means such tribes or tribal communicates or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution.”

14. Article 15 reads as under:

> “15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth :-
>
> (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
>
> (a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."

15. Article 16 reads as under:

"16. Equality of opportunity in matters of public employment :-

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making any provision for reservation 3[in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

16. It is the mandate of Article 16 that there shall be equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State. However, the Article itself carves out certain exceptions and one such being to make provisions for reservation for appointment or posts in favour of any backward class of citizens, which, in the opinion of the State, is not adequately represented in the services under the State.

17. Significantly, Article 16 or for that matter Article 366 does not define the expression "any backward class of citizens". We notice that such endeavour was made by a Constitution Bench (Five Judges) of the Apex Court in *M. Nagaraj and others v. Union of India and others,* (2006) 8 SCC 212, wherein the Court explained the necessity for reservation, being necessary for transcending castes and not for perpetuating the same. The Court cautioned that reservation had to be used in a limited sense, otherwise it would perpetuate casteism in the country. Equality in Article 16 was held individual specific, whereas reservation in Articles 16(4) and 16(4-A) was enabling. The discretion of the State, however, was subject to the existence of backwardness and inadequacy of representation for public employment. "Backwardness" had to be based on objective factors, whereas "inadequacy" had to be measured on the basis of factual existence.

18. Inadequacy in representation and backwardness of the Scheduled Castes and Scheduled Tribes are circumstances, which enable the State Government to act under Articles 15(4) and 16(4) of the Constitution. Thus, it can safely be held that the expression "any backward class of citizens" would include Scheduled Castes and Scheduled Tribes.

19. We may notice that much prior thereto, a Constitution Bench (Nine Judges) of the Apex Court in *Indra Sawhney & others v. Union of India & others,* 1992 Supp (3) SCC 217, had also observed as under:

> "769. In the former princely State of Travancore, the expression used was "Communities", as would be evident from the Proceedings of the Government of His Highness the Maharaja of Travancore, contained in Order R. Dis. N. 893/general dated Trivandrum, 25th June, 1935. It refers to earlier orders on the subject as well. What is significant is that the expression "communities" was used as taking in Muslims and certain sections of Christians as well; it was not understood as confined to castes in Hindu social system alone. The operative portion of the order reads as follows:
>
> > "....Accordingly, Government have decided that all communities whose population is approximately 2 per cent of the total population of the State or about one lakh, be recognised as separate communities for the purpose of recruitment to the public service. The only exception from the above rule will be the Brahmin community who, though forming only 1.8 per cent of the total population, will be dealt with as a separate community. On the above basis the classification of communities will be as follows:-
> >
> > A. HINDU
> >
> > 1. Brahmin.
> >
> > 2. Nayar.
> >
> > 3. Other Caste Hindu.
> >
> > 4. Kummula.
> >
> > 5. Nudar.
> >
> > 6. Ezlmva.
> >
> > 7. Cheramar (Pulaya)
> >
> > 8. Other Hindu.
> >
> > B. MUSLIM.

C. CHRISTIAN.

1. Jacobite.

2. Marthomite.

3. Syriac Catholic.

4. Latin Catholic.

5. South India United Church.

6. Other Christian."

In the then United Provinces, the term "Backward Classes" was understood as covering both the untouchable classes as well other "Hindu Backward" classes. Marc Galanter says:

> "The United Provinces Hindu Backward Classes League (founded in 1929) submitted a memorandum which suggested that the term "Depressed" carried a connotation "of untouchability, in the sense of causing pollution by touch as in the case of Madras and Bombay" and that many communities were reluctant to identify themselves as depressed. The League suggested the term "'Hindu' Backward'" as a more suitable nomenclature. The list of 115 castes submitted included all candidates from the untouchable category as well as a stratum above. "All of the listed communities belong to non-Dwijas or degenerate or Sudra classes of the Hindus." They were described as low socially, educationally and economically and were said to number over 60% of the population."

The expression "depressed and other backward classes" occurs in the Objectives Resolution of the Constituent Assembly moved by Jawaharlal Nehru on December 13, 1946."

"860. For the sake of ready reference, we also record our answers to questions as framed by the counsel for the parties and set out in para 681. Our answers question-wise are:

> (1). Article 16(4) is not an exception to Article 16(1). It is an instance of classification inherent in Article 16(1). Article 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under Clause (1) of Article 16.
>
> (2). The expression 'backward class' in Article 16(4) takes in 'Other Backward Classes', S.Cs., S.Ts. and may be some other backward classes as well. The accent in Article 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are inter-twined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to Article 46 do include S.E.B.Cs. referred to in Article 340 and covered by Article 16(4).
>
> (3). Even under Article 16(1), reservations cannot be made on the basis of economic criteria alone."

"(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable - nay,

> necessary - to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.
>
> For excluding 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement."

20. The Apex Court in *Nityanand Sharma & another v. State of Bihar & others,* (1996) 3 SCC 576 (Two Judges), after considering its earlier decision in *Indra Sawhney & others v. Union of India & others,* 1992 Supp (3) SCC 217, reiterated that reservation under Article 16(4) is not made in favour of a "caste" but a "Backward Class". Once a caste satisfies the criteria of backwardness, it becomes a Backward Class for the purpose of Article 16(4). Even that is not enough. It must further be found that the Backward Class is not adequately represented in the services of the State. It would, therefore, be for the authority constituted under Article 340 or the appropriate authority to identify the Backward Class eligible for entitlement under Article 16(4). It would thus be seen that the Dalits, Tribes and identified Backward Classes of citizens who are not adequately represented in a service or office under the State are eligible to be considered under Article 16(1) read with Article 16(4); Equally under Article 15(4) for admission in educational institutions and in other programmes.

21. In the very same decision, the Court framed the following question for itself:

> "Whether a candidate, by marriage, adoption or obtaining a false certificate of social status would be entitled to an identification as such member of the class for appointment to a post reserved under Article 16(4) or for an admission in an educational institution under Article 15(4)?"

And answered the same in the following terms:

> "33. However, the question is : Whether a lady marrying a Scheduled Caste, Scheduled Tribe or OBC citizen, or one transplanted by adoption or any other voluntary act, ipso facto, becomes entitled to claim reservation under Articles 15(4) or 16(4), as the case may be ? It is seen that Dalits and Tribes suffered social and economic disabilities recognised by Articles 17 and 15(2). Consequently, they became socially, culturally and educationally backward; the OBCs also suffered social and educational backwardness. The object of reservation is to remove these handicaps, disadvantages, sufferings and restrictions to which the members of the Dalits or Tribes or OBCs were subjected and was sought to bring them in the mainstream of the nation's life by providing them opportunities and facilities.
>
> 34. In *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde*, 1995 Supp (2) SCC 549, and *R. Chandevarappa v. State of Karnataka*, (1995) 6 SCC 309, this Court had held that economic empowerment is a fundamental right to the poor and the State is enjoined under Articles 15(3), 46 and 39 to provide them opportunities. Thus, education, employment and economic empowerment are some of the programmes the State has evolved and also provided reservation in admission into educational institutions, or in case of other economic benefits under Articles 15(4) and 46, or in appointment to an office or a post under the State under Article 16(4). Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also have had undergone the same handicaps, and must have been subjected to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A candidate who had the advantageous start in life being born in Forward Caste and had march of advantageous life but is transplanted in Backward Caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) or 16(4), as the case may be. Acquisition of the status of Scheduled Caste etc. by voluntary mobility into

> these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution.
>
> … … … …
>
> 36. The recognition of the appellant as a member of the Latin Catholics would not, therefore, be relevant for the purpose of her entitlement to the reservation under Article 16(4), for the reason that she, as a member of the Forward Caste, had an advantageous start in life and after her completing education and becoming major, married Yesudas; and so, she is not entitled to the facility of reservation given to the Latin Catholics, a Backward Class." (Emphasis supplied)

22. The aforesaid principles stand reiterated by the Apex Court in *Heikham Surchandra Singh & others v. Representative or "Lois" Kakching, Manipur (A Scheduled Caste Uplift Body) & others,* (1997) 2 SCC 523 (Two Judges), wherein the Court was dealing with a case where a person hailing from a forward class had married a person hailing from a backward class (Fisherman). (Also: *State of Tripura & others v. Namita Majumdar (Barman) (Smt),* (1998) 9 SCC 217).

23. Significantly, not only in the case of appointment but also that of election under the provisions of the Representation of Peoples Act, 1951, the Apex Court consistently followed the aforesaid principles. Noticing its earlier decision rendered in *N.E. Horo v. Smt. Jahanara Jaipal Singh,* (1972) 1 SCC 771 (Two Judges), which it partly over-ruled, the Court in *Sobha Symavathi Devi v. Setti Gangadhara Swamy & others,* (2005) 2 SCC 244 (Three Judges), specifically held that the principle relating to reservation under Articles 15(4) and 16(4) has to be extended to the constitutional reservation of a seat for a Scheduled Tribe in the House of People or under Article 332 to the Legislative Assembly, for the said reservations are also constitutional reservations, intending to benefit the real underprivileged and not extending to those who come to the class by way of marriage.

24. The principle, even in a case of election to the Municipal Council (Delh), stands reiterated by the Apex Court in *Meera Kanwaria v. Sunita & others,* (2006) 1 SCC 344 (Two Judges).

25. What is the meaning of word "tribe" stands explained by the Apex Court in *Anjan Kumar v. Union of India & others,* (2006) 3 SCC 257 (Two Judges), wherein also the Court was dealing with an identical issue in the following terms:

> "8. The 'tribe' has been characterized by Dr. Gupta, Jai Prakash in *The customary Laws of the Munda and the Oraon* quoted by this Court in *State of Kerala v. Chandramohanan*, (2004) 3 SCC 429 at 432 as under:
>
> > "Tribe has been defined as a social group of a simple kind, the members of which speak common dialect, have a single government and act together for such common purposes as warfare. Other typical characteristics include a common name, a contiguous territory, a relatively uniform culture or way of life and a tradition of common descent. Tribes are usually composed of a number of local communities e. g. bands, villages or neighbourhoods and are often aggregated in clusters of a higher order called nations. The term is seldom applied to societies that have achieved a strictly territorial organization in large States but is usually confined to groups whose unity is based primarily upon a sense of extended kinship ties though it is no longer used for kin groups in the strict sense, such as clans."
>
> Bhowmik, K. L. in Tribal *India: a profile in Indian Ethnology* observed:
>
> > "Tribe in the *Dictionary of Anthropology* is defined as 'a social group, usually with a definite area, dialect, cultural homogeneity and unifying social organization. It may include several sub-groups, such as

> sibs or villages. A tribe ordinarily has a leader and may have a common ancestor, as well as patron deity. The families or small communities making up the tribe are linked through economic, social, religious, family or blood ties'.'"

26. Significantly, in the very same decision, the Court reiterated that the object of Articles 341, 342, 15 (4) , 16 (4) and 16 (4A) is to provide preferential treatment for the Scheduled Castes and Scheduled Tribes having regard to the economic and educational backwardness and other disabilities wherefrom they suffer. So also considering the typical characteristic of the tribal including a common name, a contiguous Territory, a relatively uniform culture, simplistic way of life and a tradition of common descent, the transplantation of the outsiders as members of the tribe or community may dilute their way of life apart from such persons do not suffer any disabilities. Therefore, the condition precedent for a person to be brought within the purview of the Constitution (Scheduled Tribes) Order, 1950, one must belong to a tribe and suffer disabilities wherefrom they belong.

27. In *Ashok Kumar Thakur v. Union of India & others,* (2008) 6 SCC 1 (Five Judges), while dealing with the constitutional validity of the Constitution (93rd amendment) Act, 2005, whereby, by law, for the advancement of any socially and educationally backward class of citizens/Scheduled Castes/ Scheduled Tribes/special provisions relating to admissions to educational institutions, private or otherwise, aided or unaided, other than the minority educational institutions, the Apex Court again highlighted the absence of equality, both on social and economic plane, necessitating insertion of the Articles providing for reservation under the Constitution. What is the real meaning of "Caste"? Is "caste" a "class"? We quote the following from the said judgment:

> "149. "Caste" is often used interchangeably with "class" and can be called as the basic unit in social stratification. The most characteristic thing about a caste group is its autonomy in caste related matters. One of the universal codes enforced by all castes is the requirement of endogamy. Other rules have to do with the regulations pertaining to religious purity or cleanliness. Sometimes it restricts occupational choices as well. It is not necessary that these rules be enforced in particular classes as well, and as such a "class" may be distinguished from the broader realm of "caste" on these grounds. Castes were often rated, on a purity scale, and not on a social scale.
>
> 150. The observations made by Venkataramaiah J. in *K.C. Vasanth Kumar v. State of Karnataka, 1985 Supp SCC 714,* are relevant in this regard:
>
> > "110. We are aware of the meanings of the words caste, race, or tribe or religious minorities in India. A caste is an association of families which practise the custom of endogamy i.e. which permits marriages amongst the members belonging to such families only. Caste rules prohibit its members from marrying outside their caste. There are sub-groups amongst the castes which sometimes inter-marry and sometimes do not. A caste is based on various factors, sometimes it may be a class, a race or a racial unit. A caste has nothing to do with wealth. The caste of a person is governed by his birth in a family. Certain ideas of ceremonial purity are peculiar to each caste. Sometimes caste practices even led to segregation of same castes in the villages. Even the choice of occupation of members of castes was predetermined in many cases, and the members of a particular caste were prohibited from engaging themselves in other types of callings, professions or occupations. Certain occupations were considered to be degrading or impure. A certain amount of rigidity developed in several matters and many who belonged to castes which were lower in social order were made to suffer many restrictions, privations and humiliations. Untouchability was practised

against members belonging to certain castes. Inter-dining was prohibited in some cases. None of these rules governing a caste had anything to do with either the individual merit of a person or his capacity. The wealth owned by him would not save him from many social discriminations practised by members belonging to higher castes. Children who grew in this caste ridden atmosphere naturally suffered from many social disadvantages apart from the denial of opportunity to live in the same kind of environment in which persons of higher castes lived. Many social reformers have tried in the last two centuries to remove the stigma of caste from which people born in lower castes were suffering. Many laws were also passed prohibiting some of the inhuman caste practices."

151. Rivers, the leading anthropologist, criticizes the use of the terms "caste" and "class" as synonyms. However, many others, such as Lowie and Kimball Young W.H.R. Rivers, *Social Organization* (New York, 1924), use these terms as though they were identical.

... ...

156. On the other hand, it is possible that within a caste group there is a marked inequality of status, opportunity, or social standing which then defines the "class" within that particular "caste" system. For example, all the Brahmins are not engaged in highly respectable employment, nor are all very wealthy. It may even be that some Brahmins may be servants of members of a lower caste, or it may also be so that the personal servant of a rich Brahmin may be a poor Brahmin. Hence, there is every reason to believe that within a single caste group there are some classes or groups of people to whom good fortune or perseverance has brought more dignity, social influence and social esteem than it has to others.

157. In India, caste, in a socio-organizational manner would mean that it is not characterized merely by the physical or occupational characteristics of the individuals who make it up; rather, it is characterized by its codes and its close-knit social controls. In the case of classes, however, there may not exist such close-knit unit social controls, and there may exist great disparity in occupational characteristics.

158. A social class is therefore a homogeneous unit, from the point of view of status and mutual recognition; whereas a caste is a homogeneous unit from the point of view of common ancestry, religious rites and strict organizational control. Thus the manner in which the caste is closed both in the organizational and biological sense causes it to differ from social class. Moreover, its emphasis upon ritual and regulations pertaining to cleanliness and purity differs radically from the secular nature and informality of social class rules. In a social class, the exclusiveness would be based primarily on status. Social classes divide homogeneous populations into layers of prestige and esteem, and the members of each layer are able to circulate freely with it.

159. In a caste, however, the social distance between members is due to the fact that they belong to entirely different organizations. It may be said, therefore, that a caste is a horizontal division and a class, a vertical division."

(Emphasis supplied)

28. A Constitution Bench (Five Judges) of the Hon'ble Supreme Court in *Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and another* Vs. *Union of India and another*, (1994) 5 SCC 244 has also observed that:

"3. On a plain reading of clause (1) of Articles 341 and 342 it is manifest that the power of the President is limited to specifying the castes or tribes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or a Union Territory, as the case may be. Once a notification is issued under clause (1) of Articles 341 and 342 of the Constitution, Parliament can by law include in or exclude from the list of Scheduled Castes or Scheduled Tribes, specified in the notification, any caste or tribe but save for that limited purpose the notification issued under clause (1), shall not be varied by any subsequent notification. What is important to notice is that the castes or tribes have to be specified in relation to a given State or Union Territory. That means a given caste or tribe can be a Scheduled Caste or a Scheduled Tribe in relation to the State or Union Territory for which it is specified. These are the relevant provisions with which we shall be concerned while dealing with the grievance made in this petition.

....

16. We may add that considerations for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes/Schedule Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally non est in another State to which persons belonging thereto may migrate. Coincidentally it may be that a caste or tribe bearing the same nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different. Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the fights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State "for the purposes of this Constitution". This is an aspect which has to be kept in mind and which was very much in the minds of the Constitution-makers as is evident from the choice of language of Articles 341 and 342 of the Constitution. That is why in answer to a question by Mr Jaipal Singh, Dr Ambedkar answered as under:

"He asked me another question and it was this. Supposing a member of a Scheduled Tribe living in a tribal area migrates to another part of the territory of India, which is outside both the scheduled area and the tribal area, will he be able to claim from the local Government, within whose jurisdiction he may be residing the same privileges which he would be entitled to when he is residing within the scheduled area or within the tribal area? It is a difficult question for me to answer. If that matter is agitated in quarters where a decision on a matter like this would lie, we would certainly be able to give some answer to the question in the form of some clause in this Constitution. But so far as the present Constitution stands, a member of a Scheduled Tribe going outside the scheduled area or tribal area would certainly not be entitled to carry with him the privileges that he is entitled to when he is residing in a scheduled area or a tribal area. So far as I can see, it will be practicably impossible to enforce the provisions that apply to tribal areas or scheduled areas, in areas other than those which are covered by them...."

Relying on this statement the Constitution Bench ruled that the petitioner was not entitled to admission to the medical college on the basis that he belonged to a Scheduled Tribe in the State of his origin."

29. The aforesaid principles stand reiterated by the Apex Court in *Kumari Madhuri Patil & another v. Addl. Commissioner, Tribal Development & others,* (1994) 6 SCC 241; *U.P. Public Service Commission, Allahabad v. Sanjay Kumar Singh,* (2003) 7 SCC 657; *S. Pushpa & others v. Sivachanmugavelu & others,* (2005) 3 SCC 1; *Subhash Chandra & another v. Delhi Subordinate Services Selection Board & others,* (2009) 5 SCC 458; and *Sanjeev Kumar & another v. State of Bihar & others,* (2016) 13 SCC 105.

30. Thus, it is evident from the above judgment that let alone a General category candidate who marries a person belonging to a Scheduled Caste or a Scheduled Tribe, even a person belonging to Scheduled Caste or Scheduled Tribe of one State cannot get the benefit of Scheduled Caste or Scheduled Tribe in another State.

31. Recently a three Judge Bench of the Hon'ble Supreme Court in *Chairman and Managing Director FCI and others* v. *Jagdish Balram Bahira and ors.*, (2017) 8 SCC 670 has held as under:

> "51. Since the decision of the Bench of three judges in R. Vishwanatha Pillai Vs. State of Kerala (supra) the position of law which has been laid down by this Court is that where an appointment to a post or admission to an educational institution is made against a vacancy which is reserved for a Scheduled Caste or Tribe or a socially and educationally backward class, the invalidation of the claim of the candidate would result in the appointment or, as the case may be, the admission being void and non est. This principle has been followed by another judgment of three Judges in Dattatray (supra). The same position has been propounded by a two judge bench in Bank of India Vs. Avinash Mandivikar (supra). The formal termination of an employment or the withdrawal of admission is a necessary consequence which flows out of the invalidation of the caste or tribe claim. The only exception to this principle consists of those cases where, in exercise of the power conferred by Article 142, the Court considered it appropriate and proper to protect the admission which was granted or, as the case may be, the appointment to the post.

32. We notice similar view to have been taken by a Coordinate Bench of this Court in *Smt. Manju v. State of H.P. & others,* AIR 2007 HP 74.

33. Therefore, as per the law as it stands today, it is very clear and categorical that a person who does not belongs to a Scheduled Tribe or a Scheduled Caste category by birth, simply by virtue of marrying a person belonging thereto cannot gain the status of that particular caste or tribe.

34. Coming to the facts of this case, the contention of the learned counsel for the petitioner that petitioner mislead none at the time when the Scheduled Tribe certificate was obtained by her, on the strength of which, she gained employment, in our considered view, is of no help to the petitioner. This we say so for the reason that undisputedly, petitioner was not entitled to be issued a certificate that she belonged to a Scheduled Tribe category only on the strength of her husband belonging to the said tribe. Not only this, findings returned by the authorities while dismissing the petitioner from service also do not call for any interference, because perusal of the orders passed by the said authorities demonstrate that in fact the petitioner had submitted a false tribal certificate. In the certificate submitted, she did not mention the name of her father. It was got issued by referring therein, name of her husband.

35. Order, dated 12.09.2016 (Annexure P-12) demonstrates that petitioner was called upon by the Principal of the Kendriya Vidyalya to submit Scheduled Tribe certificate in which she was referred to as *'daughter of'* in place of *'wife of'*, but she failed to submit the same within the stipulated time.

36. We find principles of natural justice to have been fully complied with.

37. Therefore, in view of the above discussion, as admittedly by birth petitioner did not belong to a Scheduled Tribe category, she could not have gained status thereof, by simply marrying a person belonging to such category, we do not find any illegality with the action of the authorities whereby Scheduled Tribe certificate issued in her favour was cancelled and employment obtained by her on the strength of said certificate was terminated.

In view of above, as there is no merit in the present petition, the same is accordingly dismissed, so also miscellaneous applications, if any. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. and others .....Petitioners.

Vs.

Dr. Rohit Sharma and another .....Respondents.

CWP No. 1980 of 2017
Date of Decision: 14.11.2017

Constitution of India, 1950- Article 226- Civil Writ Petition- Petitioner seeking regularization- cut off mentioned by way of administrative instructions curtailing the benefit to those who had completed 6 years service as on 31.3.2012- petitioner challenging the imposition of cut off date before the H.P. Administrative Tribunal- Original Application allowed- feeling aggrieved State challenge the same before the High Court- while dismissing the writ petition, High Court held that the cabinet had taken a decision to confer the right of regularization on contract employees on completion of six years of service – any subsequent executive instructions curtailing the benefit of regularization to employees having completed 6 years on 31.3.2013 was illegal and unjust- any instructions in this behalf could not have been passed without the approval of the cabinet- writ petition dismissed. (Para-5 to 7)

For the petitioners: Mr. Anup Rattan, Additional Advocate General.
For the respondents: Mr. Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

By way of this writ petition, the State has assailed order, dated 31.03.2016, passed by the learned Himachal Pradesh Administrative Tribunal, Shimla in T.A. No. 1710 of 2015, vide which, learned Tribunal disposed of the Transfer Application in the following terms:

> *"The applicants were appointed as Veterinary Officers, on contract, and joined service on 17.06.2006. They had completed six years service for regularization in terms of decision dated 8.8.2012 taken by the CMM of Himachal Pradesh. The respondent did not regularize the services of the applicant on completion of six years service. The cutoff date mentioned in notification dated 31.8.2012 superseding the decision of the CMM that the persons who had completed six years service as on 31.3.2012 were to be regularized was illegal. The applicants have completed six years service, on contract, for regularization.*
>
> *2. Consequently, the transferred application is allowed and the respondents are directed to consider case of the applicants for regularization on completion of six years service.*

3. The pending miscellaneous application(s), if any, also stand disposed of."

2. Brief facts necessary for the adjudication of the present petition are that respondents before this Court joined the services of the respondent-State as Veterinary Officer on contract basis in June 2006. Vide instructions, dated 17th August, 2012, issued by the Department of Personnel, Government of Himachal Pradesh, on the subject "*Regularization of contract appointees in the Government Departments-Instructions thereof*", it was notified that matter regarding regularization of services of contractual employees working in various departments which was under consideration of the Government, stood decided by the Government, wherein a decision had been taken to regularize the services of the contractual appointees after completion of six years of service, provided they had been engaged as such after observing all codal formalities. By virtue of said instructions right of regularization accrued upon the present respondents on completion of six years of service as contract employees, as they had been engaged after observing all codal formalities. However, Department of Personnel again issued instructions, dated 31st August, 2012, wherein it was mentioned that the Government has decided to regularize the services of only those contractual appointees after completion of six years service, who had put in six years of service on contract basis as on 31.03.2012. Present respondents were aggrieved by the issuance of the said instructions, dated 31st August, 2012, because as per them, the right of regularization, which had accrued upon them vide instructions, dated 17th August, 2012, was arbitrarily curtailed by mentioning a cut off date, i.e., 31.03.2012. As per the present respondents, as a result of this arbitrary act on the part of the respondent-State, their regularization was delayed by nine months' time, as rather than their services being regularized after completion of six years of service on contract basis, the respondent-State regularized their services on 31.03.2013. Accordingly, they assailed the said act of the State by filing CWP No. 8926/2012. The impugned instructions were *inter alia* also challenged on the ground that whereas instructions, dated 17th August, 2012 were in consonance with the decision of the Cabinet, i.e. the decision taken vide Item No. 27 in the Cabinet meeting held on 08.08.2012, which correctly stood reflected in instructions, dated 17.08.2012, however, the subsequent instructions, dated 31.08.2012, were not in consonance with the decision of the Cabinet, dated 08.08.2012, as there was no cut off date mentioned in the Cabinet decision.

3. This writ petition was subsequently transferred to the learned Administrative Tribunal and the same stood disposed of vide order, dated 31.03.2016, which we have already quoted above, which stands assailed before this Court by way of this writ petition.

4. We have heard the learned Additional Advocate General as well as learned counsel for the respondent. We have also perused the original records of the case, which were made available for the perusal of the Court by the learned Additional Advocate General.

5. Records demonstrate that there was no cut off date prescribed in the Cabinet memorandum, wherein the decision was taken by the Cabinet to regularize the services of employees serving in various departments of the Government, who had completed more than six years of service. Learned Additional Advocate General also did not dispute the fact that instructions, dated 31.08.2012 were not issued after getting necessary approval from the Cabinet or in other words, that the insertion of the cut off date, which finds mentioned in the said instructions was not with the approval of the Cabinet.

6. Having heard learned counsel for the parties and having gone through the records of the case, we do not find any infirmity with the order passed by the learned Tribunal. We say so for the reason that in terms of the decision of the Cabinet, dated 08.08.2012, the right of regularization stood conferred upon the present respondents on completion of six years of service and this right stood crystallized by the Government pursuant to the issuance of instructions, dated 17.08.2012. It is not the case of the State that inadvertently the cut off date was not mentioned in instructions, dated 17.08.2012. Explanation which has been given at the Bar by the learned Additional Advocate General is that the cut off date was given for the sake of convenience, because otherwise the State would have had to issue the orders of regularization

almost every day, as employees serving in various Departments of Government complete six years of service every other day.

7. Be that as it may, when Cabinet had taken the decision to confer the right of regularization on contract employees, who had been so appointed after observing all codal formalities, then this right of regularization on completion of six years of service could not have been arbitrarily delayed by the State, as has been done by it by issuance of instructions, dated 31.08.2012. Convenience of the Executive cannot defeat the right of regularization, which stood conferred upon the employees by virtue of the decision of the Cabinet. In fact, in our considered view, as instructions, dated 17.08.2012, were issued on the basis of the recommendations of the Cabinet, no alteration in the same could have been done by the State without the approval of the Cabinet. In this background, when we peruse order, dated 31.03.2016 passed by the learned Tribunal, we do not find any infirmity with the same. Learned Tribunal has rightly held that the cut off date mentioned in instructions, dated 31.08.2012, supersedes the decision of the Cabinet and the same thus was illegal.

8. Therefore, as we do not find any infirmity with the order, dated 31.03.2016, passed by the learned Tribunal and further as we are also of the view that the right of regularization conferred upon the private respondents on completion of six years of service by the Cabinet could not have been arbitrarily altered or delayed to their disadvantage by the Executive, we dismiss the present writ petition being devoid of any merit. Miscellaneous application(s), if any, also stand disposed of.

****

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

Gian Dass and others .....Plaintiffs/Petitioners.

Versus

Daulat Ram and others .....Defendants/Respondents.

CMPMO No.379 of 2017.
Judgment reserved on : 31.10.2017.
Date of decision: 16th November, 2017.

Constitution of India, 1950- Article 227- Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- Section 64- National Highways Act, 1956- Section 3H (4)- Petitioners while claiming objection vis-à-vis the land acquired for construction of National Highway laying exclusive claim for the award amount- Land Acquisition Collector however passed an award and issued notices to the petitioners as well as respondent No.1 to receive the compensation for the acquisition. Petitioners filed a Reference under Section 64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which was dismissed as not maintainable- Consequently, petitioners filed a civil suit under Sections 34 to 39 of the Specific Relief Act. Respondents question the jurisdiction of the Civil Court to entertain the suit in view of specific bar under Section 63 of the Rehabilitation and Resettlement Act- Held- that acquisition carried out under the National Highways Act, 1956, having been specified in the 4th Schedule of the Rehabilitation and Resettlement Act, 2013 shall be applicable vis-à-vis determination of compensation as per notification dated 28.8.2015 issued by the Central Government- the apportionment of the amount of the compensation, however, can be challenged before the Principal, Civil Court of original jurisdiction within the limits of whose jurisdiction land is situated, as per Section 3H(4) of the National Highways Act. (Para-4 to 8)

For the Petitioners : Mr.Sanjeev Kuthiala, Advocate.

For the Respondents : Mr.Maan Singh, Advocate, for respondent No.1.
Mr.Neeraj K.Sharma, Dy.A.G., for respondents No. 6 and 8.
Ms.Jyotsna Rewal Dua, Senior Advocate with Ms.Shalini Thakur, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Article 227 of the Constitution of India has been filed with the following substantive prayers:-

"a) *To call for the record of the case pertaining to CMA 121-IV/17, registered No.255/17 instituted on 08.06.2017, titled as Gian Dass & others vs. Daulat Ram and others, pending before the Ld. Civil Judge (Senior Division) Mandi District Mandi H.P. and after examining the legality and propriety of the case direct the Ld. Trial Court to ask respondent No.8 to take steps for recovering the released amount from the respondent No.1.*

b) To direct the Ld. Trial Court to expedite the matter and to decide the stay application and other application and also pass the orders on the stay of the application immediately.

c) To direct the Ld. Trial Court to take appropriate tangible security/bank guarantee from the respondent No.1 with respect to the amount so received by the respondent No.1 from the respondent No.8 and to further direct the respondent No.8 to release the undisputed compensation amount to the plaintiffs/petitioners."

2. The dispute in question relates to land comprised in Khasra Nos.321, 322 and 323, situate in Mauza Jhiri, Tehsil Aut, District Mandi, which were abutting to the National Highway No.21 and were acquired by respondents No.7 and 8 vide notification dated 16.02.2015 published on 27.03.2015 under the National Highways Act (for short 'Act'). The petitioners filed objections against the said notification and laid exclusive claim for the award insofar it pertained to Khasra Nos. 322 and 323, respectively. On 18.01.2017, the Land Acquisition Collector passed the award in respect of the aforesaid Khasra Numbers and issued notices to the petitioners as also respondent No.1 to receive compensation vide notice dated 24.05.2017. Since the respondents were also held entitled to a part of compensation, the petitioners filed a reference under Section 64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 'Rehabilitation and Resettlement Act, 2013'). However, the said reference was dismissed as not maintainable constraining the petitioners to file a civil suit under Sections 34 to 39 of the Specific Relief Act for the relief as already reproduced hereinabove.

3. Upon notices to the respondents, they questioned the jurisdiction of the Civil Court to entertain the suit in view of the specific bar contained under Section 63 of the Rehabilitation and Resettlement Act, 2013. It was further submitted that in absence of any challenge to the lawful award made by the Collector in exercise of powers conferred in sub-section (1) of Section 3-G of the National Highways Act, the suit was not maintainable.

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

4. At the outset, it may be noticed that the provisions of the erstwhile Land Acquisition Act of 1894, were specifically excluded to the acquisitions made under the National Highways Act, 1956, as is clearly evident from perusal of Section 3-J of the Act which reads thus:-

"***3J. Land Acquisition Act 1 of 1894 not to apply***

Nothing in the Land Acquisition Act, 1894 shall apply to an acquisition under this Act.]"

5. However, as regards the applicability of the Rehabilitation and Resettlement Act, 2013 which in turn repealed the Act of 1894, there is a difference in position of law. The Central Government was empowered to extend the benefit of First, Second and Third Schedules to the acquisition under the enactment specified in Fourth Schedule of the Rehabilitation and Resettlement Act, 2013, within one year in terms of Section 105(3) of the Act, however, no such notification was issued within one year. In the meantime, three ordinances being Ordinance No.9/2014, 4/2015 and 5/2015 were issued, but all these ordinances lapsed. The Central Government thereafter issued a notification dated 28.08.2015 which is extracted below:-

"MINISTRY OF RURAL DEVELOPMENT ORDER New Delhi, the 28th August, 2015. Now, therefore, in exercise of the powers conferred by sub-section(1) of Section 113 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013), the Central Government hereby makes the following Order to remove the aforesaid difficulties, namely:-

1. (1) This order may be called the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Removal of Difficulties) Order, 2015.

(2) It shall come into force with effect from the 1st day of September, 2015.

2. The provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, relating to the determination of compensation in accordance with the First Schedule, rehabilitation and resettlement in accordance with the Second Schedule and infrastructure amenities in accordance with the Third Schedule shall apply to all cases of land acquisition under the enactments specified in the Fourth Schedule to the said Act."

6. Thus, in view of the aforesaid notification, the provisions of Rehabilitation and Resettlement Act, 2013, relating to determination of compensation in accordance with the First Schedule, rehabilitation and resettlement in accordance with the Second Schedule and infrastructure amenities in accordance with the Third Schedule, shall apply to all cases of land acquisition under the enactment specified in Fourth Schedule of the Rehabilitation and Resettlement Act, 2013. Admittedly, the National Highways Act is included in the Fourth Schedule and finds mention at Serial No.7 thereof. Yet, it needs to be noticed that save and except what has been set out in the notification dated 28.08.2015, the entire provisions of the Act have not been made applicable to the acquisition carried out under the National Highways Act. Therefore, the provisions of the Rehabilitation and Resettlement Act have only to be read to the extent the acquisition carried out under the National Highways Act as have been specifically spelt out in the notification dated 28.08.2015 and nothing beyond that.

7. Having taken note of the Rehabilitation and Resettlement Act, 2013, I may now advert to the relevant provisions of the National Highways Act. Section 3H (4) of the Act provides for apportionment of the amount and reads thus:-

"3-H. Deposit and payment of amount.-

(4) If any dispute arises as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the principal Civil Court of original jurisdiction within the limits of whose jurisdiction the land is situated."

8. It would be noticed that Section 3H (4) of the National Highways Act, 1956, prescribes that if any dispute as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the Principal Civil Court of original jurisdiction within the limits of whose jurisdiction the land is situated.

9. Indisputably, in the instant case, the dispute raised by the petitioners relates to apportionment and, therefore, the dispute was required to be referred to the jurisdiction of the Principal Court of original jurisdiction.

10. Now, the moot question is as to which Court can be said to be a Principal Civil Court of original jurisdiction as the same has not been defined in the Act. However, Section 3(17) of the General Clauses Act, 1897, defines the "District Judge" as "Judge of Principle Civil Court of original jurisdiction", but shall not include a High Court in exercise of its ordinary or extraordinary original civil jurisdiction. This means that the Principal Civil Court of original jurisdiction contemplated in Section 3H(4) of the National Highways Act, 1956 is the "District Judge" of the Civil Court within the limits of whose jurisdiction the land is situated.

11. Now, in this background, the further question that arises as to whether the civil suit filed by the petitioners of their own is maintainable in view of what has been noticed above. The answer to the said question is obviously in the negative for more than one reason. Firstly, the Civil Court where the suit has been instituted is not the Principal Civil Court of original jurisdiction and secondly the claim having not been forwarded by the competent authority under Section 3H (4) is otherwise not maintainable.

12. In view of the aforesaid discussion, it can conveniently be held that the civil suit instituted by the petitioners before the Civil Court is not maintainable. Accordingly, there is no merit in this petition and the same is dismissed and even the suit instituted by the petitioners is held to be not maintainable and is accordingly dismissed. The parties are left to bear their own costs. Pending application, if any, also stands disposed of.

13. However, dismissal of the petition will not debar the petitioners from approaching the competent authority under Section 3H (4) of the National Highways Act, 1956 and in case such application is filed, then needless to say, the competent authority shall consider such application strictly in accordance with law without being influenced by what has been observed above and decide the same as expeditiously as possible.

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

Mandeep Kaur ...Petitioner.

Versus

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

Cr.MMO No. 182 of 2017

Date of decision: 16.11.2017

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

For the petitioner: Mr. Shanti Swaroop, Advocate.

For the respondents: Mr. Vivek Singh Attri, Addl. A.G.for Respondents No. 1 and 2.

Mr. Ramakant Sharma, Sr. Advocate with Ms. Devyani Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

In F.I.R. bearing No. 5 registered, at Mahila Police Station, Baddi, the complainant/ petitioner herein reared allegations against respondents No. 4, 5 and 6 qua theirs, committing offences, embodied, in Sections 498A, 406, 506 read with Section 34 IPC. In pursuance, to, the lodging of the aforesaid F.I.R, the Investigating Officer concerned, with utmost promptitude, proceeded to recover items of Istridhan, from respondent No.5. The aforesaid seizure occurred on 23.3.2017, in respect whereof, a seizure memo stood prepared, copy whereof is appended with the instant petition, as annexure R-3. In the reply on affidavit furnished by the State, it is ear-marked, that, at the time of preparation of seizure memo, on 23.3.2017, the complainant/petitioner being also present AND also hers identifying all the items of Istridhan embodied therein. Subsequently on 17.05.2017, the complainant has instituted the instant petition, before this Court, wherewith she has appended an additional list of Istridhan items, items whereof she contends, to remain yet un-recovered, by the Investigating Officer, from the accused concerned. Hence a prayer is made for the investigation(s) being ordered to be transferred from respondent No.3, given his not holding fair investigations therein.

2. However, the preparation of the list appended with the writ petition AND bearing annexure P-3, appears, to be a sequel of sheer contrivance besides stratagem, deployed by her given (a) The aforesaid items being un-enumerated in the F.I.R (b) the State of H.P. with its reply appending annexure R-4, annexure whereof stood prepared on 23.3.2017 itself (c) at the time of its preparation, the purported items of Istridhan, mentioned herein, not, finding their enumeration therein (d) thereupon this fact of theirs being purportedly, not returned viz-a-viz her, is, obviously engineered by sheer afterthought, for only maligning**,** the investigation(s) conducted by the I.O. Consequently, the prayer made by the petitioner, for the transfer of investigation(s) from respondent No.3, is not properly constituted, hence is declined. The respondents No. 2 and 3 have also been prayed to be arrested, whereas, no allegations, for their arrest, arising from theirs committing any non-bailable offence, stands, embodied either in any apposite complaint or in any F.I.R lodged with the Police Station concerned. Even if the petitioner still intends, to, make a prayer for their arrest, she is enjoined to prior thereto, make apposite motion(s) before the authority(s) concerned, whereas hers not making the apposite motion hence constrains, this Court to also decline the aforesaid relief to her. Accordingly, the petition is dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ.

Davinder Kumar ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 65 of 2009

Date of Decision : November 17, 2017

N.D.P.S. Act, 1985- Section 20- Appeal under Section 374(2) Cr.P.C- Appellant convicted under Section 20 of the Act and sentenced to undergo rigorous imprisonment for a period of six months and pay a fine of Rs.2,000/-- an appeal preferred against the conviction and sentence- conviction passed on the sole testimony of the police officials- no endeavour made to associate

independent witnesses- Held that sole testimony of the police official can be relied without any corroboration by other admissible evidence, but provided, it is reliable, trustworthy and cogent. On appreciation of facts held that the testimony of the police officials rendered the genesis of the prosecution version highly doubtful, presence of the police officials on the spot was also shrouded in doubt- Further held that the non-availability of an independent witness, as was proclaimed by the prosecution was also doubtful- Conviction and sentence of the accused set aside.

(Para-19 to 30)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338

For the appellant	:	Mr. Ajay Chandel, Advocate, for the appellant.
For the respondent	:	Mr. R. S. Verma and Mr. M.L. Chauhan, Addl. Advocate Generals for the respondent-State. Ms. Shreya Chauhan, Advocate, as *amicus curiae*.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

Assailing the judgment dated 30.3.2009, passed by the learned Special Judge, Hamirpur, H.P., in Sessions Trial No. 21 of 2008, titled as *State of Himachal Pradesh vs. Davinder Kumar*, whereby the appellant-accused stands convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of six months and pay fine of Rs.2,000/-, he has filed the present appeal under the provisions of Section 374(2) of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that on 12.2.2008, police party headed by SI Fauja Singh (PW-8) were travelling in a vehicle and at about 3.00 p.m. at a place known as Kot, they saw the accused, who seeing the police party got perplexed and tried to flee. However while doing so, he threw a packet which the police picked and on opening found charas. Total quantity was of 200 grams. Two samples of 10 grams each were drawn. The samples as also the bulk parcel were separately sealed with seal impression – S and taken into possession vide recovery memo (Ext. PW-1/A). Fauja Singh filled up NCB forms (Ext. PW-8/A) on the spot, where after, ruka (Ext. PW-4/A) was sent through Const. Jitender Kumar (PW-4) which led to registration of F.I.R. No. 35/2008, dated 12.2.2008 (Ext. PW 9/A) at Police Station Sadar, Hamirpur, Distt. Hamirpur, H.P., against the accused under the provisions of Section 20 of the Act. With the completion of codal formalities on the spot, accused was arrested. The case property was produced before SHO Anjni Kumar (PW-9), who after resealing the same with seal impression-H, entrusted MHC Vijay Parkash (PW-6), Incharge of the Maalkhana, with the same for keeping it in safe custody. Const. Sant Ram (PW-5) took the sample parcel for chemical analysis to the State Forensic Science Laboratory, Junga, and report (Ext. PW-9/E) taken on record. Also special report (Ext. PW-7/A) was sent to the office of Superintendent of Police, Hamirpur. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as nine witnesses and statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence:

> "... I am innocent. I have been falsely implicated. In fact, a bus had collided with a car because of which, the road was blocked and I alongwith my friend were forcibly apprehended and thrown in the vehicle and mercilessly beaten. A false case has been planted upon me by the police."

5. It is a matter of record that accused did not lead any evidence in defence.

6. Appreciating the material placed on record by the prosecution, trial Court convicted the accused for the charged offence and sentenced as aforesaid. Hence the present appeal.

7. Having heard learned counsel for the parties as also perused the record, this Court is of the considered view that the reasoning adopted by the trial Court is perverse and not based on correct and complete appreciation of testimonies of the witnesses, evidence and other material placed on record, causing serious prejudice to the accused, resulting into miscarriage of justice.

8. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> ".....Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". ....
>
> (Emphasis supplied)

9. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

10. Also it is settled position of law that graver the punishment the more stringent the proof and the obligation upon the prosecution to prove the same and establish the charged offences.

11. Undoubtedly, no independent witness has been associated by the police, in carrying out the search and seizure operations. The issue as to whether in every case, and under the all circumstances, police must associate independent witnesses, while carrying out search and seizure operations, is no longer *res integra*.

12. It is also a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If testimony of such a witness is reliable, trustworthy, cogent and if required, duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in the success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people, in that event, no credibility can be attached to the statement of such witness.

13. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other

independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

14. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

15. Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

16. In view of the aforesaid statement of law, we shall now examine the testimony of police officials.

17. We shall first examine the testimonies of spot witnesses in whose presence the contraband substance was recovered from the accused. They are Const. Ashok Kumar (PW-1), Const. Krishan Chand (PW-2), Const. Jitender Kumar (PW-4) and SI Fauja Singh (PW-8). Having carefully gone through their statements, this Court is of the considered view that the genesis of the prosecution story of the police party having travelled together to village Kot and recovered the contraband substance from the conscious possession of the accused appears to be doubtful. Doubt is with regard to the (a) presence of the police party on the spot; (b) time and place from where the contraband substance was recovered; (c) persons present on the spot; and (d) non association of independent witnesses. All this renders the genesis of the prosecution story of having recovered the contraband substance from the conscious possession of the accused to be extremely doubtful.

18. Fauja Singh states that he alongwith other police officials were travelling in a vehicle. At Kot they saw the accused. Seeing the police party he tried to run away. On suspicion he was overpowered but in this process accused threw a packet which he had kept in his pant. It contained charas. Const. Krishan Chand brought weights and scale from the shop of Krishan Pal (PW-3) and when weighed, charas was found to be 200 grams. Two samples of 10 grams each were drawn from the recovered charas. The samples as also the remaining bulk charas were separately sealed with seal impression-S. Well this is what the witness states in his examination-in-chief.

19. To begin with, it be only observed that there is no cogent documentary evidence on record establishing presence of this witness on the spot. Constable Jitender Kumar states that he received a telephone call from Fauja Singh and as such, in his vehicle went to Anu Chowk from where police party left towards village Kot. But then there is no evidence establishing such fact and such version is not corroborated by Constables Krishan Chand and Ashok Kumar. Which is that vehicle? who owns the same? what was the vehicle used for? what was the police party doing at Anu Chowk? and for what purpose they were proceeding towards Kot? itself remains unexplained, rendering the genesis of the prosecution version to be highly doubtful.

20. This takes us to the cross examination part of testimony of Fauja Singh who admits that close by there were residences, shops and a temple. Yet none from the locality was associated before carrying out the seizure operations. Witness does try to state that there was no requirement as police officials were present on the spot but then if scale and weights could have been brought from the shop of a goldsmith so could they have endeavoured to bring an independent witness. It is not that police was not aware about the contents of the packet. It contained charas, for according to Fauja Singh from the smell and looks of the packet, he could made out that the stuff was charas. This Court is of the view that non association of independent witnesses, more so, when presence of the police officials on the spot itself is in doubt, would have only lend credence to their story.

21. Further one notices the contradictions and improbabilities in their statements.

22. Const. Jitender Kumar states that the accused was made to sit in the vehicle which is not the case of Fauja Singh. Const. Ashok Kumar states that accused was apprehended after he had covered certain distance which is not so stated by other police officials.

23. Krishan Chand states that Jitender Kumar and Fauja Singh (police party) reached Kot at about 3.00 p.m. which version stands contradicted by Ashok Kumar according to whom it was at about 2.15/2.45 p.m. Further as per the version of Krishan Chand, the place of incident was secluded and no house or shop was found to be close by, which version stands contradicted by other police officials present on the spot.

24. Further, Ashok Kumar and Krishan Chand state that they were present at Anu Chowk where Fauja Singh met them and from there they proceeded towards village Kot. Whereas Jitender Kumar states that when he alongwith other police officials had gone to Anu they were telephonically instructed by Fauja Singh to come to Anu Chowk.

25. In this view of the matter, this Court finds testimony of the prosecution witnesses not to be inspiring in confidence.

26. There is yet another reason for disbelieving the prosecution version. Weighing scale was brought from Krishan Pal who is a shop keeper at Hamirpur Town. He is categorical that he accompanied police official Krishan Chand to the spot for weighing the contraband substance. Well this totally knocks down the prosecution story of non availability of any independent witness who could have been associated in conducting the seizure operations.

27. As has come in the testimony of Fauja Singh, Hamirpur is at a distance of 8 k.m. from the spot. Now if a goldsmith could be brought from such a distance, why no endeavour was made to fetch scales from close by shops or why accused was not taken straightaway to the police station for carrying out seizure operations.

28. Further timing of apprehension of the accused stands contradicted by the goldsmith, according to whom Krishan Chand had reached his shop at about 3.15 p.m.

29. Not only that, even by way of corroborative evidence, prosecution has not been able to establish its case beyond reasonable doubt.

30. All these contradictions, improbabilities, embellishments stood ignored by the trial Court and as such, findings returned on all the points being perverse and contrary to law are unsustainable in law.

31. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stands wrongly convicted for the charged offence.

32. Since prosecution has not been able to establish its case of having recovered the contraband substance from the conscious possession of the accused, no statutory presumption as envisaged under Section 35 of the Act, can be drawn against the accused.

33. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence dated 30.3.2009, passed by the learned Special Judge, Hamirpur, H.P., in Sessions Trial No. 21 of 2008, titled as *State of Himachal Pradesh vs. Davinder Kumar*, is set aside and the accused is acquitted of the charged offence. Fine amount, if deposited, be refunded to the accused. Bail bonds furnished by the accused are discharged.

34. Efforts put in by Ms. Shreya Chauhan, learned Amicus Curiae in rendering valuable assistance to the Court are highly appreciable.

Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Kundan Lal Sharma .....Petitioner.

Vs.

Union of India and others .....Respondents.

CWP No. 513 of 2009
Reserved on: 28.08.2017
Date of Decision: 20.11.2017

Constitution of India, 1950- Article 226- Civil Writ Petition- Grant of ACP under the Assured Career Progression Scheme- held that financial upgradation under the ACP scheme shall be available only if no regular promotion during the prescribed period has been availed by employee- if an employee gains promotion within 12 years, then he becomes entitled for second upgradation, which is available only after 24 years- it was also held that in case an employee is conferred the benefit under FR 22(I) at the time of officiating appointment, the benefit of ACP is not permissible. (Para-9 to 11)

For the petitioner Mr. M.L. Sharma, Advocate.

For the respondents: Mr. Ashok Sharma, Assistant Solicitor General of India, for respondents No. 1 to 3.
None for respondent No. 4.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, Judge**:*

Brief facts necessary for the adjudication of the present petition are as under:

Petitioner before this Court initially joined the respondent-Institute as a Peon w.e.f. 30.04.1966. He was thereafter promoted to the post of Clerk on 27.02.1968 and Upper Division Clerk w.e.f. 15.01.1975. As per the petitioner, respondent-Institute invited applications

vide Annexure A/1 appended with the Original Application for various posts including the post of Auditor. Petitioner applied for the said post and was appointed against the same by way of direct recruitment on the basis of recommendations of the Selection Committee vide order, dated 01.09.1986 in the pay scale of Rs.425-800/- (revised to Rs.5000-8000/-). On the recommendations of 5th Central Pay Commission, which were accepted by the respondent-Institute, petitioner was granted first up-gradation under the Assured Career Progression Scheme after completion of 12 years of service in the pay scale of Rs.6500-10500/- vide office order, dated 25th October, 2001 w.e.f. 19.10.2000. However, on audit objection, said up-gradation was withdrawn vide office order, dated 28th December, 2006.

2. Feeling aggrieved, the petitioner assailed the order, dated 28th December, 2006, vide which the up-gradation was withdrawn by way of filing an Original Application No. 33/HP/2007 before the learned Central Administrative Tribunal, Chandigarh Bench (Circuit At Shimla). According to the petitioner, as he stood appointed against the post of Auditor by way of direct recruitment, therefore, he was rightly conferred benefits under the Assured Career Progression Scheme on completion of 12 years of service and the same were wrongly withdrawn vide impugned order, dated 28th December, 2006.

3. Respondents while contesting the claim of the petitioner, took the stand before the learned Tribunal that before the applicant therein was selected against the post of Auditor, he had earned two separate benefits, i.e., firstly he was granted the benefit of age relaxation for appointment to the post of Auditor and thereafter he was conferred the benefit under than FR (c) (now renamed as FR 22(I)(a)(1) for fixation of his pay from his earlier position of UDC, which was done when the petitioner was promoted as Section Officer. Thus, as per the respondents, the petitioner had to be construed to have been promoted to the post of Auditor instead of having been appointed to the said post at the entry level. It was further the stand of the respondent-State that the post of Auditor, against which the petitioner was appointed, was re-designated as Assistant in the same pay scale only after six years after the petitioner had joined as Auditor and thereafter when the post of Section Officer in the pay scale of Rs.6500-10,500/- became available, he was promoted against the said post w.e.f. 25th June, 2002. It was also the stand of the said respondents that the applicant was not even in the feeder cadre of Assistant and he could not have been promoted to the post of Section Officer and this clearly demonstrated that the applicant had drawn two separate benefits while reaching the post of Section Officer, i.e., firstly the benefit of pay fixation under FR 22 (c), which he gained while being posted as Auditor and second on having returned to the normal channel of promotion from UDC to Assistant and to Section Officer by virtue of the fact that the post of Auditor, which would otherwise have been an isolated post, was re-designated as Assistant.

4. Respondent No. 3 filed a separate reply and the said respondent also denied the claim of the petitioner.

5. Learned Tribunal vide order, dated 24.10.2008, dismissed the Original Application so filed by the petitioner. While dismissing the Original Application, it was held by the learned Tribunal that Para 5.1 of the conditions for grant of benefits under the ACP Scheme provided that in the entire Government service career of an employee, two financial up-gradations shall be counted against regular promotions and the same shall be available if no regular promotions during the prescribed period of 12-24 years had been gained by an employee. If employee gets one regular promotion, then he shall qualify for the second financial up-gradations only after completion of 24 years of service under the ACP Scheme and no benefit shall accrue under the said Scheme in case employee gains two promotions. Learned Tribunal further held that the petitioner, who had initially joined the Institute as Peon, was promoted thereafter as a Clerk and then as UDC and thereafter promoted/re-designated as Accountant to suit his convenience and ensure up-gradations/promotion to him. Learned Tribunal further held that as the applicant had already earned two promotions, he could not be granted financial up-gradation under the ACP Scheme. Learned Tribunal further ordered the Ministry of H.R.D. to constitute a

high level committee to scrutinize the matters like that of the petitioner, who as per the learned Tribunal were conferred undue benefits in his service career, with further direction that if any deviation from the established procedure is noticed, then such appointments may be reviewed and appropriate action shall be taken against the respondents. Said order passed by the learned Tribunal stands assailed by way of this writ petition.

6. We have heard the learned counsel for the petitioner as well as learned Assistant Solicitor General of India and have also gone through the records of the case.

7. Office order, dated 1st September, 1986 (Annexure A/3) demonstrates that on the recommendations of the Selection Committee and in relaxation of age limit laid down in the Recruitment Rules, the petitioner was approved for officiating appointment as Auditor in the pay scale of Rs.425-800/-. Vide office order, dated 25th October, 2001, benefit under the Assured Career Progression Scheme was conferred upon the petitioner w.e.f. 19th October, 2000. This benefit was conferred upon the petitioner by construing his appointment as Auditor w.e.f. 01.09.1986 and as not having gained any promotion from the said post for a period of 12 years. An audit objection was raised qua the benefits so conferred upon the petitioner, which reads as under:

> *"Para 25A Irregular grant of ACP Rs. 0.16 lakh.*
>
> *As per provision for Assured Career Progression Scheme two financial up-gradation in the entire career are admissible to a direct.*
>
> *It was noticed that Sh. Kundan Lal, Section Officer, who joined the Institute on 30/4/66 as Peon was promoted as Clerk on 27/2/68 and subsequent promoted as UDC on 15/1/75 in the scale of Rs.330-560. The official was further appointed as auditor on 1/9/86 in the scale of Rs.425-800. The official has got more than two financial up gradation in his career and was thus not entitled for any financial up gradation under the ACP Scheme. The official was granted financial up gradation in the scale of Rs.6500-10500 w.e.f. 1/1/2001. Irregular grant of ACP resulted in overpayment of Rs.16490/- as per details given in Annexure D to this para.*
>
> *In reply to audit memo No. 32 dated 13/9/2004 it was stated by the Institute that the official was appointed to the post of auditor as a direct recruit 1/9/86 and first financial up gradation was granted after a period of twelve years from 1/9/86. The reply is not tenable because on appointment as Auditor his pay was fixed under FR 22 giving the benefit of post service and post. The pay fixation of the official may be re-examined and got confirmed from the ministry."*

8. Response was sought by the Institute from the petitioner qua the said objection and the response submitted by him is reproduced hereinbelow:

> *"With reference to the Office Memorandum No. Admn.F.1 (Audit) No. 1570 dated 29th August 2006, in connection with the Audit objection, I beg to bring to your kind notice the following for your kind perusal and sympathetic consideration:*
>
> *1. On 10th March, 2005, I submitted a representation to the Director of the Institute mentioning the facts of the case and requesting the authorities of the Institute to take a decision in the matter on the basis of the records available in the office. I enclose a copy of the representation for ready reference (Annexure –I).*
>
> *2. In the Audit Para, the Audit has mentioned that I was not entitled to any financial upgradation under the ACP Scheme because of the fact that according to the Audit I already got financial benefits.*
>
> *The observation of the Audit seems to be incorrect because of the reasons mentioned below:*

(a) In terms of the provisions contained in the Office Memorandum No. 35034/1/97-Estt.(D) dated 9th August 1999 issued by the Ministry of Personnel, Public Grievances and Pensions, "residency periods (regular service) for grant of benefits under the ACP Scheme shall be counted from the grade in which an employee was appointed as a direct recruit" (relevant GOI document is enclosed as Annexure-II).

(b) In the year 1996, I was appointed (not promoted) as Auditor under the category of "direct recruitment" as per provisions contained in the Recruitment Rules of the Institute. The vacancy was duly advertised in the national dailies. I applied for the post with reference to the advertisement/I was called for a written test followed by interview. Then, on the recommendations of the duly constituted Selection Committee, I was offered the post of Auditor in the pay-scale of Rs.425-800 (Revised: Rs.1400-2600) and I was put on probation for two years. Therefore, for all intents and purposes, my appointment to this post ought to be treated as "direct recruit".

(c) The post of Auditor was later re-designated as Assistant with the same pay-scale of Rs. 425-800 (Revised: Rs. 1400-2600).

(d) In the existing Recruitment Rules of the Institute, the posts of Assistants in the pay-scale of Rs.1400/-2600/- have been included in the feeder cadre for promotion to the post of Section Officer in the pay-scale of Rs.6,500/-Rs.10,500/-

(e) In terms for the provisions of the ACP Scheme, one becomes eligible for first upgradation after completion of 12 years of continuous service.

(f) The ACP Scheme was introduced at the Institute in October 2000. By that time I already completed more than 12 years of continuous service. Therefore, the DPC rightly recommended the pay-scale of Rs.6,500/- 10,500/- in my case as first financial upgradation under the ACP Scheme.

In view of the above, I request you kindly place this before the Audit so that the Audit Para could be settled."

9. After perusal of the said reply, office order, dated 28th December, 2006 was passed by the respondent-Institute, vide which the benefits so conferred upon the petitioner were withdrawn. It is not in dispute that as per Para 5.1 of the conditions for grant of benefits under ACP Scheme, an employee is entitled for the said benefit upon completion of 12-24 years of service provided employee has not gained any promotion from the initial post of his appointment for the said period. If an employee gains promotion within 12 years, then he becomes entitled for only second up-gradation, which is available after 24 years. If an employee gains second promotion, then he is not eligible for the said benefits. Para 5.1 of the Conditions for grant of benefits under the ACP Scheme is reproduced hereinbelow:

"Two financial upgradations under the ACP Scheme in the entire Government Service career of an employee shall be counted against regular promotions (including in-situ promotion and fast track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial upgradations under the ACP Scheme shall be available only if no regular promotions during the prescribed periods (12-24 years) have been availed by an employee. If an employee has already got one regular promotion, he shall qualify for the second financial upgradations only on completion of 24 years of regular service under the ACP Scheme. In case two prior promotions on regular basis have already been received by an employee, no benefit under the ACP Scheme shall accrue to him."

10. Now coming to the facts of the present case, it is a matter of record that the appointment of the petitioner was approved as Auditor, which was officiating appointment, on the recommendations of Selection Committee in relaxation of age limit laid down in the Recruitment Rules vide office order, dated 1st September, 1986.

11. Be that as it may, it was the specific stand of the respondents in the reply, which has gone un-rebutted by the petitioner that the post of Auditor was subsequently re-designated as Auditor in the same pay scale only after six years of incumbent having joined as Auditor and thereafter he continued to serve as such and was promoted against the post of Section Officer when the said promotional post became available w.e.f. 25.06.2002. Further stand of the respondents that had the petitioner not been re-designated as Assistant, he could not have been promoted to the post of Section Officer, has also gone un-rebutted by the petitioner. Para 5.1 of the ACP Scheme (supra) confers benefit of ACP after completion of 12 and 24 years of service on a particular post in case an employee is not able to gain any promotion in the interregnum and after 24 years in case employee gains one promotion in the interregnum. Though the petitioner was appointed on officiating basis against the post of Auditor in the year 1986, however, he did not complete 12 years of service against this particular post. After six years of service, he was re-designated as Assistant. It is not the case of the petitioner that from the date of his re-designation as Assistant, no promotion stood conferred upon him within 12 years of service. The factum of the petitioner having been conferred the benefits under FR 22(I) (a)(1) at the time of his officiating appointment as an Auditor in the year 1986 is also not in dispute. Further more, there is a definite finding returned by the learned Tribunal about the mode and manner in which the petitioner gained promotions/officiating appointment/re-designation in the respondent-Institute. We are also surprised by the mode and manner in which the petitioner gained such promotions/officiating appointment/re-designation. According to the petitioner, he was appointed against the post of Auditor by way of direct recruitment. As per the records, his appointment to the said post was an "officiating appointment". We fail to understand as to how there can be any "officiating appointment" of an incumbent by way of direct recruitment. Service jurisprudence envisages that when a person is appointed by way of direct recruitment, his initial appointment may be temporary, permanent or on contract basis. Besides this, an employee recruited on regular basis is initially kept on probation and his services are regularized on completion of successful completion of probation, though from the date of his initial appointment. According to us, there is no concept of "officiating appointment" by way of direct recruitment. This lends credence to the doubts which have been mentioned by the learned Tribunal in its order about the mode and manner in which the petitioner gained promotion/officiating appointment/re-designation. According to us, learned Tribunal has rightly called upon the Ministry of H.R.D. to constitute a high level committee to scrutinize the matters like that of the petitioner and find out whether the appointments made in the Institute were as per procedure and Rules of the Government or not. When we take all these facts together, then according to us, there is no infirmity with the order passed by the learned Tribunal. In fact, learned Tribunal by way of a well reasoned order has dismissed the Original Application filed by the present petitioner and the reasonings given by the learned Tribunal are duly borne out from the records of the case and the same are as such not perverse.

12. Besides this, taking into consideration the factual matrix involved in the case *qua* which learned Tribunal has directed the concerned Ministry to hold an inquiry, we otherwise also feel that no interference is warranted with the order, dated 24.10.2008, passed by the learned Tribunal.

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

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

Rajni Devi Dhiman .....Petitioner
Versus
Abhishek Kaushal & another .....Respondents

Cr. MMO No. 379 of 2016
Reserved on :07.11.2017
Decided on : 20.11.2017

Code of Criminal Procedure, 1973- Section 482- Petitioner seeking to set aside the summoning order passed by the Learned Judicial Magistrate under Section 420 of I.P.C.- the respondent who proclaimed that he was in a live-in-relationship with the present petitioner was being threatened by her to commit suicide- thus he preferred a complaint under Sections 499, 500 & 506 of the I.P.C- the Learned Trial Court however summoned the accused/petitioner only under Section 420 of I.P.C- feeling aggrieved, accused/petitioner had preferred the present petition- the Court held that no offence of cheating were made out as there was nothing on record to hold that the person had been put to disadvantage as there was nothing on record to remotely suggest that accused had ever married the complainant/respondent nor there was no promise by the accused/petitioner to marry the complainant/respondent- summoning order quashed and set aside. (Para-11 and 12)

For the Appellant : Mr. R.P. Singh, Advocate.
For the Respondents: Mr. Imran Khan, Advocate, for respondent No. 1.
Mr. Rajat Chauhan, Law Officer, for respondent No. 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge *(oral)*

The present petition is maintained by the petitioner-accused (hereinafter to be referred to as 'the accused') under Section 482 of the Code of Criminal Procedure, 1973, (hereinafter to be referred to as 'Cr.P.C.'), for setting aside the impugned order dated, 25.10.2016, passed by the learned Judicial Magistrate, 1st Class, Court No. III, Una, H.P., in Case No. 19/2016, RBT No. 228-1/2016, titled as Abhishek Kaushal versus Rajni Devi Dhiman.

2. The key facts, giving rise to the present petition, are that Shri Abhishek Kaushal (hereinafter to be referred to as 'the complainant') has filed a complaint against the accused, wherein he alleged that he is the resident of Industrial Area, Tehsil Mehatpur, District Una, (H.P.) and the accused has been living with him for the last 20 years with her free and sweet consent. The complainant further alleged that both the parties were living in social circle of relatives, friends and other social dignities, as husband and wife. The other people also had been accepting and recognizing them as husband and wife. As per the complainant, they have also celebrated ritual and ceremonies of 'Granth Sahib' for conducting their marriage. There are some instances of 'WhatsApp' massages, leading to presumption and assumption that the parties are husband and wife. The complainant further alleged that due to undue influence and coercion from the strangers and relatives, the accused has threatened the complainant to commit suicide, if the marriage tie is not broken by him. She was requested not to take such a drastic step to end her precious life and harass and lower the complainant in the estimation of relatives, parents, friends and dignitaries. She was further requested to wait for the adjudication of controversy between the parties, with respect to the marriage, pending in the Civil Court, but she began to shower filthy language and dirty and unsocial strictures on the bond and mind of the complainant to compel him to commit suicide alongwith her. According to the complainant, the accused further threatened him that in case he does not commit suicide alongwith her, she would leave a suicide

note to entangle him in a murder case. She further tried to give back the dowry articles and ornaments to the complainant, if he agreed to break the marriage tie. She was requested to solve the controversy by *Khangi* assembly of the both the sides, but in vain. According to the complainant, the threatening words of the accused to commit suicide alongwith other threats, leading to break in the marriage ties, are looming large 24 hours on his mind, due to which, he has lost his sleep and may give him jolts of heart attack. He prayed that the accused be tried for the commission of offences under Sections 420, 499, 500 & 506 of the Indian Penal Code (for short 'IPC). Thus, the complainant filed the complaint before the learned Trial Court, whereby he examined four witnesses in all including himself. He examined CW-1 Smt. Kusum Kaushal, CW-2, Smt. Anita Sharma, CW-3, Shri Rohit Sharma and also appeared himself in the witness box as CW-4. The witnesses in their testimonies, supported the contents of the complaint. In view of the evidence on record, the learned Trial Court held that there is no sufficient ground to proceed against the accused for commission of offences punishable under Sections 499, 500 & 506 of the IPC, but summoned the accused for the commission of an offence punishable under Section 420 of the IPC. Feeling aggrieved by the impugned order, dated 25.10.2016, the accused has preferred this petition.

3. Learned Counsel for the petitioner-accused has argued that the learned Court below, without appreciating the fact that no case was made out against the accused, even after going through the pleadings of the parties, has issued summons against the petitioner-accused under Section 420 of the IPC. He has further argued that as no case is made out, even after going through the evidence and the complaint, so the summoning order is required to be quashed.

4. On the other hand, learned Counsel for respondent No. 1 has argued that when the petitioner-accused has lived with respondent No. 1-complainant, as his wife and they were knowing each other for the last so many years, her refusal to live with him as wife, is an offence punishable under Section 420 of the IPC. He has further argued that the summoning order is not required to be interfered with.

5. In order to appreciate the rival contentions of the parties, I have gone through the record in detail.

6. The case of respondent No. 1-complainant is based upon the 'WhatsApp' messages and the fact that the accused remained with the complainant for some time as his wife and they are knowing each other for the last so many years. Further, his case is that he has lost his business and spent huge money upon the accused and so, her refusal to marry the complainant and live with him as wife, is a cheating.

7. To appreciate the aforesaid fact, I have gone through the averments contained in the complaint as well as the evidence adduced on behalf of the complainant.

8. In order to prove his case, the complainant examined his mother-Smt. Kusum Kaushal as CW-1. She alleged that the accused has relations with the complainant for the last 20 years and they remained in live-in relationship. They are recognized as husband and wife publicly. She further stated that the complainant has spent huge money upon the accused. As per her, when the accused and the complainant were asked to marry each other, the accused refused and asked the complainant to break the marriage ties. The accused threatened the complainant that in case, he does not break the marriage tie, she would commit suicide and entangle him in a murder case. She further stated that due to this kind of threatening given by the accused, the complainant is suffering from depression and he may suffer from heart attack, at any time.

9. Smt. Anita Sharma and Shri Rohit Sharma appeared in the witness box as CW-2 and CW-3, respectively. They also supported the versions of CW-1.

10. Complainant himself appeared in the witness box as CW-4. He stated that his father was an Industrialist and he had a Computer Coaching Institute. He was financially very

strong and earned about `1.50 lacs per month. He further stated that he is living with the accused since the childhood and are in live-in-relationship for the last 10-15 years. As per him, they are recognized publicly as husband and wife and they had also performed a secret marriage at home and Rohit is the witness to that marriage. He further alleged that he has spent huge money upon the accused and has lost his business. According to him, the accused has sent many 'WhatsApp' messages to him. When the complainant asked the accused to marry him, she flatly refused and now, she is threatening him that in case he does not break the marriage ties, she would commit suicide and entangle him in a murder case. Now, he is suffering from depression.

11. As far as the ingredients of Section 415 of the IPC are concerned, the same read as under:

> *"415 Cheating: Whoever, by deceiving any person fraudulently or dishonestly induces the person, so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".*

12. The case was required to be proved that if facts, which do not exist, are made out to exist and thereby, the other person is put to disadvantage. However, in the instant case, neither there is anything on record to show that the accused has ever married the complainant nor there was any promise to marry the complainant. In these circumstances, it can safely be held that the offence punishable under Section 420 of the IPC is not made out against the accused-petitioner. At the same point of time, the statements of the parties recorded before the police, show that the parties had agreed to abide by the outcome of the civil litigation, pending in the Civil Court, with respect to the marriage,. There is also nothing on record to come to the conclusion that parties have ever married each other and the accused has put the complainant at loss, after deceiving him. On the other hand, when the statements of the parties were recorded before the police, the father of the accused had stated that they would abide by the outcome of the civil litigation with respect to the marriage, which is pending in the Civil Court. The 'WhatsApp' messages do not show that there was any marriage inter-se the parties. The present complaint and evidence do not make out any prima-facie case against the accused-petitioner. It seems that the learned Court below, without any application of mind, had issued the summons against the accused, as no prima-facie case punishable under Section 420 of the IPC is made out, even after going through the complaint and the evidence, which has come on record.

13. The net result of the above discussion, is that the impugned order dated, 25.10.2016, passed by the learned Court below, summoning the accused, is without any application of mind and requires to be quashed and set aside. Ordered accordingly. The complaint against the accused-petitioner is without any basis, as there is no prima-facie case. Thus, the same is ordered to be dismissed.

14. Accordingly, petition is dismissed alongwith pending application(s), if any.

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

Raj Kumar Garag ...Appellant.

Versus

Raj Kumar & others ...Respondents.

OSA No.16 of 2011

Date of Decision: November 22, 2017

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

Code of Civil Procedure, 1908- Order 20 Rule 5- Held that if findings returned in respect of any one or more of the issues are sufficient for the decision of the suit, clubbing of the issues does not prejudice the party- further held that there was nothing on record to remand the matter back for re-adjudication afresh, on all issues. (Para-13 to 17)

Code of Civil Procedure, 1908- Standard of Proof- Further held that mere admission of document in evidence does not amount to its proof and the standard of proof required in civil cases is dependent upon the balance of probabilities, as opposed to proof beyond reasonable doubt in criminal matters. (Para-49 to 53)

Specific Relief Act- Section 20- Specific relief of contract- Held that in a suit for specific performance even if the plaintiff proves the issues and establishes his case, it is not that under all circumstances, suit is to be allowed- power is discretionary, more particularly, If the contract is not equal and fair. (Para-54)

Cases referred:

Vinod Kumar vs. Gangadhar, (2015) 1 SCC 391
State Bank of India and another vs. Emmsons International Limited and another, (2011) 12 SCC 174
Madhukar and others vs. Sangram and others, (2001) 4 SCC 756
Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs., (2001) 3 SCC 179
Kalahasti Veeramma vs. Prattipati Lakshmoyya and others, AIR (35) 1948 Madras 488
Pitamber Prasad vs. Sohan Lal and others, AIR 1957 Allahabad 107
P.C. Thomas v. P.M. Ismail and others, (2009) 10 SCC 239
N.E. Horo v. Smt. Jahanara Jaipal Singh, (1972) 1 SCC 771
Ranvir Singh and another v. Union of India, (2005) 12 SCC 59
LIC of India and another v. Ram Pal Singh Bisen, (2010) 4 SCC 491
Sait Tarajee Khimchand and others v. Yelamarti Satyam and others, (1972) 4 SCC 562
Laxman Tatyaba Kankate & another v. Smt. Taramati Harishchandra Dhatrak, (2010) 7 SCC 717
Rakesh Mohindra v. Anita Beri & others, 2015 AIR(SCW) 6271
Anvar P.V. v. P.K. Basheer and others, (2014) 10 SCC 473
R.V.E. Venkatachala Gounder v. Arulmigu Visweswaraswami & V.P. Temple and another, (2003) 8 SCC 752
P.V. Joseph's son Mathew v. N. Kuruvila's Son, 1987 (Supp1) SCC 340
Bal Krishna v. Bhagwan Das, (2008) 12 SCC 145
Mahammadia Cooperative Building Society Ltd. v. Lakshmi Srinivasa Cooperative Building Society Ltd. and others, (2008) 7 SCC 310
Laxman Tatyaba Kankate & another v. Smt. Taramati Harishchandra Dhatrak, (2010) 7 SCC 717

For the Appellant	Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.
For the Respondents	Mr. Sudhir Thakur, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Appellant-plaintiff Raj Kumar Garag (hereinafter referred to as the plaintiff), whose suit for specific performance of agreement to sell dated 24.8.2006 (Ex.PW-2/A), stands dismissed by the learned Single Judge of this Court, lays challenge to the judgment dated 26.9.2011, passed in Civil Suit No.45 of 2007, titled as *Raj Kumar Garg v. Raj Kumar and another*, by way of present appeal, preferred under Section 10 of the Letters Patent Appeal and Section 96 of the Code of Civil Procedure.

2. Facts, in brief, are as under:

(a) Allegedly, vide Agreement dated 24.8.2006 (Ex.PW-2/A), plaintiff agreed to purchase 65 bighas of agricultural land, owned by respondents No.1 & 2 - defendants Raj Kumar and Ajay Kumar (hereinafter referred to as the defendants). Total sale consideration being 48 lakhs, out of which Rs.4 lakhs was paid at the time of signing of the agreement, with the remaining amount agreed to be paid at the time of registration of the sale deed, which was to be done on or before 23.4.2007. On 20.4.2007, plaintiff sent a registered communication (Ex.PW-2/C) to the defendants, asking them to execute the sale deed. On 23.4.2007, though plaintiff made himself available before the Sub Registrar, but defendants chose neither to respond to the notice nor remain present for execution of the sale deed. Resultantly, on 21.6.2007, plaintiff presented the plaint, seeking specific performance of the agreement.

(b) While specifically denying the plaintiff's case, in the written statement, so filed by them, defendants termed the agreement to be an act of fraud and concoction on the part of the plaintiff, in connivance with one Ankush Vasishta in whose favour they had initially executed Power of Attorney for sale of 50 bighas of agricultural land, for a consideration of Rs.3 crores. Sale deed was to be executed in favour of Sudarshan Sharma of Chandigarh. On the asking of said Ankush Vasishta, on 16.1.2007, they executed certain papers. However, while leaving, by mistake, copy of one such paper was left behind, which, when shown to their well-wisher and neighbour Gopal, revealed the fraud perpetuated upon the defendants. Resultantly, they firstly cancelled the Power of Attorney issued in favour of Ankush Vasishta and thereafter reported the matter to the police and lodged several complaints. On 22.2.2007, a complaint was lodged at Police Station, Dharampur. Similar complaint was sent to the Director General of Police, Shimla and Hon'ble the Chief Minister of Himachal Pradesh for conducting an enquiry. Further, defendants filed a suit for declaration, impleading Ankush Vasishta and the present plaintiff as party defendants.

(c) Undoubtedly, in the replication, plaintiff refuted allegations of falsehood, but admitted pending litigation.

3. Pleadings led to the striking of following issues:

"1. Whether this suit is liable to be stayed under Section 10 of the Code of Civil Procedure as the defendants have instituted a suit against the plaintiff regarding the property which is subject matter of this suit in the court of Civil Judge (Jr. Division), Kasauli and which suit was instituted prior in point of time to the present suit? .....OPD

2. Whether the plaintiff entered into an agreement dated 24.8.2006 with the defendants for purchasing the suit land as alleged? .....OPP

3. Whether the plaintiff paid a sum of rupees 4 lacs to defendants as advance of the consideration amount as alleged? .....OPP

4. Whether the plaintiff is entitled to the decree of specific performance of agreement dated 24.8.2006, and injunction or any other relief as pleaded? .....OPP

5. Whether the agreement dated 24.8.2006 is illegal, false or fictitious and obtained by committing fraud and misrepresentation by plaintiff on the defendants? .....OPD

6. Whether the plaintiff is stopped by his own acts, conduct and acquiescence to file and maintain the present suit? .....OPD

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

8. Whether the plaintiff has no legal, valid enforceable and subsisting cause of action against the defendants? ...OPD

9. Whether the suit is bad for non joinder of necessary parties?.....OPD

10. Relief."

4. Vide impugned judgment, learned Single Judge decided Issue No.1 as not pressed, Issues No.2,3 & 4 against the plaintiff and Issues No.5,6,7 & 8 in favour of the defendants. Issue No.9 also was decided in favour of the defendants.

5. It is a matter of record that during the pendency of the lis, vide various agreements entered in the year 2014, defendants transferred the suit land in favour of third party, who also stand impleaded as respondents No.3 to 5 in the present appeal.

6. Noticeably, learned Single Judge clubbed and together decided Issues No.2 to 9, holding the plaintiff not to have proven valid execution of agreement to sell dated 24.8.2006 (Ex.PW-2/A). Documents proven on record by the parties probablized the defendants' version. Learned Single Judge found the version, emanating from the plaintiff's witnesses to be contradictory and the agreement to be a self-serving document, prepared without the parties being *ad idem* with regard thereto. Sale consideration was found to be inadequately low. What also weighed with the learned Single Judge was the status of the parties, for the plaintiff being a property broker and the defendants being agriculturists and rustic villagers.

7. We shall deal with each one of the contentions raised by the learned counsel appearing on both the sides.

8. The Appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties. Unless restricted by law, the whole case therein is open for rehearing both on questions of fact and law. The judgment of the Appellate Court must reflect its conscious application of mind and record findings supported by reasons on all the issues arising alongwith the contentions put forth and pressed by the parties for decision of the Appellate Court. The Appellate Court be it High Court or Court subordinate thereto, is to deal with all the issues and the evidence led by the parties. As per the requirement of Rule 31 of Order 41 CPC, judgment of the Appellate Court must state: (a) points for determination; (b) decision there upon; (c) reasons for the decision; and (d) where the decree in appeal is reversed or varied, the relief to which the appellant is entitled to. [*Vinod Kumar vs. Gangadhar,* (2015) 1 SCC 391 (Two Judges); *State Bank of India and another vs. Emmsons International Limited and another,* (2011) 12 SCC 174 (Two Judges); Madhukar and others vs. Sangram and others, (2001) 4 SCC 756 (Three Judges); and *Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs.,* (2001) 3 SCC 179 (Three Judges)].

9. In this backdrop, the following points arise for consideration:-

(i) As to whether suit filed by the plaintiff ought to have been stayed in view of previously instituted suit;

(ii) Whether the learned Single Judge was right in clubbing the issues and returning common findings there upon;

(iii) Whether the findings returned, reasons assigned and conclusions derived by the learned Single Judge are borne out from the record and legally sustainable;

(iv) Whether plaintiff is entitled to specific performance of agreement dated 24.8.2006 or not.

10. It is a matter of record that prior to the filing of the instant suit, which was so done on 21.6.2007, defendants had already filed a suit against the plaintiff, Ankush Vasishta and Sudarshan Sharma. This was so done on 23.4.2007. It is also a matter of record that subsequently the said suit was withdrawn and as such learned Single Judge rightly held Issue No.1 to have been rendered infructuous.

11. Further, we are unable to persuade ourselves with the submission made by Mr. G.D. Verma, learned Senior Advocate, that withdrawal of the suit amounted to closure of defendants' defence. Significantly, plaintiff did not elaborately discuss or disclose the averments of the said suit in the instant plaint, leaving it to the defendants, elaborately apprising the Court about the same. In the plaint, there is only a passing reference of earlier suit filed by defendant Raj Kumar. What is the nature of the suit? What are the issues involved? Who all are the parties? Whether the issues involved are same in both the suits or not? was never disclosed. It is in this backdrop, one cannot hold that mere withdrawal of the earlier suit by the defendants would foreclose their right of taking all the pleas in their defence in a subsequently instituted suit by the plaintiff.

12. Point No.(i) is answered accordingly.

13. Next, it is contended that the learned Single Judge erroneously clubbed all the issues and did not return any findings, specific in nature, on Issue No.5.

14. Order 20 Rule 5 CPC read as under:-

> "5. Court to State its decision on each issue
>
> In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit."

15. With profit we may reproduce what stands observed by the High Court of Madras in *Kalahasti Veeramma vs. Prattipati Lakshmoyya and others,* AIR (35) 1948 Madras 488, which read as under:-

> "2. The type of judgment complained of by the learned Subordinate Judge is no doubt open to serious criticism. Unfortunately, many judicial officers have a habit of clubbing together all or most of the issues and writing a diffuse judgment, without bringing their minds to bear on the particular matters that have to be decided under each issue, and then giving their conclusions on the several issues at the end of the judgment. The objection to that form of judgment is not so much that it contravenes the provisions of O.20, R. 5 of the Code, which does not seem to require anything more than that reasons should be given for the findings under the individual issues, but rather that it tends to loose thinking; with the result that the Judge does not keep before his mind the essential points to be considered; so that the judgment not only loses clarity but often leads to wrong conclusions, which would have been avoided if the Judge had discussed the various issues separately. Having said this, however, I do not find the judgment under consideration so bad that it was impossible for the appellate Court to appreciate what the findings of the trial Court were. In almost every paragraph a point which had to be determined was considered and the learned Munsif's findings given. The appellate Court would have therefore had no difficulty if it had taken some trouble to ascertain what the findings of the

District Munsif were on the various points that had to be considered in the suit and in the appeal—and presumably the learned counsel would have drawn its attention to the findings and the reasons given for them."

16. Having perused the impugned judgment, we notice that the sole issue arising for consideration was valid execution of agreement dated 24.08.2006 and its enforceability. It is in this backdrop, we are of considered view that the findings upon any one or more of the issues was sufficient for decision of the suit. To our understanding, it is this which weighed with the learned Single Judge in clubbing the issues and deciding as such. We notice that learned Single Judge has extensively reproduced the evidence and in the later part of his judgment, also assigned reasons holding the agreement not to be legally enforceable, and as such plaintiff not entitled to the relief prayed for. In our considered view, learned Single Judge has answered the core issue pertaining to the legality and validity of the execution of the agreement.

17. It is in this backdrop, we are not inclined to accede to the request of Mr.G.D.Verma, learned Senior Counsel, of remanding the matter back for re-adjudication afresh, on all the issues. It is not the requirement of law that in every case matter ought to be remanded. Power of the Appellate Court to hear and adjudicate the matter on law and fact is wide enough to decide the issues, even if required to be answered separately, in accordance with law.

18. 'Issue' as per the dictionary meaning is a point in question, an important subject of debate, disagreement, discussion or argument. It is a disputed point or question to which the parties to action have narrowed their several allegations upon which they are desirous of obtaining decision of Court, either on the question of law or fact. It is the issues framed and not pleadings that guide the parties in the matter of leading evidence. Issues must be confined to the material questions of fact or law (*facta probanda)* and not on subordinate facts or evidence by which material questions of fact or law are proved or disproved (*facta probantia).* They are lamp-post which enlighten the parties to the proceedings, the trial Court and even the Appellate Court with regard to the controversy and the evidence for eliciting truth and justice. Quite often distinction between burden of proof and onus of proof is overlooked and forgotten. Whereas the former denotes legal burden and never shifts, on the other hand, the latter would necessarily mean the evidentiary burden and keeps on shifting.

19. A decree is not dependent upon the quality of the judgment but upon the fact that the court has given formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. [*Pitamber Prasad vs. Sohan Lal and others,* AIR 1957 Allahabad 107 (Two Judges)]

20. Point No.(ii) is answered accordingly.

21. Well, it is true that the learned Single Judge has not used the words "falsehood", "fiction", "fraud" or "misrepresentation", while deciding the issues, but then bare reading of Paras No.28-30 of the judgment reveals that in dismissing the suit, he agreed with the defendants' contention.

22. But, let us examine the evidence, led by the parties to the suit.

23. In his support, plaintiff examined the following witnesses:

PW-1	Shri K.K. Sharma
PW-2	Shri Raj Kumar Garg, Plaintiff.
PW-3	Shri Sandeep Kumar
PW-4	Shri Pankaj Kumar

And placed on record the following documentary evidence:

Ex.PW-1/A	Plaintiff's affidavit.

Ex.PW-2/A	Agreement to Sell
Ex.PW-2/B	Receipt
Ex.PW-2/C	Legal Notice dated 20.4.2007
Ex.PW-2/D-1 & Ex.PW-2/D-2	Postal receipts
Ex.PW-2/D-3 & Ex.PW-2/D-4	RAD envelopes
Ex.PW-2/E	Copy of Jamabandi

24. In defence, defendants examined the following witnesses:

DW-1	Shri Om Parkash
DW-2	Shri Parveen Gupta
DW-3	Shri Ram Pal Sharma
DW-4	Ms Anuradha Sood
DW-5	Shri Deepak Kumar
DW-6	Shri Raj Kumar, (defendant).
DW-7	Shri Gopal Singh
DW-8	Shri K.K. Sharma

And placed on record the following documentary evidence:

Ex.D-1	Agreement for Sale of Land
Ex.DW-2/A	Copy of complaint to the Additional Secretary to the Chief Minister
Ex.DW-2/B	Copy of complaint to The Principal Secretary to the Chief Minister.
Ex.DW-3/A	Copy of Daily Station Diary, Police Station Dharampur, District Solan.
Ex.DW-4/A	Copy of Civil Suit No.94/1 of 2007
Ex.DW-4/B	Copy of Order dated 23.4.2007 in Civil Suit No.94/1 of 2007
Ex.DW-5/A	General Power of Attorney
Ex.DW-5/B	Cancellation/Revocation of General Power of Attorney
Ex.DW-5/C	Copy of complaint to Deputy Commissioner, Solan, District Solan, H.P., alongwith statements.
Ex.DW-5/D	Copy of complaint to Hon'ble Chief Minister.
Ex.DW-7/A	Copy of Judgment in Sessions Trial No.1-S/7 of 2009.
Ex.DW-7/B, 7/C & 7/D	Per year average charts.
Ex.DW-7/E	Legal notice to Shri Ankush Vasishtaa
Ex.DW-7/F	Postal receipt
Ex.DW-7/G	Counter foil of bank deposit receipt.

Ex.DW-7/H	Legal Notice to Shri Ankush Vasishta.
Ex.DW-7/J & 7/K	Postal receipts.
Ex.DW-7/L	Copy of a letter written to the Manager of Bank of Baroda.
Ex.DW-7/M	Postal receipt
Ex.DW-7/N	Copy of Jamabandi
Ex.DW-7/O	Copy of Jamabandi

25. It is well settled principle of law that unless by way of categorical and unequivocal admission, defendants so admit, the onus to prove its case is on the plaintiff, more so in a case of the present nature and that being Specific Performance of Agreement to Sell.

26. From the documents so filed by the plaintiff, one finds the defendants to be owners of the suit land, i.e. the land allegedly agreed to be sold by them in his favour, vide Agreement to Sell dated 24.8.2006 (Ex.PW-2/A); plaintiff having issued legal notice dated 20.4.2007 (Ex.PW-2/C); such notice having been sent by Registered AD (Ex.D-1 & D-2); Registered ADs returned with the remarks "Recipient was not found at home. Retuned to sender" (Ex.DW-2/D-2 & Ex.DW-2/D-4); and the plaintiff's affidavit of having made himself available on the date of execution of the sale deed (Ex.PW-1/A).

27. Significantly, defendants have categorically denied contents of the Agreement to Sell (Ex.PW-2/A); Legal Notice (Ex.PW-2/C); dispatch of Registered AD letters (Ex.PW-2/D-3 & 2/D-4).

28. Hence, initial onus to prove execution of the agreement would be upon the plaintiff.

29. Now, bare perusal of the agreement (Ex.PW-2/A) reveals that on all the three pages, at least at six places, there are blanks which are filled up in hand. So much so, name of the purchaser, i.e. the plaintiff, is filled in hand, so also the amount of sale consideration and the advance paid for. Even the column with regard to the date of agreement is left blank. Also, Annexure-I forming part of the agreement, referred to in the recital clause (f) is not appended with the same. Thus, prima facie, agreement itself does not inspire confidence.

30. We only remind ourselves about the status and the background of the parties to the lis. Plaintiff is a property broker/shopkeeper/hotel owner and defendants are agriculturists and rustic villagers. The first thing which strikes us is as to why would a person, entering into transaction of huge extent of land, not execute a properly filled up agreement.

31. Before we deal with the ocular evidence of the plaintiff, we may only notice what the defendants had to state in their written statement and deposed in Court. They being owners of agricultural land, had executed Power of Attorney in favour of Ankush Vasishta for sale of 50 bighas of agricultural land for a total consideration of Rs.3 crores. On 16.1.2007, on the asking of said Ankush Vasishta, they executed certain papers and by mistake copy of one such paper was left behind, which when shown to a neighbour, revealed the fraud. Defendants immediately cancelled the Power of Attorney as also lodged report with the police. Necessary remedial actions were taken. Categorically they have deposed that Ankush Vasishta and plaintiff are property brokers, working together at Dharampur.

32. In this backdrop, let us examine whether plaintiff has been able to establish valid execution of the agreement or not. And for such purpose we need only examine testimonies of the plaintiff (PW-2) and witnesses to the agreement Shri Sandeep Kumar (PW-3) and Shri Pankaj Kumar (PW-4).

33. In his examination-in-chief, plaintiff states that he entered into an agreement with the defendants, who knew him, for purchase of the suit land. He further states that the

defendants and the witnesses [Sandeep Kumar and Shri Pankaj Kumar] signed the agreement in his presence, whose signatures he identifies, at Points B1, B2, C1, C2 & D1. Out of total sale consideration of Rs.48 lakhs, a sum of Rs.4 lakhs was paid to the defendants. This was at the time of execution of the agreement and the balance sale consideration was to be paid at the time of registration of the sale deed. On 20.4.2007, he got sent a registered Legal Notice (Ex.PW-2/C), assuring his presence on 23.4.2007, in the Office of Sub Registrar, Kasauli for the purposes of registration of sale deed. On the said date, even though he remained present from 10 a.m. to 4 p.m., but defendants did not come. For making payment he carried a sum of Rs.50 lakhs. Defendants refused to execute the sale deed, for the reason that they were demanding more money as the value of the land had increased. He was and is ready and willing to perform the obligations in terms of agreement to sell and is also possessed of sufficient funds.

34. From the cross-examination part of the testimony of this witness, we find the defence of the defendants to have been somewhat probablized, if not established. He admits to be a businessman and having known Ankush Vasishta, but denies any business relationship of property dealership. He admits proforma of agreement to have been prepared and the one placed on record by the defendants (Ex.D-1) to be similar to agreement to sell (Ex.PW-2/A). He states that agreement was executed in his office at about 4 p.m. and that blank columns were filled by Shri Pankaj Kumar, so also receipt (Ex.PW-2/B) on the back side of first page of the agreement (Ex.PW-2/A) is scribed by Shri Pankaj. He does not remember whether the receipt was dated or not. He admits that with respect to the very same agreement, police had lodged a complaint against him. He admits that prior to the filing of the suit in question, defendants had already filed a suit against him and Ankush Vasishta, which even though, as on the date of recording of the statement, was pending, but neither he nor Ankush Vasishta had filed any written statement.

35. It be noticed that it was more than one year that the plaint came to be instituted.

36. Crucially, he admits that agreement (Ex.D-1) was handed over to defendant Raj Kumar one month prior to the execution of the agreement of sale. But then, this is not his pleaded case. He does not state that copy of the agreement was ever handed over to the defendants or that for more than one month parties had been negotiating execution of agreement (Ex.PW-2/A). What is important is his admission that the property in question stood mortgaged with the State Bank of India, which mortgage was redeemed by making payment of Rs.7 lakhs. Though he denies that it was Ankush Vasishta who paid a sum of Rs.8 lakhs for the said purpose, but defendants have proven such fact.

37. Further, we notice that though Sandeep Kumar (PW-3) admits execution of agreement but not that it was scribed in his presence. Only blanks were filled up in his presence. But then, he contradicts the plaintiff's version by deposing that blanks were filled up by Ghan Shyam, brother of plaintiff Raj Kumar. We reiterate the plaintiff to have categorically deposed that "*The blank columns in Ext.PW2/A were filled in by Pankaj who was a witness of this agreement. Ext.PW2/B has been scribed by Pankaj. The figure 48 lacs in words as well in the numerical has been written by Shri Pankaj*". The contradiction is major and material, rendering the version of the witnesses to be extremely doubtful and their creditworthiness to be impeached. Valid execution of the agreement is thus rendered doubtful, in fact not proven. Well, who is this Ghan Shyam? is a mystery. That part, witness (PW-3) does not remember whether the receipt was executed separately or on the same stamp paper. Further, according to this witness, agreement was signed around 4.45 p.m., unlike the version of the plaintiff, who states it was at 4 p.m. Also, he admits that two criminal cases are pending against him in the Courts at Kasauli. He does not categorically deny that in the year 2006, value of the suit land was approximately 5 lakhs per bigha, which in fact matches with the figure indicated by the defendants.

38. Further, when we peruse the testimony of another witness Shri Pankaj (PW-4), we find him to be an employee of the plaintiff and working in his hotel. He does not know whether the agreement was typed or not. But what is material is the contradiction he has brought in the statement of plaintiff and Sandeep Kumar with regard to the place of execution of agreement. According to the plaintiff, agreement was signed in his office (Gas Agency), whereas

according to this witness (PW-4), it was so done at the Shivalik Guest House, which is at a distance of 3 kms from the Gas Agency. When we peruse the statement of the plaintiff, we find the Gas Agency to be owned by him and it is from here that he runs his office. Further, this witness contradicts the plaintiff by deposing that blanks were not filled up in his presence. Not only that, he is categorical that all the parties signed the agreement at "around 4 PM", so also receipt was scribed at that time. Now, there is contradiction with regard to the time, place and the persons in whose presence blanks were filled up.

39. Thus, having perused the evidence, documentary and ocular, so led by the plaintiff, we are of the considered view that though contradictory, but self serving testimonies of plaintiff's witnesses cannot be said to be inspiring in confidence.

40. Resultantly, we find the plaintiff not to have established execution of agreement dated 24.8.2006 (Ex.PW-2/A) or a sum of Rs.4 lakhs advanced as sale consideration in terms thereof.

41. Not only that, when we peruse the testimonies of the defendants' witnesses, we find the element of falsehood, illegality and the agreement being prepared falsely for the purpose of filing of the suit, to have been established on record.

42. Defendant Raj Kumar categorically states that he executed a Power of Attorney (Ex.DW-5/A) in favour of Ankush Vasishta for disposing of his 50 bighas of land for a sale consideration of Rs.3 crores. Allegedly, Ankush and the plaintiff are partners. Well, there is nothing on record to establish such fact. Be that as it may, but the witness does state that Ankush made him sign certain papers. It was at 9-10 p.m., when three persons, i.e. Raj Kumar, Pankaj and Sandeep had come to his house. He was told that papers being executed were for sale of 50 bighas of land. In the meanwhile, there was power failure and as such after obtaining the signatures, these persons left away. But while doing so, by mistake, document (Ex.D-1) was dropped, which next day he showed it to Shri Gopal Singh and learnt about the instant deal. Realizing the fraud perpetuated by these persons, immediately he got the Power of Attorney cancelled and lodged a complaint at Police Station, Dharampur. Also, he sent a copy thereof (Ex.DW-5/B) to the Director General of Police, Himachal Pradesh and Hon'ble the Chief Minister. Neither did he ever execute any agreement with the plaintiff, much less the instant agreement (Ex.PW-2/A), nor did he receive any amount towards the sale consideration. In fact, Ankush deposited a sum of Rs.8 lakhs in the loan account of his son, which he returned in cash. He got issued notice to Ankush Vasishta (Ex.DW-7/E), indicating the element of fraud and cheating. Also, he filed a Civil Suit (Ex.DW-4/A), both against Ankush Vasishta and the plaintiff. In cross-examination, unrefutedly he clarifies being semi-illiterate, hailing from the family of agriculturists. Though he admits his signatures on Ex. PW-2/A, but denies having executed any such agreement in favour of the plaintiff.

43. The question arising for consideration is as to why would Ankush Vasishta redeem the mortgage by paying a sum of Rs.8 lakhs. Defendants have established that at the relevant time and place, average price of the land was approximately Rs.5 lakhs per bigha (Ex.DW-7/B, Ex.DW-7/C & Ex.DW-7/D). It is not a case of distress sale. Why would a person sell his land at a price far lower than the present market price. It is also not the case of the plaintiff that defendants wanted to sell the land as a large chunk, which factored the sale consideration to be low.

44. We reiterate that we are dealing with the defendants who are agriculturists and rustic villagers. They were not made aware of the terms of the agreement. Only their signatures were obtained on blank papers, that too not by the plaintiff but Ankush Vasishtaa, who, undisputedly is acquainted to the plaintiff. Necessary remedial action was taken by the defendants, both against Ankush Vasishtaa and the plaintiff.

45. Version of defendant Raj Kumar stands corroborated by Gopal Singh (DW-7), according to whom, in the morning of 17.1.2007, defendant Raj Kumar had shown him the

agreement paper (Ex.D-1), which led to the discovery of fraud and initiation of appropriate proceedings.

46. The factum of filing of the suit, in which the present plaintiff was proceeded ex-parte, stands established by Civil Ahalmad posted in the office of Civil Judge (Sr. Division), Kasauli, District Solan (DW-4).

47. Factum of the complaints written to the Hon'ble the Chief Minister as also the Police officials, stands proved through the testimonies of Shri Om Parkash (DW-1), Shri Parveen Gupta (DW-2), Shri Ram Pal Sharma (DW-3), Shri Deepak Kumar (DW-5) and Shri K.K. Sharma (DW-8).

48. Thus, in our considered view, defendants have been able to discharge the burden that the agreement was an act of falsehood and a fraudulent act and there being no legal valid enforceable cause of action subsisting in favour of the plaintiff for the suit being decreed. We do not find any reason to interfere with the findings returned by the learned Single Judge.

49. Mr. G.D. Verma, leanred Senior Advocate, relying on the ratio of law laid down by the Apex Court in *P.C. Thomas v. P.M. Ismail and others,* (2009) 10 SCC 239, contends that since the agreement to sell (Ex.PW-2/A) stands exhibited, correctness of contents thereof, be presumed with the plaintiff having established his case and discharged the onus with regard to its valid execution. (*N.E. Horo v. Smt. Jahanara Jaipal Singh,* (1972) 1 SCC 771; and *Ranvir Singh and another v. Union of India,* (2005) 12 SCC 59).

50. We are afraid, the decisions do not lay down the principle of law, sought to be so propounded. That apart, in the instant case, with the filing of the written statement, while carrying out admission and denial of the documents and leading ocular evidence, defendants have categorically denied and disputed its contents. As such contention needs to be rejected.

51. In *LIC of India and another v. Ram Pal Singh Bisen,* (2010) 4 SCC 491, the Apex Court held that mere admission of document in evidence does not amount to its proof. In other words, mere marking of exhibit on a document does not dispense with its proof, which is required to be so done in accordance with law. (Also: *Sait Tarajee Khimchand and others v. Yelamarti Satyam and others,* (1972) 4 SCC 562; *Laxman Tatyaba Kankate & another v. Smt. Taramati Harishchandra Dhatrak,* (2010) 7 SCC 717; *Rakesh Mohindra v. Anita Beri & others,* 2015 AIR(SCW) 6271).

52. In fact, on the issue raised by Mr. G.D. Verma, we deem it appropriate to reproduce the following observations made by the Apex Court in *Anvar P.V. v. P.K. Basheer and others,* (2014) 10 SCC 473:

> "Construction by plaintiff, destruction by defendant. Construction by pleadings, proof by evidence; proof only by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. These are some of the first principles of evidence. What is the nature and manner of admission of electronic records, is one of the principal issues arising for consideration in this appeal."

53. Further, in *R.V.E. Venkatachala Gounder v. Arulmigu Visweswaraswami & V.P. Temple and another,* (2003) 8 SCC 752, the Apex Court has observed as under:

> "20. .....The objections as to admissibility of documents in evidence may be classified into two classes :- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been

admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons : firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court."

"28. Whether a civil or a criminal case, the anvil for testing of "proved", "disproved" and "not proved", as defined in S. 3 of the Indian Evidence Act, 1872 is one and the same. A fact is said to be "proved" when, if considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. It is the evaluation of the result drawn by applicability of the rule, which makes the difference.

"The probative effects of evidence in civil and criminal cases are not however always the same and it has been laid down that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. BEST says : There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision : but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. (BEST, S. 95). While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt." (See *Sarkar on Evidence*, 15th Edition, pp. 58-59).

In the words of Denning, LJ (*Bater v. B*, 1950 2 All ER 458, 459 B-C). "It is true that by our law there is a higher standard of proof in criminal cases then in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So also in civil cases there may be degrees of probability." Agreeing with this statement of law, Hodson, LJ said "Just as in civil cases the balance of probability may be more readily fitted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others." (Hornal v. Neuberger P. Ltd., 1956 (3) All ER 970 at p. 977D)."

54. The law with regard to grant of relief of specific performance is now well settled. Even if plaintiff was able to prove the issues and establish its case, it is not that under all

circumstances, suit is to be allowed. Provisions of Section 20 of the Specific Reliefs Act, 1963, are evidently clear. The power is discretionary. If the contract is not equal and fair, though not void, still it can refuse the relief of specific performance. (*P.V. Joseph's son Mathew v. N. Kuruvila's Son,* 1987 (Supp1) SCC 340*; Bal Krishna v. Bhagwan Das,* (2008) 12 SCC 145; *Mahammadia Cooperative Building Society Ltd. v. Lakshmi Srinivasa Cooperative Building Society Ltd. and others,* (2008) 7 SCC 310; and *Laxman Tatyaba Kankate & another v. Smt. Taramati Harishchandra Dhatrak,* (2010) 7 SCC 717).

55. Points No.(iii) & (iv) are answered accordingly.

In view of the above, there being no merit in the appeal, same is dismissed. Pending application(s), if any, also stand disposed of.

****

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

Akhil Kumar and others .....Petitioners/Defendants.
Versus
Anil Kumar & others .....Respondents.

CMPMO No. 437 of 2017.
Reserved on : 15.11.2017.
Date of Decision: 23rd November, 2017.

Code of Civil Procedure, 1908- Temporary Mandatory Injunction- Principal reiterated that the relief of interlocutory mandatory injunction should be granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy or to restore the wrongful taking of possession. (Para-5 to 8)

Cases referred:
Dorab Cawasji Warden versus Coomi Sorab Warden and others, (1990)2 SCC 117
Mohd. Mehtab Khan & others v. Khushunma Ibrahim & others, AIR 2013 SC 1099

For the Petitioners: Mr. Pratap Singh Goverdhan, Advocate.
For the Respondents: Mr. C.P. Attri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition stands directed against the orders recorded by the learned Additional District Judge-1, Solan in Civil Msc. Appeal No. 11-2/14 of 2017, whereby, he during, the pendency of Civil Suit No. 9/1 of 2016, granted relief, of, temporary mandatory injunction vis-a-vis the plaintiff besides directed one Kulbhushan Gupta to forthwith handover keys of the demised shop to the plaintiff, one, Anil Kumar. Moreover relief of ad interim permanent prohibitory injunction, was, pronounced upon the defendants, for restraining them from theirs, during the pendency of the aforesaid civil suit, hence interfering/obstructing the plaintiff, from running the demised shop. Being aggrieved therefrom, the defendants/petitioners herein, have instituted the instant petition before this Court, whereupon they concert to beget its reversal.

2. Uncontrovertedly, one Phool Chand, held tenancy in the shop forming a part of House No.148 situated at Muaza Lower Bzar Solan, Tehsil and District Solan, H.P. The aforesaid Phool Chand expired on 30.12.2014. Upon demise, of Phool Chand, the plaintiff claimed exclusivity of rights, of, tenancy vis-a-vis the demised premises, (I) on anvil of an unregistered

testamentary disposition executed on 27.08.2014 vis-a-vis him by the aforesaid Phool Chand. It is averred in the suit that, since, the occurrence of demise of Phool Chand, (ii) AND upto 21.09.2015, the plaintiff holding possession of the demised shop, (iii) hence, on anvil of the plaintiff, holding possession, vis-a-vis the demised premises/shop, for more than six months prior, to the institution of the suit, he contends, of, his holding a legitimate right to vindicate his possession. Moreover, an averment, is borne in the suit, of, since 21.09.2015, the demised premises/shop being respectively locked by each of the litigants AND of one Kulbhushan Gupta, to whom, the respective keys, of, the locks respectively, put on shutters thereof, by each of the contestants stood handed over, under supurdari, being directed to handover its possession, to the plaintiff.

3. The defendants contested the suit, by instituting a written statement thereto, wherein, they propagated that the Will propounded by the plaintiff, not, being validly executed. Thereupon, they also canvass of theirs and not the plaintiff, at the relevant time, holding possession, of the demised premises. They, in their written statements also in their replies to the apposite application, contended, that the relief claimed by the plaintiff being not affordable to him.

4. The landlord of the demised premises, impleaded in the extant suit, as co-defendant No.3, has, in his written statement, to the plaint not supported the plaintiff's averment, of his at the relevant stage, holding, possession of the demised premises, rather he has contended therein, of the demised premises being locked. He has also denied the factum of the plaintiff, residing, with his father, during the latter's life time. However, defendant No.7, one Kulbhushan Gupta, who also stood impleaded as a party to the suit and is arrayed as defendant No.7, has, supported the plaintiff's averments, of, his since December, 2014, whereat the demise, of, one Phool Chand, occurred, his, holding possession of the tenanted premises and has further recorded, a contention therein, of, in the morning of 21.09.2016, a quarrel erupting inter se the parties at contest, especially at the stage when the plaintiff's son, opened the lock(s) of the tenanted premises, whereafter, the defendants No.1 to 3, proceeded to also lock the shutters of the tenanted premises. He has continued to therein record, a, contention of the matter being reported to the police and the contesting parties, being summoned by the Police at Police Station Sadar, whereat, a compromise occurred inter se them, in sequel whereof, the keys of the locks respectively put upon the shutter(s) of the demised premises/shop, by each of the litigants, were entrusted to him.

5. The principles, for guaging the validity(ies) of granting a relief of ad interim mandatory injunction are borne in paragraph No.16, of, a judgment rendered by the Hon'ble Apex Court in a case titled as ***Dorab Cawasji Warden versus Coomi Sorab Warden and others, (1990)2 SCC 117,*** paragraph whereof reads as under:

> "16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:
>
> (1) The plaintiff has a strong case for trail. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction. (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
>
> (3) The balance of convenience is in favour of the one seeking such relief. "

....(p.126-127)

The aforesaid relief, has been therein expostulated, to be an equitable relief, meant only for (i) preserving or restoring the status quo, existing on the last non contested status, immediately, preceding the controversy AND for compelling undoing(S) of illegal acts and (ii) for restoration of, that, which was wrongfully taken from the party complaining. The aforesaid principles STAND further reiterated, by the Hon'ble Apex Court, in a case titled as ***Mohd. Mehtab Khan & others v. Khushunma Ibrahim & others, AIR 2013 SC 1099,*** the relevant paragraph No.12 whereof reads as under:-

> "12. A proceeding under Section 6 of the Specific Relief Act, 1963 is intended to be a summary proceeding the object of which is to afford an immediate remedy to an aggrieved party to reclaim possession of which he may have been unjustly denied by an illegal act of dispossession. Questions of title or better rights of possession does not arise for adjudication in a suit under Section 6 where the only issue required to be decided is as to whether the plaintiff was in possession at any time six months prior to the date of filing of the suit. The legislative concern underlying Section 6 of the SR Act is to provide a quick remedy in cases of illegal dispossession so as to discourage litigants from seeking remedies outside the arena of law. The same is evident from the provisions of Section 6(3) which bars the remedy of an appeal or even a review against a decree passed in such a suit." (p1103-1104)

therein also it is expostulated that (i) prima facie proof qua unjust and illegal ouster from possession vis-a-vis the apposite suit property, of the complaining party, being the sine qua non, for making an adjudication upon an application, espousing a relief for grant, of, ad interim mandatory injunction vis-a-vis the suit property concerned also it is expostulated therein (ii) that the question of title or of better right(s) of any of the contesting party(ies), is insignificant, for making any pronouncement, upon, the aforesaid application, (iii) rather the solitary indispensable principle warranting its prima facie proof, being of, possession of the suit property concerned, standing prior, to the institution of the application, being evidently held by the litigant concerned, (iv) also proof emanating, of, the aspiring litigant, holding evident possession thereof, (v) his being evidently dispossessed therefrom, by unlawful acts, of, a party, who, on the basis of superior title or superior possessory right, claims possession thereof. Bearing in mind the aforesaid principles of law, the factum of validity(ies) of the Will propounded by the plaintiff, is, insignificant (vi)also any questioning(s) by the defendants in respect of its validity, is insignificant, nor any non adjudication being meted thereupon, by the learned Civil Court is also unworthwhile, as, (viii) upon invalidity thereof being judicially pronounced, thereupon, the apposite title vis-a-vis the demised premises, as claimed by the defendants, would atain validation, (ix) whereas, for testing the validity of any adjudication pronounced, upon, the apposite application, the afore referred factum of evident settled possession thereof, being, at the relevant time, standing held by either of them, is, the more overwhelming factum to be borne in mind.

6. Consequently, it has to be determined, from, the evidence on record, whether the plaintiff or the defendants/petitioners herein, satisfy the aforesaid tests, (i) thereupon, with one Kulbhushan Gupta, the signatory, of a compromise, occurring at page 87 of the record, of the learned trial Court, also who stands constituted therein, to be the enstrustee, of, the keys of the locks, respectively, put on the shutters of the demised premises, by each of the contesting parties, (ii) in consonance therewith hence rearing a contention in his written statement, thereupon, he is to be prima facie construed to be credible. The imputation of prima facie credence, to the aforesaid factum (ii) underscores, an inference of prima facie, all, the contesting parties locking the disputed premises, on 21.09.2015, (iii) since then Kulbhushan Gupta, constituted, in the apposite memo, of supurdari, as prepared on the aforesaid date, to be the entrustee, of, the keys of the locks respectively, put upon the shutters of the demised premises, by each of the litigants, holding possession of the apposite keys, (iv) hence, reiteratedly his contention in his written

statement, of the plaintiff/applicant, prior thereto, holding possession thereof, is to be imputed credence also, the averred contention, borne in the written statement of defendant No.7 Mr. Kulbhushan Gupta, of, a quarrel erupting inter se the contesting parties on 21.09.2015, is to be also imputed prima facie sanctity. Nonetheless, it is also to be, from other best befitting material existing on record, hence determined, of, prior to 21.09.2015, the plaintiff evidently holding settled lawful possession of the demised premises AND only thereafter, the defendants/petitioners herein, by their unlawful acts, concerting to usurp his possession, (v)whereupon, on occurrence hereat of affirmative material qua the aforestated trite factum hence spurring vis-a-vis the plaintiff, it, would be permissible for this Court, to, hold of the afore extracted principles of law, for hence imputing validation, to the impugned order also begetting satiation.

7. (i) The bills of the electricity standing defrayed vis-a-vis the demised premises, immediately prior to 21.09.2015, by the plaintiff. (ii) An affirmative order being recorded by the learned Rent Controller, Solan, on an application preferred before him, by the plaintiff, wherein he sought its permission, to deposit the rent qua the demised premises, for the period commencing from 1.11.2014 upto 31.08.2015, in sequel whereto, the subsequenlty sought apposite permission by the plaintiff for its deposit, stood also accorded on 18.8.2015, (iii) begets an inference, of the denial of the landlord of the plaintiff, not, holding possession, of the demised premises prior to 21.09.2015, prima facie, not at this stage carrying any tenacity.

8. Since, the afore said application, moved, by the plaintiff before the learned Rent Controller, Solan, for his hence seeking its permission, to, deposit the quantum of rent, before him, appertained to the period commencing from 1.11.2014 upto 31.08.2015, (i) hence, with its covering the period prior to 21.09.2015, on latter date whereof, each of the contesting parties respectively put their respective locks upon the shutters of the demised premises. (ii) Besides, when during pendency whereof, the defendants/petitioners herein also instituting, an application cast under the provisions of Order 1, Rule 10 of the CPC, wherein they sought their impleadment, as co-petitioners therein, (iii) whereas, with the aforesaid application standing dismissed, (iv) besides when, the aforesaid order was, not, concerted, to be reversed by theirs making a challenge thereagainst, before the learned Appellate Authority concerned, (v) thereupon, the disaffirmative order pronounced, upon, an application instituted by the defendants/petitioners under Order 1, Rule 10 of the CPC has attained conclusivity. (vi) rather also the affirmative order pronounced, upon, the plaintiff's application wherein he sought permission to deposit rent, for the aforesaid period, with respect to the demised premises, and in compliance therewith the apposite deposit, was, also made, renders a conclusion, of, the defendants/petitioners herein being estopped, to, contend of the plaintiff, not, holding possession of the demised premises, since 31.12.2014 to 21.09.2015, also they are estopped to contend that prior to the incident of 21.09.2014, the plaintiff not holding possession thereof. The defendants, on 30.06.2016, also filed an application for permission to deposit rent with respect to the demised shop, for, the period commencing from 1.9.2015 upto June, 2016, application whereof stood allowed by the learned Rent Controller Solan on 4.8.2016. Nonetheless, the aforesaid affirmative pronouncement made upon the defendants' application, would not, tear apart the sanctity of an earlier thereof affirmative order pronounced upon the plaintiff's application, for the reason(s), (i) the plaintiff's application appertaining, to, the period commencing subsequent to the demise of the original tenant, one Phool Chand; (ii) during pendency whereof, the defendants' effort to seek therein their impleadment standing rejected, (iii) hence, the affirmative order made upon the plaintiff's application, satiating the cardinal test, of, prior to the institution, of, the suit AND prior to the incident of 21.09.2014, the plaintiff holding, possession of the demised premises, (iv) contrarily, the permission, as accorded vis-a-vis the defendants, upon their application, to deposit rent qua the disputed shop, when appertains to a period commencing prior to the incident of 21.09.2015 AND lasts upto a period, when, the Appellate Court pronounced an order upon the apposite application, for relief of ad interim injunction AND when on 21.09.2015, the lawful possession of the plaintiff qua the demised premises, was, evidently unlawfully usurped by acts of the defendants, (v) thereupon defrayments of rent, if any, by the defendants, do not carry any

effect nor beget satiation of the cardinal tests. (vi) More so, when the apposite contention of defendant No.7, supportive of the plaintiff, subsumes besides overwhelms all effects thereof.

9. Be that as it may, the defendants also seek capitalization, from theirs liquidating expenses towards electricity tariffs, appertaining to the demised premises, yet the aforesaid liquidation(s) by them, are meaningless and cannot erode the tenacity, of the aforestated prima facie inference marshalled by this Court, qua, the plaintiff prior to 21.09.2015 holding settled possession, of, the demised premises, (I) given theirs appertaining, to, a period subsequent to the demise of deceased Phool Chand. Moreover, photographic evidence in respect of the plaintiff/applicant, holding, possession of the demised premises, whereto imputation of reliance, was meted by the learned Appellate Court, has not, been in the grounds of the instant revision petition, canvassed, to be not appertaining to the identity of the plaintiff also stands not therein canvassed, to be not appertaining to the demised premises, (ii) sequel whereof is of immediately prior to the incident of 21.09.2015, the plaintiff/applicant holding possession, of the demised premises, (iii) reinforced vigour, to, the aforesaid inference, is drawn, from, the factum of a newspaper cutting, occurring at page 70 of the record, of, the learned trial Court, wherein an news item is printed qua deceased original tenant, Phool Chand disinheriting one Akhil Kumar and his family members, (iv) renders hence a firm inference of the plaintiff, residing with his father throughout the latter's life time, whereas, obviously hence the defendants/petitioners, not, residing with him. Even if, the plaintiff is alloted a shop in Ganj Bazar, Solan, also if he is holding control thereof, yet effects thereof, not, undermining the effect(s) of the aforesaid inference(s), drawn, from formidable apposite material existing in respect thereto, (ii) wherefrom, it is established that prior, to and subsequent, to the demise of his father also immediately prior to the incident of 21.09.2015, his, holding possession of the demised premises. Consequently, with the material referred above hence satiating the principle(s) borne, in the afore extracted apt portion(s) of the decision(s) rendered by the Hon'ble Apex Court, significantly also when in tandem therewith, the plaintiff establishes (a) his hence holding settled possession of the disputed premises; (b) his settled possession thereof being concerted, to be unlawfully usurped by the defendants/petitioners herein. In sequel, the order of the learned First Appellate Curt is well merited and does not warrant any interference. More so, when the balance of convenience lies in favour of the plaintiff also when in the event of refusal of the ad interim injunction, it will put the plaintiff/applicant to a loss which, cannot, be compensated in terms of money.

10. For the foregoing reasons, the instant petition is dismissed and the impugned orders are maintained and affirmed. However, it is made clear that the the observations made hereinabove shall not be construed as any expression on the merit(s) of the case. No order as to costs. All pending applications also stand disposed of .

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

Shri Dalbir Singh Pathania & Anr. .....Appellants/Defendants.

Versus

Sushil Kumar & Ors. .....Respondents/Plaintiffs.

RSA No. 656 of 2005 and CMP No. 423 of 2009.
Reserved on : 17.11.2017.
Decided on:23rd November, 2017.

Code of Civil Procedure, 1908- Suit for Mandatory Injunction alongwith Permanent Prohibitory Injunction- Held- if the documentary evidence adduced by the plaintiff is infirm and not worth credence oral evidence cannot be a substitute thereof, enabling the plaintiff to prove his case. (Para-10 and 11)

For the Appellant: Mr. Bhupender Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate.

For the Respondents: Mr. Rajnish K. Lal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree for mandatory injunction, with, consequential relief of permanent prohibitory injunction being rendered qua the passage in dispute, was, under concurrent pronouncements recorded thereon, by both the learned Courts below, hence, decreed.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for declaration and against the defendants seeking declaration that there is a path show shown as ABCD in the site plan which is being enjoyed by the plaintiffs for long and the defendants have got no right, or title to obstruct it, it being a Rasta Share Aam in the land comprising khasra No.415. The defendants who purchased the land comprising khasra No.1013 from one Mangla obstructed the passage by installing an iron gate over it and thereby the plaintiffs have been obstructed from proceeding to their houses from the bazar, whereas, this passage was being enjoyed by them for long. The plaintiffs had also sought a decree of mandatory injunction directing the removal of the iron gate raised by the defendants. It has also been averred that the passage in addition to going to the house, his being also used to proceed to the fields and is within the Lal Lakeer (Abadi deh land). This land is being enjoyed by the plaintiff and other villagers. Thus the suit.

3. The defendants contested the suit and filed written statement, wherein, it is averred that the path claimed never existing to be utilized by the plaintiff but it is exclusive passage leading to the house of the defendants and the defendants had earlier constructed a gate in the year 1972 which was wooden gate but in the year 1995, the defendants after removing the wooden gate constructed an iron gate over there. Prior to it, the defendants were tethering their animals over this land. It has been averred that prior to the settlement operation the Share-Aam-Rasta was in the land comprising khasra No.415 which was on the four marlas but during settlement operation of the land of khasra No.1013 was merged into the khasra No.415 which was earlier bearing khasra No.930 and thereby merging the land of another khasra No. which was earlier owned by one Mangla and was thereafter purchase by the defendants the area of land showing Share-Aam-Rasta comprising khasra No.415 has been increased, whereas, the area of land of defendants has been decreased. Thereby depriving the defendants of the valuable rights. The matter was taken up before the Settlement Officer, who decided in favour of defendants and necessary corrections were ordered. Thereafter the matter was taken to the Court of Divisional Commissioner by the plaintiffs but that revision petition was dismissed. As per the latest record the area of land comprising khasra No.415 has been decreased to the area which was earlier having four marlas and thus the path claimed is not available to the plaintiff and the iron gate has rightly been constructed which is in the ownership and possession of the defendants.

4. The plaintiffs/respondents herein filed replication to the written statement of the defendants/appellants herein, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the passage mentioned ABCD shown in red colour in the site plan attached, is a public passage as alleged? OPP

2. If issue No.1 is proved in affirmative, whether the plaintiffs are entitled to the relief of permanent injunction and mandatory injunction, as prayed for?OPP

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

4. Whether the plaintiffs have no locus standi to file the present suit?OPD.

5. Whether the plaintiffs have no cause of action to sue the defendants? OPD.

6. Whether the plaintiffs are estopped by their act and conduct from bringing the present suit? OPD.

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

8. Whether the plaintiffs have not come to the court with clean hands and have suppressed material facts, as alleged, if so, its effect? OPD.

9. Whether the suit of the plaintiffs is bad for non joiner of necessary parties? OPD.

10. Whether the suit of the plaintiffs is bad for mIs joinder of causes of action? OPD.

11. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom by the defendants/appellants, before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal before this Court wherein, they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission , this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether both the Courts have committed grave error of law and jurisdiction in not appreciating that the rights of easement as claimed by the plaintiffs over the suit land, lacked proper pleadings and proof and also that such suit was incompetent for right of passage by easement of prescription and necessity together? Have not courts below acted in erroneous and perverse manner in not taking into consideration the bare provisions of Easement Act?

b) Whether both the courts have misdirected themselves in not relying on the latest revenue entries which have presumption of truth attached to them, which is considered would have entailed in dismissal of the suit?

Substantial questions of Law No.1 and 2.

8. Upon suit khasra number 415, the plaintiffs' averred right of its user, as a passage, by them, for theirs reaching the bazar, (i) whereas in the defendants erecting an iron gate upon the aforesaid passage, hence are espoused in the plaint, to unlawfully forbid the plaintiffs from using the aforesaid path, (ii) hence, the plaintiffs claimed rendition of a decree, for permanent prohibitory injunction, for restraining the defendants, from, preventing them from using passage delineated, as, ABCD in the site plan, appended with the plaint, (iii) also claimed a decree for mandatory injunction being pronounced vis-a-vis the defendants, for the latter demolishing the iron gate erected by them, upon, the passage delineated, as ABCD in the site plan, appended with the plaint.

9. The defendants instituted a written statement to the plaint, wherein, they espoused (i) of the propagation, of, the plaintiffs of theirs holding since times immemorial, a right of easement, upon, the suit path recorded in the revenue record as “shre-aam-rasta” being unacceptable, (ii) given theirs holding apposite access(es) from a route alternative thereto. However, with reflections occurring, in Ex.P3/A, Ex.P-1 and P4/A, of suit khasra number being reflected therein as “shre-aam-rasta”, hence, the plaintiffs' claim for its apposite user is lawful,

dehors theirs holding alternative thereto accesses to reach the bazar. Consequently, the plaintiffs' suit for user of path borne in suit kahsra No.415, is properly constituted, even if, they purportedly apart from the suit khasra number, hold, an alternative path, for reaching the bazar.

10. Be that as it may, the plaintiffs' were entailed with a dire legal necessity, to prove (i) that the reflections borne in Ex.P1, proven by PW-1, wherein the dimensions of the recorded suit "Share-aam-rasta", are embodied, (ii) also wherein he elucidates the points of commencement and termination of the suit "path" borne, on suit kahsra No.415, (iii) standing prepared by PW-1, with his evidently in contemporaneity of its preparation, holding, the relevant settlement map/aks musabi; (iv) his borrowing the dimensions, of the path reflected in Ex.P-1, from, the relevant apt aks musabi/settlement map, (v) whereafter, his proceeding to relay the aforesaid dimensions borrowed by him from the Aks Musabi, onto the lands, apposite vis-a-vis the lands borne in suit khasra No.415. (vi) whereupon, Ex.P-1, would be formidably concluded to appertain to the suit path. For making the aforesaid discernments, an allusion to the testification, of PW-1 is imperative, (vii) wherein he is unable to articulate, of, his at the time of his preparing Ex. P-1, his carrying the apt aks musabi/settlement map, (viii) obviously hence he has also been unable to communicate therein, of, his therefrom making borrowing(s), of, the dimensions of suit kahsra No.415, whereafter, he relayed them onto the ground/land apposite vis-a-vis suit khasra number. In aftermath, lack of the aforesaid articulations in the testification of PW-1, who prepared Ex.P-1, contrarily constrain a conclusion of (ix) PW-1 imprecisely and conjecturally preparing EX.P-1; (x) the reflections borne in Ex.P-1 being amenable to a construction of theirs bearing no linkage nor holding any connectivity with suit kahsra No.415. Consequently, for lack of efficacious proof being lent qua Ex.P-1 carrying precise linkage with suit kahsra No. 415, rendered any imputation of credence thereon, to be wholly insagacious. Apart therefrom any reliance imputed vis-a-vis Ex. P-3, exhibit whereof is the report of the Local Commissioner, who, therein has made alike inapt communication(s) vis-a-vis those rendered by PW-1 also hence for alike infirmities gripping Ex.P-1, proven by PW-1, also thereupon renders, Ex. P-3 to be not carrying any probative vigour, (xi) for thereupon making any firm conclusion, of, the plaintiffs proving qua thereupon, theirs, firmly establishing, of, the defendants by purportedly erecting an iron gate upon suit kahsra number, theirs hence impeding or forbidding the plaintiffs from using it as a path, for enabling theirs accessing to bazar, (xii) nor it can be concluded that by theirs purportedly erecting an iron gate upon the suit khasra numbers, theirs precluding its user by the plaintiffs. Consequently, the decree for permanent prohibitory injunction as well as for mandatory injunction was not pronounceable against the defendants as inaptly done by both the learned Courts below.

11. Since, the best documentary evidence, adduced by the plaintiffs, for proving the averments borne in the plaint, is, for all the reasons aforestated, hence, infirm, thereupon, oral evidence, if any, adduced by the plaintiffs, is, neither a befitting substitute thereto nor is a befitting piece, of evidence, for enabling the plaintiffs, to contend that their suit claim, stands formidably proven.

12. During the pendency of the instant appeal before this Court, the counsel, for the defendants/appellants herein, has instituted before this Court, an application bearing CMP No. 423 of 2009, application whereof, is cast under the provisions of Order 41, Rule 27 of the CPC , wherein they seek the leave of this Court, to adduce on record, a verdict pronounced by the learned Financial Commissioner, wherein, he has affirmed, the findings recorded by the Revenue Officer concerned, qua the dimensions of old khasra No.930, wherefrom suit khasra No.415, was carved, being untenably increased from four marlas, to about 15 marlas. Since, this Court for all the reasons recorded hereinabove, has pronounced that the plaintiffs' endeavour, to prove their suit claim, vis-a-vis the suit khasra number, being founded, upon infirm evidence, (i) thereupon, this Court deems it fit, to, not afford any relief vis-a-vis the defendants/applicants, vis-a-vis adduction into evidence, of the order pronounced by the learned Financial Commissioner, (ii) given its adduction being neither just nor essential for deciding the controversy. Preeminently also any occasion for granting the apposite leave, to the defendants/applicants, would arise, only when the Local Commissioner concerned and PW-1, had carried, valid demarcation(s) of the suit kahsra number, whereupon the effects thereof would stand denuded by the order rendered by the

Financial Commissioner, (iii) whereas, when this Court hereinabove concludes, of, the aforesaid apt pieces of documentary evidence prepared by PW-1 and by the Local Commissioner concerned, being infirm nor theirs carrying any evidentiary worth, (iv) thereupon, it is also befitting to decline the apposite leave, to the defendants/applicants. Accordingly, both the substantial questions of law, are answered in favour of the appellants and against the respondents.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have excluded germane and apposite material from consideration.

14. In view of the above discussion, the instant appeal is allowed and the impugned judgments and decrees rendered by both the learned Courts below are set aside. Consequently, the suit of the plaintiffs is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Gian Chand & others .....Appellants/Plaintiffs.

Versus

Kailasho Devi & Ors. .....Respondents/Defendants.

RSA No. 494 of 2004.
Reserved on : 17.11.2017.
Decided on:23rd November, 2017.

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

(Para-7 to 9)

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiffs sought to amend the pleadings to incorporate relief of challenging the impugned judgment- held, that in view of proviso appended under Order 6 Rule 17 CPC- amendment cannot be allowed as plaintiffs were aware of the judgment in question, brought by them only on the record in the beginning of the suit- they have not exercised due diligence - no grounds for interference- appeal dismissed. (Para-10 to 11)

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

For Respondents No.1 to and 10 to 17: Mr. R.K. Sharma, Senior Advocate with Ms. Anita Parmar, Advocate.
Other respondents already proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree of permanent prohibitory injunction restraining from causing any interference over the suit land, was, under concurrent pronouncements recorded thereon by both the learned Courts below, hence, dismissed.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for permanent prohibitory injunction against the defendants claiming that the land comprised in Khata No. 3, Khatauni No.4, Khasra No.711, measuring 9 marlas, Khata No.10, Khatauni No.8, khasra No.713, measuring 9 marlas, Khata No.10, Khatauni No.11, Khasra No.712, measuring 16 marlas, total measuring 3 K-5M, as per jamabandi for the year 1985-86, situated in Tika Lag, Mauza Mewa, Tehsil Bhoranj and District Hamirpur, H.P., is shown to be in possession of the plaintiffs and the defendants No.13 to 15. The plaintiffs and defendants No.13 to 15 were tenants over the suit land and were cultivating the same. They are in possession and lateron proprietary rights were confirmed upon the plaintiffs and defendants No. 13 to 15, in respect of the suit land along with other land of which they were tenants under the defendants No.1 to 12, except the share of widow Jai Devi, defendant No.6. Defendant No.1 to 12 are threatening to take forcible possession of the suit land by showing that there was a compromise between Jagdish Chand and defendants No.1 to 12 on 23.2.1988. The plaintiffs and defendants no.13, 15 and 16 have never entered into an agreement nor they authorised any body to enter in to such agreement and the said agreement/compromise is illegal, null and void. The alleged compromise/agreement in Civil Suit No.137/1 of 1986, titled as Mangatu vs. Jai Devi is illegal, null and void.

3. The defendants contested the suit, however, they have failed to file written statement to the plaint despite several opportunities standing granted to them, hence, the learned trial Court under an order recorded on 17.12.1996, closed their right to file written statement to the plaint.

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

1. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction? OPP.

2. Relief.

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

6. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. The instant appeal stand admitted, on 4.9.2017, on the hereinafter extracted substantial questions of law:-

a) Whether in the facts and circumstances of the case, the compromise judgment and decree Exts. P-13 and P-14 were liable to be set aside being not lawful when admittedly, at the time of alleged relinquishment, the plaintiffs/appellants were tenants and defendants No.13, 15 and 16 were tenants in possession of the property and relinquishment could not be made in favour of the landlord?

b) Whether the suit of the plaintiff was within limitation when admittedly, the appellants were in possession of the property and suit was brought when cloud was cast on the title by the defendants seeking to interfere with their possession?

c) Whether the findings recorded are perverse based on misreading of documents, judgment and decree Exts. P13 and P-14 and the statement of

the plaintiff and the inferences drawn are not warranted on the material on record?

Substantial questions of Law No.1 to 3.

7. Previous suit bearing C.S. No. 137 of 1986, was on anvil, of the statement(s), of the contesting parties hence decreed. The judgment pronounced by the learned Senior Sub Judge, Hamirpur upon Civil Suit No. 137-I/1986 bears Ext. P-13, decree rendered in pursuance thereto is borne in Ex. P-14. The suit land embodied, in the previous suit, is, uncontrovertedly congruous vis-a-vis the suit land in the extant suit. In the previous suit, one of the co-plaintiff herein, namely, Roshan Lal was arrayed as co-defendant No.12. Prem Dass and Gain Chand, respectively arrayed as co-plaintiffs No. 2 and 1, in the extant suit, were, also arrayed therein as co-defendants No.13 and 14. Hence, the conclusive verdicts recorded, in the previous suit, borne in Ex. P-13 and Ex. P-14 are enforceable besides binding upon them. Since Mangatu was arrayed in the previous suit as co-plaintiff No.1 along with one Jagdish Chand, arrayed herein as co-plaintiff No.2, hence, with hereat co-plaintiffs No. 4 to 8, deriving an interest in the extant suit, purportedly through Mangatu, thereupon, they are bound, by the conclusive rendition recorded in Ex.P-13 and in Ex.P-14. One Purkha, co-plaintiff No.9 herein, was, arrayed in the previous suit as co-defendant No.10, whereas, one Bhura, co-defendant No.15 in the extant suit, was, arrayed in the previous suit as co-defendant No.9, thereupon, the affinity(ies) occurring inter se the contesting parties in the previous suit vis-a-vis the extant suit, render the previous rendition(s) to be binding besides enforceable vis-a-vis them. Nanak Chand and Nikka, who are respectively arrayed as co-defendants No.12 and 13 in the extant suit, were, respectively arrayed in the previous suit as co-defendants No.7 and 11, hence, they are also bound by the previously recorded conclusive verdict borne in Ex.P-13 and Ex.P14. Onkar Chand and Om Sagar, respectively arrayed as co-defendants No.4 and 5 in the extant suit, were respectively arrayed in the previous suit, as, co-defendants No. 4 and 5, hence, they are also bound by the conclusive verdict recorded in previous suit, borne in Ex. P-13 and P-14. Moreover with Biasan Devi, Rohit Kumar, Vikas, Amriti and Taran, being respectively arrayed hereat as co-defendants Nos. 9(a), 9(b), 9(c) and co-defendants No.10 and 11, AND claim interest(s) in the extant suit khasra numbers, in the capacity of theirs, respectively being the widow, sons and daughters of deceased Sarwan Kumar, who was arrayed in the previous suit as defendant No.3, hence render themselves to be bound by the judgment and decree recorded in the previous suit. Similarly, Satya Devi, Santosh, daughters of Mauzi Ram only arrayed hereat, respectively as co-defendants No. 2 and 3, as also, Thakur Dass arrayed hereat as co-defendant No.7, like wise Kailsho Devi, who stood impleaded as co-defendant No.1 in the extant suit, AND was arrayed in the previous suit as co-defendant No.6, besides Jai Devi, arrayed as co defendant No.6 in the extant suit, was arrayed as defendant No.1 in the earlier suit. Since, the aforesaid, claim an interest in the extant suit khasra numbers, in the capacity of theirs being respectively the daughters of Mouzi Ram as also widow and son of Brahmu, besides when the interest of the aforesaid, in the previous litigation, stood respectively either personally represented or through their respective apposite predecessors-in-interest, hence they are also bound by the previously recorded verdicts borne in Ex.P-13 and P-14. Consequently, with, in the afore referred manner analogity occurring inter se the suit khasra numbers borne in the extant suit vis-a-vis the previous suit, as also with, visible congruity occurring inter se the contesting parties hereat vis-a-vis the contesting parties in the previous suit, (i) thereupon, hence the judgement and decree pronounced in the previous suit bearing Civil Suit No. 136-I/1986, is , inter se binding upon the alike contesting parties hereat vis-a-vis alike contesting parties therein besides is binding upon the respective successors-in-interest of litigants in the previous suit, latter whereof's interest vis-a-vis the suit property herein bearing similarity vis-a-vis the suit property therein, stood earlier represented by their respective predecessors-in-interest, hence the previous judgment and decree, is rendered enforceable upon all the litigants hereat.

8. With conclusivity being fastened vis-a-vis the previous rendition(s), thereupon, the plaintiffs' espousal, in the extant suit, (I) of, no lawful valid agreement being entered vis-a-vis the suit property borne therein nor the previous litigants besides their respective predecessors-

in-interest holding the apposite authorization(s), for the relevant purpose, (ii) thereupon, hence the previous rendition(s), being vitiated cannot be accepted, for reversing the binding and conclusive verdicts, rendered upon the previous suit bearing C.S. No. 136-1/1986, verdicts whereof are comprised in Ex.P-13 and in Ex.P-14. Preeminently, also the aforesaid plea, was, to be firmly rested upon firm evidentiary material, wherefrom evincings spurred, of, (iii) despite, theirs at the time of institution of the previous suit besides at the stage of its consummation, hence theirs holding an independent valid indefeasible interest in the suit property, (iv) yet the respective predecessors-in-interest of the apposite contestants in the extant suit, willfully abandoning theirs being arrayed as part(ies) in the previous suit, (v) whereupon their interests in the previous suit property, were earlier not properly watched. However, evidence in support of the aforesaid factum remains, not, adduced by the contestants. Consequently, previous renditions embodied in Ex.P-13 and in Ex.P-14, AND as rendered upon the previous suit, wherein, some of the contestants therein are common vis-a-vis the contestants herein, also when visibly some of the contestants herein, were in the previous suit, represented by their respective predecessors-in-interest, latter whereof were therein either arrayed in the array of co-plaintiffs or in the array of co-defendants, (vi) thereupon, the earlier verdict(s) pronounced upon alike contestants therein vis-a-vis the contestants hereat, also the previous verdict(s) pronounced upon the predecessors-in-interest of the apposite contestants hereat, latters' interest in the analogous suit property, was, earlier watched by their predecessors-in-interest, (viii) are binding besides enforceable upon all the apposite successors-in-interest AND upon all alike contestants therein vis-a-vis contestants hereat. Preeminence vis-a-vis the aforesaid inference is galvanized from the suit property therein being alike vis-a-vis the suit property hereat.

9. The aforesaid conclusion formed by this Court, though may not render, it, imperative upon the plaintiffs, to also make a specific claim for setting aside the pronouncement, borne in Ex.P-13 and in Ex.P-14. (i) Nonetheless, failure(s), of the plaintiff, to make a challenge vis-a-vis the judgment and decrees recorded in the previous suit, rather theirs making challenge, to the purported compromise, compromise whereof, though, has been referred in the previous suit, yet scribed compromise whereof, remains unadduced on record, (ii) thereupon, any relief in respect of setting aside, of any purported compromise, entered, in the previous suit, would also not beget any further relief from this Court, for quashing and setting aside the previous judgment and decree, respectively borne in Ex. P-13 and Ex.P 14, the latter exhibits remaining unimpugned in the extant suit. Preeminently, also when the snag in pleadings qua the aforesaid fact, would, forbid any according of relief qua it.

10. During the pendency of the instant appeal before this Court, the plaintiffs/appellants herein instituted an application, bearing CMP No. 1061 of 2004, application whereof is cast under the provisions of Order 6, Rule 17 of the CPC, provisions whereof read as under:-

> **"17. Amendment of Pleadings.-** the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

Through the aforesaid application, the plaintiffs/appellants herein, concert to cure the effect of all infirmities besides omission(s) on their part, to, make a challenge upon the judgement(s) and decree(s) pronounced, in previous suit bearing C.S. No. 136-I/1986, pronouncements whereof are respectively borne in Ex.P-13 and in Ex.P14. Even, though, the aforesaid amendment, may be necessary, for conclusively putting to rest, the entire gamut of the controversy engaging the parties to the lis besides for removing the apposite snags, (i) yet with the proviso, occurring

underneath Order 6, Rule 17 of the CPC casting an interdiction upon Courts of law, against according, of, the apposite leave, to the litigant concerned, concerting to beget amendment(s) in the apposite pleadings, (ii) if evidence comes forth, qua despite exercise of due diligence, the facts, for whose incorporation, in the apposite pleadings, the leave of the Court is sought, (iii) were yet discoverable at the earliest or at the stage contemporaneous vis-a-vis the institution of the suit. Bearing in mind the aforesaid principle of law encapsulated in the proviso appended underneath Order 6, Rule 17 of the CPC, hence, when even, if the aforesaid leave to the plaintiff may be affordable, it being just and essential, for firmly resting the controversy, engaging the parties, nonetheless with (iv) the instant suit standing instituted on 6.11.1991, (v) also during the course of trial thereof, adduction of Ex.P13 and Ex.P14, hence, occurring, at the instance of the plaintiffs; (vi) hence with the plaintiffs, during, the course of trial of the instant suit, before the learned trial Court, hence acquiring knowledge qua rendition(s), comprised in Ex. P-13 and Ex. P-14, (vii) yet theirs failing, to, at the earliest, seek leave of the Court to make apt amendments in the relief clause of the plaint, especially in consonance therewith, (v) renders the mandate of the statutory interdiction to hence stand attracted against the plaintiffs whereupon, this Court is constrained to decline leave, vis-a-vis the plaintiffs, for theirs begetting the espoused amendments in the plaint. Accordingly, CMP No. 1061 of 2004 is dismissed.

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

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

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

Smt. Jayoti Kumari Sharma .....Appellant.
Versus
Sh. Shashi Pal .....Respondent.

FAO No. 256 of 2012.
Reserved on : 06.11.2017.
Decided on : 23rd November, 2017.

Hindu Marriage Act, 1955- Section 13- Nullity of Marriage and Divorce- Respondent wife has illicit relation with one 'A'- she was caught alone in matrimonial home with 'A' twice and could not explain the presence of latter- respondent used to pick up quarrels with petitioner and his parents- she did not visit her ailing mother –in- law in the IGMC despite the fact that she was working there as staff nurse- she filed false case against petitioner and his parents under Sections 498-A and 323 of IPC, in consequence of which they were arrested- held relying upon the judgment of the Supreme Court in ***Samar Ghosh versus Jaya Ghosh, (2007)4 SCC 511*** that comprehensive appraisal of the entire matrimonial life of the parties needs to be made and marriage shall be deemed to have irretrievably broken down, if owing to the acute mental pain, agony and sufferings, the parties cannot be expected to live with each other at all- further held that evidence on record clearly shows that marriage of the parties is fully covered in the parameters of the aforementioned authority and, as such, annulment of their marital status is

necessary in given circumstances- Court below has rightly annulled the marriage- petition stands dismissed. (Para-8 to 10)

Case referred:
Samar Ghosh versus Jaya Ghosh, (2007)4 SCC 511

For the Appellant: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the Respondent : Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the pronouncement recorded by the learned District Judge, Shimla, on 07.06.2012 in H.M.A. Petition No. 23-S/3 of 2010, whereby, he dissolved the marital ties inter se the appellant herein with the respondent herein.

2. The brief facts of the case are that the respondent (hereinafter called as the petitioner) was married to the appellant (hereinafter called as the respondent) on 02.05.2005, according to the Hindu rites and ceremonies at in village Karen (Sundernagar-Mandi). Thereafter, parties lived as husband and wife. The petitioner had been working in Vidhan Sabha Secretariat. He stood allotted government accommodation, Set No.5, Metropole annexe. At the time of her marriage, the respondent had been working as staff nurse in Fortis Hospital, Mohali. The petitioner had got the respondent employed on contract and she stood posted in Civil Hospital, Jogindernagar in January, 2006. In may, 2006, the petitioner had got the respondent transferred to Shimla and she had started working in IGMC, Shimla. The petitioner has averred that the respondent had treated him with cruelty. The conduct of the respondent from very beginning had been nagging, dominating and far from satisfactory. The petitioner had been tolerating cruelty meted out to him with a view to carry on his marriage. The respondent had been picking up quarrel with the petitioner and his parents over petty matters. The parents of the petitioner had been suffering from various ailments requiring time-to-time medical check up. Hence, the parents of the petitioner had been residing with him. The respondent had opposed the residing of her father-in-law and mother-in-law with her. At occasions, the respondent had manhandled the petitioner. When asked to improve her conduct, the respondent had threatened to commit suicide. The petitioner had been compelled to report against the respondent to the local police on 10.11.2006. The respondent had been getting salary of Rs.13,500/- per month. As against this, the petitioner had been in receipt of salary of Rs.12,737/- per month. The petitioner had been contributing to GPF, GIS and his carry home salary had been Rs.5000/- per month. The respondent had been snatching salary of the petitioner and had not been contributing in any way for maintenance and upkeep of the household. The respondent had given birth to one male issue on 6.2.2008. It is averred that after some time of marriage, the respondent had developed intimacy with one Ajay Negi. It so happened that in the month of March, 2007, the petitioner had returned to his house earlier than his usual time and had found Sh. Ajay Negi present in his house. The petitioner had interrogated the respondent about the presence of a stranger with her. Instead of admitting her fault, the respondent had started quarrelling with the petitioner. In the month of April, 2007, the petitioner had left ofr his village, but could not board the bus and had returned to his house only to find Sh. Ajay Negi at his house at about 8.00 p.m. The respondent had ot been able to give any satisfactory explanation of presence of stranger with her. On 8.4.2007, the petitioner's mother had visited him in connection with her medical treatment. The respondent had picked up a quarrel with her mother-in-law. The ailmentof the petitioner's mother had got complicated and she required immediate medical aid. The petitioner had been compelled to take his mother to I.G.M.C. The respondent though employed in IGMC yet did not visit her mother-in-law and had started

proclaiming her good health. On 3.9.2007, the respondent had picked up a quarreled with the petitioner. She had caused injury on the finger of the petitioner with blade. The respondent had reported crime under Sections 498-A, 323 IPC against the petitioner vide FIR No. 237/07, Police Station, Sadar. The petitioner had been arrested by the police on 4.9.2007 and had been released on bail on 5.9.2007. Parents of the petitioner had also been arrested in false case registered by the respondent. The petitioner avers that his marriage with the respondent had completely broken down. The respondent had treated the petitioner with cruelty and, hence the petition for dissolution of marriage.

3. The petition for divorce instituted by the petitioner herein before the learned District Judge, Shimla, stood contested by the respondent, by hers instituting a reply thereto, wherein, she controverted all the allegations constituted against her in the apposite petition. She has denied that she had ever treated the petitioner with cruelty. She has also denied that she was extremely violent in nature and has an errant behaviour. It is averred that the conduct of the respondent had not been nagging, dominating or in any way objectionable to the petitioner. The petitioner wanted to wriggle out of his marriage on false grounds. The respondent had given birth to one son out of her union with her husband on 6.2.2008. The petitioner had refused and neglected the maintenance of the respondent and her child. The respondent had been compelled to apply for maintenance for her son against the petitioner. The respondent had been treated with cruelty and she had rightly reported crime under Sections 498-A, 323 of the IPC against the petitioner tot he local police on 3.9.2007. The petitioner had been withdrawing from the society of the respondent without any rhyme and reason. He had been occasionally visiting his residence in Metropole annexe. The respondent had nothing to do with Ajay Negi. The petitioner was not entitled to dissolution of his marriage on the ground of cruelty.

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

1. Whether the respondent has treated the petitioner with cruelty? OPP

2. Whether the respondent has developed intimacy with one Sh. Ajay Negi, as alleged? OPP.

3. Relief.

5. On an appraisal of evidence adduced before the learned District Judge, the latter allowed the apposite petition.

6. In the Hindu Marriage Petition, the petitioner concerted, to establish (i) of his legally wedded wife encumbering him with cruelty, whereupon, he made a further endeavour to beget dissolution of his marital ties with her. The mental cruelty (ies) ascribed by the petitioner vis-a-vis his wife, is grooved in hers being indifferent vis-a-vis his parents also hers misbehaving with the petitioner's parents. He avers in his petition that upon his mother visiting Shimla, on 8.4.2007, for obtaining treatment at IGMC, Shimla, for alleviating her heart problem, his spouse quarreling besides assaulting her, sequeling befallment of a heart attack upon her, leading to hers being admitted at IGMC, Shimla. He avers that, one, Chiranji Lal Sharma, neighbour of the petitioner, had accompanied him, to IGMC, Shimla, whereat he admitted his mother. However, he avers that the respondent remained indifferent, to the hospitalization of his mother AND never visited her, at the aforesaid hospital. The petitioner avers in the petition, that, his spouse lodged a false report in Police Station, Sadar Shimla on 3.9.2007, embodying therein offences constituted under Sections 498-A, 323 of the IPC. Furthermore, the petitioner avers, of, his spouse subsequent to theirs contracting marriage, hence developing intimacy with one Ajay Negi, latter whereof, being, in the month of March, 2007, also in the month of April, 2007, hence noticed by him, to be in his homestead in the company of his spouse. He proceeds to aver that, upon, his detecting the aforesaid Ajay Negi, in the company of his spouse, at his homestead, thereupon, the aforesaid Ajay Negi, fleeing therefrom (ii) also on his taking exception(s) qua his presence in his homestead, also his confronting therewith, his spouse, begetting the sequel of his spouse quarreling besides physically manhandling him. The lodging of the FIR against the

petitioner and his parents by the respondent/appellant herein, at Police Station Sadar, Shimla, constituting therein offences under Sections 498-A and 323 of the IPC, remains uncontroverted. Also Ex. PY-2, exhibit whereof, is a verdict pronounced by the learned Judicial Magistrate 1st Class (IV), Shimla, upon case No. 30-2 of 2011/07, unveils, of the learned trial Court pronouncing an order of acquittal upon the charges levelled against the petitioner and his parents. The aforesaid order has attained conclusivity. The effect of a binding and conclusive verdict being pronounced by the learned Judicial Magistrate 1st Class, Shimla, whereby, he acquitted the petitioner and his parents, for, charges constituted under Section 498-A and 323 of the IPC, (iii) is, of thereupon, the respondent/appellant herein by levelling false allegations against the petitioner besides his parents, hence , entailing the petitioner's psyche with severe mental agony, consequence whereof, is of the appellant herein/respondent besetting grave mental cruelty upon the petitioner/respondent herein.

7. Furthermore, the averred unwanted besides undesirable visits, of, one Ajay Negi to the homestead, of the petitioner/respondent herein and his being thereat found in the company of the appellant herein/respondent, thereupon too, a severe mental torture standing encumbered, upon, the respondent herein, stand(s) testified by the petitioner/respondent herein. Jayoti Kumari Sharma, the appellant herein/respondent, during, the course of her cross-examination, (i) whereat she stood confronted, with the aforesaid visits of Ajay Negi, to the petitioner's homestead, (ii) also upon hers being suggested, of, hers holding intimacy with him, rather took to deny the aforesaid suggestions, (iii) yet with hers acquiescing, to a further suggestion put to her by the counsel for the respondent herein/petitioner, of, the latter confronting her qua the nature of hers holding a relationship with him also hers acquiescing to a suggestion put to her, of his protesting against his visiting her, at his homestead, rather fosters an inference of (iv) any prior thereto denial, of, Jayoti Kumari Sharma of hers being unacquainted with Ajay Negi being ridden with falsity; (v) thereupon, hers stealthily camouflaging the nature of the relationship, she held with one Ajay Negi; (vi) corollary whereof, is, of her husband for want of a tangible sound explication being purveyed by his spouse, in respect of her relationship with one Ajay Negi, his being left with a sufficient room to suspect the nature of her relationship with Ajay Negi, (vi) thereupon, his mind being beset with mental turmoil also with concomitant cruelty.

8. Be that as it may, the aforesaid inferences, do, with aplomb constrain this Court, of Sashi Pal, husband of Jayoti Kumari Sharma, by adducing cogent evidence, his efficaciously discharging the onus cast upon him qua the issue appertaining, to his spouse encumbering him with mental cruelty. It is averred in the petition, of, the marital estrangement inter se him and his spouse, commencing in the month of September, 2007, whereafter, theirs living separately, since then upto now; (i) whereupon, he contends that their prolonged separation (ii) or their marital estrangement, (iii) begetting the inference of their marital ties being irretrievably broken down, thereupon, its dissolution, being warranted, as aptly done by the learned District Judge, Shimla. The appositely proven legal para meters, for making apt conclusion(s) with respect, to irretrievable break down of marriage and refusal(s) to severe it, by an apposite decree being rendered, aggravating the agonies of the martial parties, are, encapsulated in a verdict of the Hon'ble Apex Court reported in a caste titled as ***Samar Ghosh versus Jaya Ghosh, (2007)4 SCC 511,*** the relevant paragraph No.101 whereof stands extracted hereinafter:-

> "101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.
>
> (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
>
> (ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot

reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty." (pp.546-547)

9. Jayoti Sharma, the legally wedded spouse, of Shashi Pal Sharma, is averred in the apposite petition, to, on 20.03.2010, forcibly occupying the official quarters allotted, to her husband. In respect thereto, her husband rendered, a testification. (i) The testification, in respect thereto, rendered by one Shashi Pal , would not be sufficient, for its being construable to carry any probative worth, for, clinching affirmative findings qua the aforesaid facet, (ii) especially with Jayoti Sharma, his spouse, during, the course of hers being subjected to cross-examination by her husband's counsel, denying the apt suggestion, of, hers occupying the official quarters allotted to her husband, (iii) also hence would render frail the aforesaid rendered testification of her husband. However, when she, in her testification, embodied in her examination-in-chief, (iv)

makes a disclosure, of, hers staying at the official quarters allotted to her husband, rather does foster an inference of her husband proving the factum of hers staying thereat besides his also proving of his staying elsewhere, whereupon, the immediately prior thereto drawn inference hence wane(s). However, even if, Jayoti Sharma is staying at the official quarters allotted to her husband, it would not ipso facto, render a firm conclusion, of her husband, not, thereat staying along with her. Nonetheless, with the respondent, in her, reply to the apposite petition, contending of her husband withdrawing himself, from her society and his only paying occasional visits to her at the quarters allotted to him at Metropole, Shimla, (v) rather firmly rests, a clinching conclusion, of Jayoti Sharma acquiescing to the factum of prolonged martial estrangement(s) inter se her vis-a-vis her husband commencing since 3.09.2007 AND lasting upto now. The inordinate prolonged bittered estrangement inter se the parties at contest, does, in consonance with the afore extracted apt portion of the verdict(s), recorded by the Hon'ble Apex Court, beget an inference, of, their marital ties being irretrievably broken down, severance whereof being hence an utmost legal necessity. Furthermore, with the averments borne, in the petition, of the petitioner's spouse being indifferent vis-a-vis his parents also hers not carrying any shred of emotion, whereas, for its survival, an institution of marriage is enjoined to be anvilled upon martial affection(s) AND good will, (vi) contrarily, with emotions inter se them being evidently demolished, predominantly apparent, from, upon the petitioner's mother suffering a heart attack on 8.4.2007, whereupon, she stood admitted at IGMC, Shimla, whereto she was carried by the petitioner and by one Shri Chiranji Lal Sharma, whereat the petitioner's spouse evidently omitted to visit her, factum whereof is testified by the petitioner besides is testified by Chiranji Lal Sharma. (vii) Moreover, with testifications qua the aforesaid facet, rendered conjointly by Shashi Pal Sharma and by one Chiranji Lal Sharma, remaining unerodded of their probative vigour, despite, theirs standing subjected to an ordeal of rigorous cross-examination, by the counsel for the appellant herein, begets an inference of the (viii) aforesaid conclusion(s), being in tandem with the verdict recorded by the Hon'ble Apex Court in Samar Ghosh's case (supra),(ix) also when the aforesaid Shashi Pal led cogent evidence in proof, of his marital ties with his legally wedded spouse, being emotionally starved besides nowat being emotionally barren, thereupon, also all the aforesaid proven facts, fall squarely in consonance with the apposite legal parameters, borne in Smar Ghosh's case (supra), for thereupon constraining this Court, to annul their marital tie(s), it being irretrievably broken down.

10. The learned Senior Counsel appearing, for the appellant herein, has drawn the attention of this Court, to the averment borne in paragraph 3, of the apposite petition, embodying the fact, of, both martial partners, cohabiting as husband and wife, at Shimla, also a male issue being born out of their wedlock on 6th February, 2008, (i) whereupon, he contends, of the averments borne in paragraph 10 of the petition, of, since 3.9.2007, upto now both the marital partners living apart, being ipso facto rendered spurious. The mere factum, of a male child being born to the marital partners, on, 6th February, 2008, would not constrain, this Court to accept the aforesaid submission, as the timing of the birth of male child (ii) is beyond the time of theirs permanently alienating themselves from their respective marital status(es), (iii) rather upon 9 months being counted in reverse therefrom, is, the apt recoknable time for imputing veracity, to the averment existing in the petition, of since September 2007, both the married partners living apart. Upon counting in reverse 9 months from 6.2.2008, thereupon, the spouse of one Shashi Pal Sharma, hence is to be concluded to conceive some few months prior to September, 2007. Thereupon, this Court is enabled to firmly conclude, that, despite a male child being born subsequent thereto, to the spouse of Shashi Pal Sharma, his birth thereat, not negating the aforesaid inference, of, his spouse Jayoti Shama alienating herself from his company since the month of September, 2007 and the alienation(s) continuing upto now..

11. This Court with vigour besides with utmost fortified vigour, is coaxed to conclude that the relevant parameters, encapsulated, in the aforesaid extracted paragraphs of the verdict rendered by the Hon'ble Apex Court in Samar Ghosh's case (supra), standing invincibly satiated, by Shashi Pal Sharma, thereupon, the further concomitant sequel is of this Court being

further enabled to conclude, of the marital ties inter se the parties at contest, being irretrievably broken down, also to conclude of annulment of their marital status(es) being an utmost necessity.

12. The above discussion unfolds the fact that the conclusions as arrived by the learned trial Court are based upon a proper and mature appreciation of the relevant evidence on record. While rendering the findings, the learned trial Court has not excluded germane and apposite material from consideration.

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

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

Raj Kumar .....Petitioner/Accused.

Versus

Himachal Pradesh State Co-operative Marketing and Consumers Federation Ltd, Shimla and others .....Respondents.

Criminal Revision No. 410 of 2015
Reserved on: 14.11.2017
Date of Decision : 23rd November, 2017

Negotiable Instruments Act, 1881- Section 138- Accused had issued a cheque for a sum of Rs.21,65,072/- as purchase price of liquor supplied by the respondent- the cheque was dishonoured due to insufficient funds- accused was tried and convicted by the Trial Court- appeal filed in Appellate Court was dismissed- held that contention of the accused that complaint has not been filed by a competent persons stands rebutted from the resolution of the respondent federation lying on record - other requirements of Section 138 of NI Act have been fully complied with – there is presumption under Section 139 of NI Act regarding cheque having been issued for consideration- accused had not rebutted the presumption- Trial Court has rightly convicted the accused- appeal is rightly dismissed- revision stands dismissed. (Para-9 to 11)

For the Petitioner: Mr. Sanjeev Suri, Advocate
For the Respondents No.1 & 2: Mr. Neeraj Gupta, Advocate
For Respondent No.3: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant criminal revision is directed against the impugned judgment rendered by the learned Additional Sessions Judge-I, Solan, H.P, on 11.8.2015 in Cr. Appeal No. 03-S/10 of 2012, whereby, the latter affirmed the findings of conviction recorded by the learned Judicial Magistrate 1st Class, Kasuali, Court No.II, District Solan, H.P. in Criminal Complaint No. 99/3 of 2007/02. However, it reduced the sentence of imprisonment from two years to nine months, yet the sentence with respect to imposition of fine, by the learned trial Court was affirmed by the learned Addl. Sessions Jude.

2. Brief facts of the case are that in the year 2001-02, the petitioner/accused approached the respondents for supplying liquor on credit basis to him. On the basis of request so made, the respondents supplied liquor to the application of the value of Rs.21,65,072/- only. To discharge the aforesaid liability, the appellant issued cheque dated 21st September, 2002 in a

sum of Rs.21,65,072/- drawn against his account maintained with State Bank of Patiala, Branch Solan, District Solan, H.P. in favour of the complainant. The complainant(s) presented the aforementioned cheque with their banker namely Punjab National Bank, Parwanoo, within the period of its validity for collection of amount. However, the banker of the appellant vide its memo dated 26.9.2002, returned the cheque to their banker and thereby it was informed that due to insufficient funds in the account of the appellant, the cheque could not be honoured. The banker vide its memo dated 1.10.2002 returned the cheque as well as the aforementioned memo and thereby he was apprised of the aforementioned factual position. On receipt of the aforementioned information, the complainant(s) served upon the accused/petitioner a legal notice dated 10.10.2002, sent by way of registered letters and under postal certificate and thereby he was apprised of the factum of dishonouring of the cheque by his banker and he was further called upon to make the cheque payment within the stipulated period. The registered letter sent on his home address was returned with remarks that appellant was out of station, whereas, notice sent on the address of Solan, was returned with remarks that the appellant had left the aforementioned address without his further address of contact. However, the notice sent vide UPC did not receive back and as such was presumed to have been served upon him in due course of time. In view of the nature of the reports made, the service was deemed to have been effected upon him. The accused/petitioner failed to pay the cheque amount within the stipulated period. Hence the complaint.

3. The learned trial Magistrate after taking cognizance of the offence punishable under Section 138 of the Negotiable Instructions Act, 1881 (hereinafter referred to as the Act), put notice of accusation to him, for his committing an offence punishable under Section 138 of the Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the complainant(s) examined one witness. On closure of complainants evidence, the statement of the accused, under Section 313 of the Code of Criminal Procedure, was recorded, in which he pleaded innocence and no evidence was led in defence by him.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant. In an appeal preferred therefrom by the accused/petitioner, before the learned Additional Sessions Judge, the latter affirmed the findings of conviction recorded by the learned trial Court. However, it reduced the sentence of imprisonment, from, two years to 9 months, whereas, the sentence in respect of imposition of fine, was maintained and affirmed by it.

6. The accused/petitioner is aggrieved by the judgment of conviction recorded by the learned trial Court and affirmed by the learned Additional Sessions Judge. The learned defence counsel has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court and affirmed by the learned Additional Sessions Judge, not, standing based on a proper appreciation of the evidence on record, rather, theirs being sequelled by gross mis-appreciation and non appreciation of the material on record. Hence, he contends qua the findings of conviction being reversed by this Court in the exercise of its revisional jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned counsel appearing for the complainants has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court and affirmed by the learned Additional Sessions Judge, standing based, on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The learned counsel appearing, for the petitioner/accused has, upon anvil of clause (a) of Section 142 of the Act, vigorously contended, of, with evident non satiation of the statutory ingredients borne therein, thereupon, the learned Magistrate concerned was barred to

take cognizance upon the apposite complaint. Also hence, the impugned rendition is rendered vitiated. Provisions of Section 142 of the Act read as under:-

> "[142 Cognizance of offences. —Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—
>
> (a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
>
> (b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:
>
> [Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]
>
> (c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.]"

In making the aforesaid submission, he alludes to Ex. CW1/A, the apposite dishonoured negotiable instrument, (i) pertinently, of, it being issued vis-a-vis Him Fed Bottling Plant, wherefrom, he contends that the complaint, was institutable by the Manager of Him Fed Bottling Plant, rather than by one Sh. Ramesh Bhaik, who, inaptly under Ex. CW1/B, exhibit whereof is a copy of a resolution passed by the complainant, authorising, Mr. Ramesh Bahik to present the complaint or to testify in respect of the contents borne therein, was hence bestowed with the authorisation(s), given (a) his name not occurring in Ex.CW1/A, (b) nor his being its holder in due course. However the aforesaid submission is repelled, for the reasons, (a) the learned defence counsel while holding the complainant's witness to cross-examination, his not purveying apposite suggestions to him, for, hence invalidating the apposite resolution borne in Ex. CW1/B, whereunder, the complainant authorised one Ramesh Bhaik, to, institute a complaint and also to testify in respect of the recitals borne therein; (b) no suggestion being put by the learned defence counsel to the complainants' witness that the payee of Ex.CW1/A, nomenclatured therein, as Him Fed Bottling Plant not being an ancillary or a subsidiary entity of the complainant(s), rather it being an entity distinct, from, the entity of the complainant; (c) no suggestion being put to the complainants' witness, of, the complainant(s) being, not, the holder in due course, of EX.CW1/A. Since, the aforesaid most pertinent suggestions, warranted theirs being purveyed vis-a-vis the prosecution witness, reiteratedly with also theirs holding echoings (i) of, the complainant being, not, legally construable to be the holder in due course of Ex.CW1/A, (ii) especially AND arising from, want of its holding control, over its liquor bottling plant, wherefrom the supply(ies) of liquor bottles, were made, by the complainant vis-a-vis the accused, (iii)renders the aforesaid submission to be not bedrocked upon any hard evidentiary strata. Consequently, this Court, cannot accept, the submission made by the learned counsel, appearing for the petitioner/convict, that for purported non satiation of the ingredients borne in clause (b) of Section 142 of the Act, thereupon, the learned trial Magistrate being barred to take cognizance upon the apposite complaint nor this Court hence recording any rendition in affirmation of the findings of the conviction returned upon the accused.

10. Furthermore, the learned counsel appearing for the petitioner/accused, on anvil of the provisions borne in Section 141 of the Act, provisions whereof read as under:-

> "[**141 Offences by companies**. — (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
>
> [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

has contended (i) that given one Raj Kumar being designated in the apposite complaint to be the proprietor/partner of M/s Thakur and Company, arrayed as co-accused No.1, with its bearing the designation, of, Thakur and Company, Wine Merchants, Hospital Road Solan, thereupon, (ii) the complainants' acquiescing qua co-accused No.1 being construable to be a "company" registered under the Companies' Act, with a further sequel of the mandate borne in sub-section (1) of Section 141 of the Act, (iii) whereupon, qua offences alleged to be committed by a "company", the complainant(s) is/are enjoined, to hold vivid reflections of one Raj Kumar arrayed as accused No.2, being responsible for the conduct and business, of, one Thakur and Company, Wine Merchants, Hospital Road Solan, (iv) whereas, the aforesaid recitals, not, finding occurrence in the apposite complaint, render it to be mis-constituted with a further sequel, of its entailing dismissal. However, the aforesaid submission is also rejected (v) given the learned counsel appearing for the petitioner/convict, not, bearing in mind the fact that in the apposite complaint, one Raj Kumar, who is arrayed therein as co-accused No.2, being reflected, as Proprietor/Partner of the Thakur and Company, Wine Merchants, Hospital Road Solan, wherefrom, (vi) it is apt to conclude, of, co-accused No.1, who, though stands designated in the apposite complaint, as, M/s Thakur and Company, Wine Merchants, Hospital Road Solan, rather hence being a partnership firm, (vii) especially with accused No.2 being reflected to be its Proprietor/Partner, nomenclaturing wherewhom, is ipso facto personificatory of it being a partnership firm, (viii) especially with accused No.1 being reflected in the apposite complaint to be Thakur and Company, thereupon, co-accused No.2 enjoined his reflection therein as its Director or Managing Director rather than its Proprietor or Partner, (ix) consequently, the reflections in the apposite complaint, of co-accused No.2, to be the Proprietor or Partner (of Thakur and Company, Wine Merchants, Hospital Road Solan, (x) constrains a conclusion of the mere description of accused No.1, as Thakur and Company, Wine Merchants, Hospital Road Solan, being not amenable to any inference, of it being construable to be a company registered under the Companies Act, nor it is sagacious to thereupon make any conclusion that hence, thereupon, the complainant(s) was/were enjoined, to, in the apposite complaint, hence, make candid recitals, of accused No.2 being responsible for the act, conduct and business of accused No.1. In aftermath, the lack of aforesaid recitals, in consonance with the statutory ingredients embedded in sub-section (1) of Section 141 of the Act, in the apposite complaint, (xi) do not render the apposite complaint being construed to be mis-constituted nor any inference is arousable qua thereupon, the verdicts pronounced thereon being vitiated. Reinforced vigour to the aforesaid inference is marshalled from the factum (xii) of no therewith best documentary evidence comprised in the registration certificate, of, accused No.1, as a Company, being adduced into evidence, by accused No.2 nor his counsel while subjecting the complainants' witness to cross-examination, making any suggestion to him, qua upon non occurrence, in the complaint, of the statutory ingredients, of the afore

extracted provisions of the Act, thereupon, it being hence mis-constituted, (xiii) preeminently also with the accused in proceedings, drawn, under Section 313 of the Cr.P.C. not therein making any echoings in tandem with the espousal(s) made herebefore, render the aforesaid espousal, being not based upon any hard evidentiary material, (xiv) predominantly also with one Raj Kumar appending his signatures, on, Ex.CW1/A, as proprietor or accused No.1.

11. The learned counsel appearing for the petitioner/convict submits, of, both the learned Courts below, inaptly drawing the statutory presumption, embodied in Section 139 of the Act, merely, on anvil of the complainant being the holder of Ex.CW1/A, whereas, the aforesaid presumption was rebuttable also stood firmly rebutted. Provisions of Section 139 of the Act read as under:-

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

He submits that their existed no evident commercial transaction inter se the complainants and the accused nor the amount borne in Ex. CW1/A, was a legally recoverable debt. In the aforesaid regard, he draws the attention of this Court, to an admission occurring in the cross-examination of CW-1, of Him Fed, not, possessing any document, in respect of its supplying liquor bottles vis-a-vis the accused. However, any reliance upon the aforesaid admission is also mis-placed, (i) especially upon its conjuctive reading with Ex.CW1/B, exhibit whereof comprises a resolution rendered by the complainants' upon CW-1, whereby, he stood authorised to prosecute the complaint, (ii) besides its reading in coagulation with the afore referred inferences, of, the complainant being holder of the cheque in due course, (iii) rather than its payee, payee whereof is Him Fed Bottling Plant, industrial unit whereof, is for reasons aforestated, a subsidiary of the complainant, rather begetting inference, of, (a) with CW-1 evidently, not, being the Manager or the Cashier/Accountant, of, the Him Fed Bottling Plant, whereover , the complainant evidently held its control, its being its subsidiary, (b) thereupon, his making any admission, of the controlling entity, of, an ancillary apt industrial unit, obviously, not, holding the relevant documents, suggestive of sale(s) of liquor bottles being made by Him Fed Bottling Plant vis-a-vis the accused hence not repelling the statutory provisions embodied in Section 139 of the Act, (c) given the befitting documentary evidence being held by the Accountant(s) or the General Manager of Him Fed Bottling Plant, an ancillary unit of the complainants, (d), wherefrom it enjoined its emanation, (e) than from the principal entity, (e) however, the accused not ensuring the adduction into evidence, of the aforesaid best documentary evidence, constrains an adverse inference against him, that upon its production, it would render unsustainable their defence. Reiteratedly, the isolated admission, occurring in the cross-examination CW-1, is insignificant, for carrying forward the submission of the learned counsel, for his hence rebutting the statutory presumption occurring in Section 139 f the Act.

12. For the foregoing reasons, I find no merit in the instant petition and it is dismissed accordingly. In sequel, the findings of conviction recorded by both the learned Courts below are affirmed and maintained. However, since the complainant has also a legal remedy, to recover the cheque amount by instituting a civil suit, against the petitioner/accused, hence, the quantum of fine amount as imposed upon the convict/accused, appears to be grossly harsh and exorbitant. Consequently, the concurrently imposed sentence of fine upon the convict, comprised in a sum of Rs.40 lacs, is modified in a sum of Rs. 5 lacs, in default whereof he shall undergo simple imprisonment, for a period of three months. However, the substantive sentence of 9 months imprisonment imposed upon the convict by the learned Addl. Sessions Judge-I, Solan is maintained and affirmed. Records be sent back forthwith.

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

Smt. Reena Devi .....Appellant.
Versus
Parmod Kumar .....Respondent.

FAO No. 433 of 2016
Reserved on : 20.11.2017.
Decided on : 23rd November, 2017.

Hindu Marriage Act, 1955- Section 13- Divorce and Dissertation by petitioner- Marriage between petitioner and respondent solemnized on 12.11.2011- respondent wife withdrew from the company of petitioner without his will and against his consent and without any reasonable cause- Trial Court annulled marriage after appreciation of the evidence on record- petitioner contracted second marriage before expiry of period of limitation for filing appeal against the verdict of trial Court- it was held that respondent took a false ground for justifying withdrawal from the martial company of harassment that she was ousted from the matrimonial home in the month of July, 2012- further held that it is clear from the oral evidence on record that respondent had no reasonable cause to leave the company of husband and withdrew cohabiting with respondent without his consent and against his will and, as such, deserted the petitioner and also subjected him to mental cruelty- further held relying upon ***Suman Kapur versus Sudhir Kapur, AIR 2009 SC 589*** that petitioner/respondent is entitled to compensate to the tune of Rs.1,00,000/- to meet the ends of justice in view of petitioner having contracted second marriage before expiry of period of limitation- Trial Court has rightly annulled the marriage- no merits in appeal- appeal dismissed. (Para-6 to 9)

Case referred:
Suman Kapur versus Sudhir Kapur, AIR 2009 SC 589

For the Appellant: Mr. R.K. Sharma, Senior Advocate with Mr. Mohan Singh, Advocate.
For the Respondent : Mr. Nimsh Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the pronouncement recorded by the learned District Judge, Chamba, on 30.6.2016 in H.M.A. Petition No. 98 of 2014 whereby, he dissolved the marital ties inter se the appellant herein with the respondent herein.

2. The brief facts of the case are that the respondent (hereinafter called as the petitioner) was married to the appellant (hereinafter called as the respondent) on 12th November, 2011, according to the Hindu rites and ceremonies. Out of this wedlock no issue has been born. The respondent is working as JBT teacher and is posted at Government Primary School Bathri, whereas the petitioner is working as Senior Assistant in the office of BEO, Banikhet. After marriage their relations remained cordial for about one month and thereafter the behaviour of the respondent towards him and his family changed. She used to avoid to do house hold works. After one month of marriage, she started living in the house of her parents at village Sangrain. In the month of May 2012, she was transferred to Govt. Primary School, Bathri, their relations become more strained as the respondent started holding the petitioner responsible for her transfer. Even after the transfer, the respondent continued to live with her parents and used to travel from Balera to Bathri and from Bathri to Balera daily. He visited the parental house of respondent so many times to bring her back but she remained in his house for about ten days

and thereafter on the end of June, 2012, she left his house without any reason or cause. In July, 2012, the petitioner, his mother and other relatives tried their best to reconcile and persuaded the respondent to come back to her martrimonial house but she refused. Thereafter on 25.11.2012, his mother, uncle Om Parkash, borhter-in-law Ashwani Kumar along with Susheel Kumar, Vishwanath and Vikey Kumar again visited the house of respondent to bring her back but the respondent refused to join the society of petitioner under the influence of her parents. The respondent without any sufficient or reasonable cause and with a view to break the matrimonial relations, has withdrawn from the society of the petitioner and deserted him and deprived him from the matrimonial obligations without any just reason. He also averred that the respondent has also taken all her ornaments and other valuable articles with her.

3. The petition for divorce instituted by the petitioner before the learned District Judge, Shimla, stood contested by the respondent, by hers instituting a reply thereto, wherein, she controverted all the allegations constituted against her in the apposite petition. He has denied that her behaviour was not property, rather the petitioner is not treating her in proper manner. She is still ready to join the company of the petitioner. She has denied that the mother of the petitioner and his relative tried to reconcile the matter and she refused. Rather, the petitioner along with his associates one Vishvanath came to her school on 9.11.2012 and demanded Mangalsutra and insisted her to give divorce. She has alleged that the petitioner has made her life miserable and it was not possible for her to live with him in dignified manner. She alleged that the petitioner himself has withdrawn his petition and the allegations levelled in that reply were correct, therefore, the petition be dismissed.

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

1. Whether the respondent has deserted the petitioner for the last two years preceding the presentation of the present petition, as alleged?OPP.

2. Whether respondent has also treated the petitioner with cruelty, as alleged? OPP.

3. Whether the petition is not maintainable as alleged?OPR.

4. Relief.

5. On an appraisal of evidence adduced before the learned District Judge, the latter allowed the apposite petition.

6. Marriage inter se the petitioner and the respondent one Reena Devi was solemnized on 12.11.2011. However no issue is born from their wedlock. The petitioner sought dissolution of his marital ties with one Reena Devi, on the score of the latter (i) without his will and against his consent alienating herself from his martial company, alienation whereof commencing from June 2012 and its continuing upto now, (ii) despite repeated endeavours of the petitioner Pramod Kumar, to retrieve her to his matrimonial company, his spouse not relenting, (iii) thereupon, he avers that with his spouse without any reasonable cause also without his consent and against his wishes abandoning his company, (iv) hence, he makes a concomitant therewith averment, of, his spouse, deserting him besides encumbering his psyche with mental pain and suffering. Consequently, on the afore referred averments, he seeks dissolution of his marital ties with his spouse. In proof of the averments, cast in the apposite petition, he tendered in his examination-in-chief, his affidavit borne in Ex.PW1/A. His testimony is corroborated by PW-2 and by PW-3. The testimonies rendered by the afore referred witnesses AND comprised in their respective examinations-in-chief, do acquire an aura of solemnity, given the echoings made therein by them, holding harmony vis-a-vis the grounds reared in the Hindu Marriage Petition AND theirs being not ripped of their veracity, even during, the ordeal of theirs held to a rigorous cross-examination. Contrarily, the rebuttal evidence adduced by respondent Reena Devi, for hers belying the averments cast in the apposite petition, especially the one, of hers being ousted from her matrimonial home in the month of July, 2012 also the testimony, in consonance therewith, rendered by RW-2, is rather wanting in sanctity, given it being discardable, it being

beyond pleadings. Consequently, it is to be held (i) of respondent Reena Devi, contriving, a false ground for alienating herself from the matrimonial company of her husband, (ii) thereupon, hers holding no reasonable cause to alienate herself from the matrimonial company of her husband, (ii) rather hers without his consent and against his will not cohabiting with him. In sequel, it is held, of, Reena Devi deserting the petitioner besides encumbering him with mental cruelty.

7. At this stage, it is imperative, to, deal with the uncontroverted factum of the petitioner Pramod Kumar, in the interregnum since the rendition of an apposite verdict, upon, the Hindu Marriage Petition AND the institution of an appeal therefrom, by Reena Devi (i) besides before expiry of the prescribed period of limitation, for an appeal being filed against the verdict of learned District Judge, (ii) his contracting a marriage. For settling a firm finding upon validity thereof, a, verdict rendered by the Hon'ble Apex Court in a case titled as ***Suman Kapur versus Sudhir Kapur, AIR 2009 SC 589,*** the relevant paragraph(s) No.47 and 48 whereof stand extracted hereinafter, is of utmost relevance:-

> "47. Since, we are confirming the decree of divorce on the ground of mental cruelty as held by both the courts, i.e. the trial Court as well as by the High Court, no relief can be granted so far as the reversal of decree of the courts below is concerned. At the same time, however, in our opinion, the respondent-husband should not have re-married before the expiry of period stipulated for filling Special Leave to Appeal in this Court by the wife.
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> 48. It is true that filing of appeal under Article 136 of the Constitution is not a right of the party. It is the discretion conferred on this Court to grant leave to the applicant to file appeal in appropriate cases. But, since the Constitution allows a party to approach this Court within a period of ninety days from an order passed by the High Court, we are of the view that no precipitate action could have been taken by the respondent-husband by creating the situation of fait accompli. Considering the matter in its entirety, though we are neither allowing the appeal nor setting aside the decree of divorce granted by the trial Court and confirmed by the appellate Court in favour of respondent-husband, on the facts and in the circumstances of the case, in our opinion, ends of justice would be met if we direct the respondent-husband to pay an amount of Rs. Five lakhs to the appellant-wife. The said payment will be made on or before 31st December, 2008.
>
> (pp.599-600)

wherein, it is mandated that (i) the aforesaid errant conduct of a party vis-a-vis whom, an, affirmative verdict is pronounced upon the apposite Hindu Marriage Petition, though, warrants disapprobation also its presenting the Appellate Court with a *fait accompli, (ii)* yet the Hon'ble Apex Court, given its prior thereto validating the decree impugned before it, (iii) hence, did not pronounce upon the validity, of, the litigant concerned vis-a-vis whom the apposite affirmative decree stood pronounced, proceeding to, in the interregnum since the apposite verdict being pronounced, till an appeal being preferred therefrom also his, despite the time prescribed for filing an appeal, not expiring, hence contracting marriage, (iv) rather for the errant conduct, of the litigant concerned, the Hon'ble Apex Court awarded compensation in a sum of Rs.5 lacs, vis-a-vis the aggrieved. However, since, there is a distinctivity inter se the economic status of the parties hereat vis-a-vis the litigating parties in the aforesaid verdict rendered by the Hon'ble Apex Court, thereupon this Court deems it fit, to award vis-a-vis appellant Reena Devi, compensation of Rs.1,00,000/- (Rs. One lacs only), dehors its not invalidating the petitioner's contracting a second marriage.

8. The above discussion unfolds that the conclusions as arrived by the learned trial Court are based upon a proper and mature appreciation of the relevant evidence on record. While rendering the findings, the learned trial Court has not excluded germane and apposite material from consideration.

9. For the foregoing reasons, there is no merit in the instant appeal which is accordingly dismissed. The impugned judgment and decree is maintained and affirmed. However,

Pramod Kumar, respondent is directed to, within two months from today, pay a sum of Rs.1,00,000/- (Rs. One lac only) as compensation to Smt. Reena Devi. All pending applications also stand disposed of. Records be sent back forthwith.

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

Seema Kumari .....Appellant.
Versus
Pradeep Kumar & others ....Respondents.

FAO No. 372 of 2008.
Reserved on : 15.11.2017.
Decided on : 23rd November, 2017.

Hindu Marriage Act, 1955- Section 13- Nullity of marriage and divorce- Premarital illicit relation of wife- ten weeks old pregnancy from respondent No.3 at the time of marriage- the record documents maintained in the Hospital qua hospitalization of the respondent wife after 15 days of the marriage where from it was revealed that wife had ten weeks old pregnancy- Learned Trial Court allowed the petition of divorce- the contention that hospital record does not bear signatures of the wife and as such same does not connect with the respondent wife is rejected- wife had herself admitted that she had terminated her pregnancy at Ghanahatti and failed to disclose the specific time when she conceived- wife also did not adduce any medical evidence to prove that she had conceived after cohabiting with petitioner only- Trial Court has rightly annulled the marriage- no merits in appeal- appeal dismissed. (Para-8 to 10)

For the Appellant: Mr. B.B. Vaid, Advocate.
For the Respondents : Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the pronouncement recorded by the learned Addl. District Judge, Shimla, on 24.04.2008 in H.M.A. Petition No. 2-S/3 of 2006 whereby, he declared the marriage inter se the appellant herein, with one Pradeep Kumar respondent No.1 herein to be a nullity. Being aggrieved therefrom, the appellant herein has instituted the instant appeal before this Court, for hers hence begetting its reversal.

2. The brief facts of the case are that the appellant (hereinafter called as the respondent) was married to respondent No.1, Pradeep Kumar, (hereinafter called as the petitioner) on 010th October, 2005, according to the Hindu rites and ceremonies at Kathgarh in District Nawanshahar, Punjab. Respondent No.2 is father of respondent No.1, while respondent No.3 was the middle man in the marriage. After the marriage, the parties to the marriage started living at Ghanahati. On 23rd October, Seema Kumari complained of some pain in abdomen. Smt. Jagiro Devi, the grandmother of the petitioner, who is a midwife, examined her and expressed a view such pain was on account of pregnancy. She further advised that Seema Kumari be taken to hospital for medical examination. Seema Kumari was taken to Deen Dayal Upadhya, Hospital, Shimla, where the doctor found her to be carrying 10 weeks pregnancy. The petitioner was stunned at this revelation as he had married to Seema Kumari only 15 days back. When she was brought back from the hospital, she revealed that she was having illicit relations with one Sabi son of Kashmiri Lal, respondent No.3. A meeting was then held on 26.10.2005. Respondent No.2, his wife and respondent NO.3 visited the house of the petitioner. The incident was narrated

to them. Besides the petitioner, his wife, grand mother, many other relatives were present. IN presence of all, Seema Kumari disclosed that she had premarital illicit relations with Sabi and she had conceived through him. Respondent No.2 and his wife stayed back, while other relatives dispersed. They stayed for another two days and during this period tried to pursued the petitioner to keep Seem Kumari, as his wife, to which the petitioner did not agree. Seema Kumari then left the petitioner's house along with her parents on 28.10.2005. The petitioner had not knowledge that Seema Kumari was pregnant by some other persona at the time of marriage. Hence the petition.

3. The petition for divorce instituted by the petitioner herein before the learned Additional District Judge, Shimla, stood contested by respondents, by theirs instituting a reply thereto, wherein, the marriage inter se the parties admitted. It ws denied that the petitioner ever complained of any pain in abdomen or that she was examined by grandmother of the petitioner. It was also denied that she was taken to the hospital or that the doctor found that she was pregnant. She also denied that she revealed to the petitioner that she was having sexual relations before marriage with Sabi. She also denied that any Panchayat in the presence of the relatives from both sides was held. She denied that she left the petitioner's house on 26.10.2005. On the other hand, it is pleaded that, Seema Kumari lived in the house of the petitioner till 28.10.2005, on which day she was compelled to leave the house of the petitioner. It was also denied that Seema Kumar was pregnant at the time of marriage. However, it is pleaded that after the marriage, she became pregnant, but the petitioner and his family members got the pregnancy terminated at Ganahatti.

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

1. Whether respondent No.1 was pregnant at the time of solemnization of her marriage on 10.10.2005 with petitioner? OPP

2. Whether the petition has not been filed properly in view of the forms verified?

3. Whether the petition has not been filed in accordance with Hindu Marriage Act, as alleged? OPR.

4. Relief.

5. On an appraisal of evidence adduced before the learned District Judge, the latter allowed the apposite petition.

6. In proof of Seema Kumari, appellant herein, prior to hers solemnizing marriage with one Pradeep Kumar, the petitioner, (i) hers hence carrying a 2 ½ months pregnancy, the petitioner relied upon Ex.PW4/A, exhibit whereof is prepared by one Dr. Beant Singh, who, however, being not alive, at the apposite stage of its tendering(s) into evidence, (ii) thereupon, for proving it, one Dr. Ramesh Kumar, stepped into the witnesses, given his being well conversant with the signatures and handwritings of Dr. Beant Singh. (iii) Abstract of OPD register, borne in Ex.PW4/B, has also been in an alike manner proven by PW-4 Dr. Ramesh Kumar. The learned Additional District Judge, Shimla, construed them, to be credible, hence, concluded that the ground reared, in the petition, by the petitioner, of his spouse one Seema Kumari carrying, at the time of hers solemnizing with him, 2 ½ months' pregnancy, being hence proven. Thereupon, obviously, he concluded, of, with the aforesaid trite factum being withheld besides suppressed by one Seema Kumari vis-a-vis Pradeep Kumar, the petitioner, hence, the marriage solemnised inter se both, being construable to be a nullity.

7. The learned counsel appearing for the appellant has contended with vigour, that placings of reliance upon the aforesaid exhibits being neither proper nor apt, as thereon, do not exist the signatures of one Seema Kumari, hence rendering her to be delinked from the aforesaid exhibits, besides (i) the concomitant conclusion formed by the learned Additional District Judge, Shimla, that hence the petitioner proving the espoused ground, of Seema Kumari, at the time of

hers solemnizing marriage with him, hers carrying 2 ½ months' pregnancy, being also an erroneous inference.

8. A reading of the aforesaid exhibits, does unveil, of, though the name of one Seema Kumari, finding occurrence therein, (i) yet evidently her signature(s), do not exist, upon either of the aforesaid exhibits, (ii) yet the non existence, of the signatures, of one Seema Kumari, upon the aforesaid exhibits, does not, constrain an inference, of, the identity of Seema Kumari remaining unconnected therewith. The reason, for forming the aforesaid conclusion, is nursed, (iii) from the fact of the petitioner's witnesses, testifying, in unison, of, on 25.10.2005, the petitioner, his father Surat Ram and his daughter-in-law, Kamlesh Devi, carrying Seema, to Deen Dayal Upadhya, Hospital Shimla, for hers being medically examined thereat AND of hers standing thereat examined, by one Dr. Beant Singh. The consistently rendered testifications, by PWs qua the aforesaid fact AND as comprised in their respective examinations-in-chief, were, concerted to be shred of their efficacy, by the counsel for Seema Kumari, by his holding them to a rigorous cross-examination, yet when in course thereof, each of the petitioner's witnesses remained unscathed, consequently, their testifications qua the aforesaid fact, hence gather credence. Furthermore, the petitioner's witnesses, in their respective examinations-in-chief, consistently deposed, of all the respondents and others visiting Shimla, on, 26.10.2005 AND thereat inter se confabulations, amongst all concerned, occurring at the house of the petitioner, (iv) whereat, elicitations being concerted to be made, from Seema Devi, qua the person from whom she conceived, in sequel, whereto she disclosed the name, of, one Sabi son of Kashmiri. The afore rendered testifications, borne, in the respective examinations-in-chief, of the petitioner's witnesses, were also concerted to be shred of their tenacity, by the counsel, for Seema Kumari, by his holding them to cross-examination, yet in course whereof, no elicitations emanated, for hence undermining the vigour of the afore referred testifications, occurring their respective examinations-in-chief, hence, the aforesaid testifications acquire credence.

9. Be that as it may, even if assumingly, the aforestated consistent testification(s) rendered qua the afore referred facts, do not carry any credence, nonetheless, the effort of Seema Devi, to delink her identity, from, the one borne in Ex.PW4/A and Ex.PW4/B, is per se illusory, (i) given an admission occurring in her testification, borne, in her cross-examination, of the foetus carried in her womb, being aborted, at Ganahati, whereafter, she has not been able to disclose, with certainty qua whether the abortion occurring in the year 2005 or in the year 2006. The effect of the aforesaid admission occurring in the cross-examination of RW-1 AND her want, to with specificity make a disclosure, of, the foetus carried in her womb, being, conceived prior to or subsequent to hers solemnising marriage with the petitioner, Pradeep Kumar, renders open an inference of, hers, hence wavering qua the specific time, whereat she conceived. In case, she had in her testification, assigned the precise and specific time, whereat she conceived also the time of her conception, specifically appertaining only, to the stage when she could be construed to conceive only from her wedlock, with one Pradeep Kumar, thereupon her marriage with Pradeep Kumar was not amenable to dissolution. Whereas, her vague nebulous statement qua the aforesaid factum besides hers not, adducing any medical record, personifying that in sequel, to, hers cohabiting with one Pradeep Kumar, hers hence conceiving, rather constrains a conclusion that hence the aforesaid admission(s), linking her identity with Ex.PW4 and with Ex.PW4/B, dehors her signatures being not appended thereon.

10. The above discussion unfolds that the conclusions as arrived by the learned trial Court are based upon a proper and mature appreciation of the relevant evidence on record. While rendering the findings, the learned trial Court has not excluded germane and apposite material from consideration.

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

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

State of H.P. & another .....Appellants.
Versus
Bhagat Ram .....Respondent.

RFA No. 1 of 2009 along with RFA No. 2 of 2009, 3 of 2009, 4 of 2009 and 5 of 2009.
Reserved on : 10.11.2017.
Date of Decision:23rd November, 2017.

Land Acquisition Act, 1894- Section 18- Held that lands of which sale deeds are considered for determining the market value of the lands sought to be acquired must have proximity in time to the issuance of necessary notification for the acquisition of the concerned land and must also have proximity in the location vis-à-vis the lands brought under acquisition- further held that Learned Reference Court has rightly appreciated the evidence on record- no merits in appeal- appeal dismissed. (Para-3 to 5)

For the Appellant(s): Mr. R.S. Thakur, Addl. A.G.
For the respondent(s): Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

All these appeals are being disposed of by a common judgment, given theirs arising from a common Award rendered by the learned Addl. District Judge-II, Kangra at Dharamshala, in reference petitions respectively instituted before him, by the landowners, under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred as the Act), whereby, they assailed the award(s) rendered by the Land Acquisition Collector concerned.

2. The relevant para meters, for, making a valid determination of the market value(s), of, the lands brought to acquisition, are, discernable from the apposite sale deeds, satisfying the twin legal canons (i) of proximity in time angle inter se their execution vis-a-vis the issuance of the apposite notification, and; (ii) proximity in location angle inter se the land(s) borne in the relevant sale exemplar(s) vis-a-vis the lands brought to acquisition.

3. The learned Reference Court, had, in determining compensation amount vis-a-vis the land(s) brought to acquisition, placed reliance upon Ex.PW1/A. Consequently, it is to be determined, whether imputation of reliance thereon, was valid or not, validity of reliance thereon, is to be gauged, from the factum, of, the petitioners' satiating the twin legal para meters (i) of execution of Ex.PW3/A occurring in contemporaneity vis-a-vis the issuance of the apposite notification. For determining whether the aforesaid principle, of law, begets satiation, an allusion to the trite factum, of, the apposite notification being issued on 10.10.1995, whereas, Ex.PW3/A, standing executing prior thereto, though hence obviously renders Ex. PW3/A to be a pre-notification sale exemplar; (ii) yet with its execution occurring prior to the issuance of the apposite notification, whereas only in years subsequent thereto besides with passage of time increase(s) in the market value occurring, may thereupon, render it to be, hence, satisfying parameter, of, its execution holding a close contemporaneity vis-a-vis the apposite notification. (iii) It may hence satiate the parameter of its execution holding proximity in time angle vis-a-vis the apposite notification. Nonetheless, the other parameter, for, facilitating, imputation of firm reliance, upon, Ex.PW3/A is comprised in its also satisfying, the other para meter of proximity in location angle, arising from lands borne therein, evidently occurring in close proximity vis-a-vis the lands brought to acquisition. However, with PW-3, who tendered into evidence Ex.PW3/A, underscoring, in his examination-in-chief, of, the lands borne therein, being located remotely

from the national highway, whereas, the land(s) brought to acquisition being located in proximity thereto, (iv) hence fillips an inference, of, the market value of lands borne therein, may be, being reckonable for determining just and fair compensation vis-a-vis the land(s) brought to acquisition, given (a) land(s) borne therein, standing, located improximately from the national highway, for construction whereof the lands of the landowners were brought to acquisition, latter lands whereof, rather occur in proximity thereto; (b) the remoteness of location of lands borne in Ex.PW3/A, from the National Highway, in proximity whereof rather the acquired lands occur, would render the market value of land(s) embodied therein, to be holding a lesser market value vis-a-vis the lands brought to acquisition, (c) given the latter lands, being testified by PW-3 in his examination-in-chief, to be occurring in proximity vis-a-vis the national highway, whereat, reiteratedly obviously, they would rear a higher market value, than the market value reared by land(s) borne in Ex.PW3/A, given theirs being located remotely from the national highway. Consequently, Ex.PW3/A also satiates the further legal parameter, of, the lands borne therein being, for the aforesaid reasons, constituting an apt reckonable indice, for determining compensation with respect, to the land(s) brought to acquisition.

4. What adds acceleration to the aforesaid inference, is, grooved in the fact, of, despite the aforesaid underscorings, occurring in the testification of PW-3, comprised, in his examination-in-chief, yet theirs being not concerted to be belittled, of their efficacy, by the learned District Attorney, by his adducing cogent evidence, (i) thereupon, the afore occurring testification is enjoined to be imputed solemnity. Moreover, with PW-3, in his cross-examination negativing the suggestion put to him by the learned DA, that given the imminence of acquisition of lands borne in Ex.PW3/A, the sale consideration(s) in respect thereto being rigged, (ii) for hence capatalizing an apt therewith inference, rather renders open an inference that (a) the land(s) brought to acquisition, fetching, a higher price, given its occurrence, in proximity to the national highway, than the land(s) borne in Ex.PW3/A, necessarily even when it has not been shown, that any sale exemplar appertaining to the mohal concerned occurred, in the relevant year, (i) thereupon, the mere factum of lands borne in Ex.PW3/A being located in a Mohal, distinct from the mohal whereat the lands brought to acquisition, are located, may not be significant, for not placing reliance thereon. Predominantly also, with the State of H.P. while relying upon Ex.RW2/A, sale exemplar whereof, appertains to the mohal, whereat, the lands brought to acquisition, stand located, hence constraining this Court, to place reliance thereon, yet their endeavour is frustrated, (iii) by the factum of RW-2, not, proving the factum of the land(s) borne therein, occurring in close proximity vis-a-vis the lands brought to acquisition, (iv) nor any firm documentary evidence is adduced by the State of H.P., that, the lands comprised therein stand located in the vicinity of the lands brought to acquisition, (v) hence reliance thereon being imperative, than reliance upon Ex.PW3/A. In aftermath disimputation of reliance by the learned Reference Court vis-a-vis Ex. RW2/A, is apt, whereas, its placing reliance upon Ex.PW3/A, for, determining just and fair compensation vis-a-vis the lands of the landowners brought to acquisition, is, both apt as well as tenable.

5. The above discussion unfolds the fact that the conclusions as arrived by the learned Reference Court stand based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned trial Court has not excluded germane and apposite material from consideration.

6 In view of above discussion, there is no merit in the present appeals and they are dismissed accordingly. In sequel, the impugned common award rendered by the learned Reference Court is affirmed and maintained. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Vijay Kumar and others .....Appellants.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 243 of 2006.
Reserved on : 15th November, 2017.
Date of Decision: 23rd November, 2017.

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989- Section 3(1)(v)- Indian Penal Code, 1860- Section 457- Accused persons harassed the complainant for his being from scheduled caste and forcibly dispossessed him from the shop in his possession owned by the accused persons- Held that failure of the complainant to mention the names of the witnesses in the FIR who apprised him about the incident of dispossession, which had definitely not taken place in his presence and also failure to mention the material facts of the complaint in his pleadings of the civil suit pertaining to same incident created doubt about the correctness of his allegations- thus, prosecution has failed to prove charges against accused persons- conviction set aside- appeal allowed. (Para-12 to 14)

For the Appellants: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj Vashist, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered on 29.07.2006 by the learned Sessions Judge, Hamirpur, H.P. in Sessions trial No.11 of 2005, whereby, the learned trial Judge convicted accused Vijay Kumar and accused Saneh Lata for theirs committing offences punishable under Section 3(1)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, and under Section 457 of the IPC, whereas, he convicted accused Kishori Lal and accused Husan Kumar for theirs committing an offence punishable under Section 457 of the IPC. Consequently, accused Vijay Kumar and accused Saneh Lata are sentenced to undergo rigorous imprisonment for a period of two years each and to pay a fine of Rs.8000/- each, for commission of an offence punishable under Section 3(1)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. In default of payment of fine, they were sentenced to undergo simple imprisonment for a period of one year each. Further accused Vijay Kumar, Saneh Lata, Kishori Lal and Husan Kumar are sentenced to undergo rigorous imprisonment, for a period of three years each and to pay a fine of Rs.10,000/- each, for theirs committing an offence punishable under Section 457 of the IPC. In default of payment of fine amount, all the convicts are further sentenced to undergo simple imprisonment for a period of one year each. All the sentences were ordered to run concurrently.

2. Briefly stated the facts of the case are that complainant Om Parkash moved a complaint to the Superintendent of Police, Hamirpur, H.P. to initiate criminal proceedings against the accused persons disclosing therein that he is a member of scheduled caste and was running a shop of photography at Nadaun in a rented shop, shop whereof owned by accused Saneh Lata, since 1984 on payment of rent of Rs.300/- per month. On 13.9.2003, he received a letter from accused Vijay Kumar, wherein, he was addressed by his caste and threatened that the shop in question would be got vacated. Sensing some foul play, he rushed to the court and filed a suit for injunction against Vijay Kumar and Saneh Lata. In the said suit, they were directed by the court not to dispossess him from the shop forcibly. On 19.9.2003, summons of the aforesaid civil suit

were duly served upon Vijay Kumar and Saneh Lata, but on the same night, at about 1.30 a.m., accused Vijay Kumar tried to break the lock of the shop, but PW-1, receiving information of the said illegal design, rang up to PW-17 Sh. Mandan Lal, the then Dy. S.P, and requested him to do something to protect his property. On instructions of PW-17, the police of P.S. Nadaun, visited the shop in question, however, accused Vijay Kumar along with 5-6 persons ran away from the site. ON 20.9.20-03, he moved an application qua the said incident in Police Station, Nadaun, but no action was taken by the police against the accused persons. On 21.9.2003, the shop in question was opened by him only for some time, because of Sunday, but at about 9.00 pm, when he was away from his shop at his residence, he came to know that accused Vijay Kumar and Saneh Lata along with 8-10 persons, including accused Kashmiri Lal and Husan Kumar, in connivance with each other broke the lock and threw his belongings on the road. He rushed to the police station and lodged the report. On the instructions of Station House Officer the then MHC started reducing his statement in writing but when he disclosed that Rs.13,000/- in cash and two video Cameras, two Cameras and Cameras of still photography were missing and his forcible dispossession amounted to atrocities on scheduled castes, the SHO, Hari Paul Saini instructed the MHC not to record FIR and refused to register the case. The SHO asked him to visit the police station on the following day and report the matter to Dy. S.P., Hamirpur, who would visit the police station, but on the following day, Dy. S.P. did not visit the police station. The local police including SHO, Hari Paul Saini were hand in gloves with accused Vijay Kumar and Saneh Lata and with their connivance, the accused committed the said offences and on the basis of said averments, the complainant prayed for action. The S.P. vide endorsement Ex.PW17/A referred the said complaint to PW-17 Dy. S.P., Headquarter to personally enquire into the matter and report. PW-17 Madan Lal accordingly enquired into the matter and submitted his report Ex.PW17/B. Vide his inquiry report, PW-17 found that accused Vijay Kumar and accused Saneh Lata harassed PW-1 on the basis of scheduled caste and forcibly dispossessed him therefrom the shop. On the basis of said inquiry report, the Superintendent of Police vide order dated 22.1.2003, ordered the registration of the FIR in Police Station, Nadaun and after such registration of the case directed Mohinder Singh, Dy. S.P. , Sub Division Barsar to carry investigation of the case, as a result of which FIR Ex.pw1/L of 22.10.2003 came to be recorded in Police Station, Nadaun and investigation ensued.

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

4. Accused Vijay Kumar and accused Saneh Lata, stood charged by the learned trial Court, for theirs committing offences punishable under Sections 3(1)(v) and 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act and Sections 457, 380 and 427 of the IPC read with Section 34 of the IPC, whereas, accused Kashmiri Lal and accused Husan Kumar stood charged, by the learned trial Court, for theirs committing offences punishable under Sections 457, 380 and 427 of the IPC read with Section 34 of the IPC. In proof of its case, the prosecution examined 17 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court, wherein, they claimed innocence and pleaded false implication in the case. In their defence, the accused examined three witnesses besides placed reliance upon various documents.

5. On an appraisal of the evidence existing on record, the learned trial Court, recorded findings of conviction against the accuseds/appellants herein.

6. The appellants/convicts stand aggrieved by the judgment of conviction recorded against him by the learned trial Court. The learned counsel appearing for the appellants/convicts has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court, being not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by

this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court standing based on a mature and balanced appreciation, by it, of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. Uncontrovertedly, accused Saneh Lata inducted complainant Om Prakash, as a tenant in the premises owned by her, premises whereof stand located at Nadaun, District Himirpur. The induction of Om Prakash as a tenant occurred in the year 1984. The rent per mensem as contracted inter se both is comprised in a sum of Rs.300/-.

10. Apparently, each of the accused are respectively charged, in respect of an incident which occurred, on 21.09.2003, (i) whereat the accused are alleged, to, with theirs holding a common intention, for, unlawfully depriving, the complainant, from his evident possession of the shop in question, hence, break open its lock whereafter, they are alleged to throw his belongings onto the road. However, the occurrence of 21.09.2003, did not take place in the presence of the complainant, rather when he was away from his shop, the alleged charged occurrence took place also in respect thereto, he, obviously stood apprised by some persons. However, in the complaint, the name(s) of the person(s), who apprised him, of the alleged charged occurrence, remains unrecited. Also the names, of, those persons, who testified in court in respect, of, the offences, in respect whereof the accused stood charged, and stood convicted also reiteratedly remained visibly unmentioned in the apposite FIR borne in Ex.PW1/L. However, the learned Sessions judge, Hamirpur, did not purvey any apposite therewith leverage vis-a-vis the defence, (i) merely, on the ground, of, the FIR being not enjoined, to, embody encyclopedic details, of, the entire incident nor it being enjoined to carry, the names of all the prosecution witnesses concerned. However, the aforesaid reason assigned by the learned Sessions Judge, for irrevering the factum of the FIR, not, echoing the names of the prosecution witnesses, appears t be a specious reason given (a) even if, the learned Sessions Judge, has aptly concluded, of, the FIR being not enjoined, to disclose encyclopedic details, of the entire genesis of the occurrence also when minimal detraction(s) therefrom by the PWs concerned, are permissible, (b) yet when the recitals occurring in Ex.PW1/E, appertain to an incident of 21.09.2003, incident whereof was not personally witnessed by the complainant, rather in respect thereto, he was purveyed information by certain persons, (c) thereupon, he was enjoined, to echo in the apposite FIR, the names of all those persons, who had purveyed him information qua the offences, in respect whereof, the accused stood charged besides convicted, (d) especially when the occurrence, in, the FIR, of, names of those persons, who apprised the complainant qua the commission of the charged offences by the accused, was imperative, for (e) hence ridding the apposite recitals borne in the apposite FIR, from any infirmity, of theirs being inadmissible in evidence, theirs comprising hear say evidence, (f) also for rendering them capacitated to testify in respect thereto. Consequently, when the names of the persons, who revealed the charged incident vis-a-vis the accused remained unrecited in the apposite FIR, thereupon, the testification(s) rendered by the apposite PWs concerned, for hence lending proof vis-a-vis the charge framed against the accused, (g) is hence contrarily amenable, to, an inference of hence their testimonies being discardable, given theirs emanating from invented besides concocted witnesses, (h) rather than the learned Sessions Judge, merely, for reason, of, the FIR being not enjoined, to, disclose encyclopedic details of the genesis of the occurrence, hence imputing credence vis-a-vis their respective testimonies. In aftermath, the learned Sessions Judge, in imputing creditworthiness, to the testifications of the prosecution witnesses, whose names remained undisclosed in the FIR, garners an inference, (i) of the prosecution, merely, for untenably sustaining the charge against the accused, its fabricating evidence against the accused, (j) also thereupon the entire genesis of the prosecution version comprised in the apposite FIR, being ridden with a pervasive vice of falsity, (k) rendering its

contents to be unbelievable also rendering testifications in consonance therewith deposed by PWs to stand imbued with an alike stain.

11. The learned Sessions Judge has disimputed credence to Ex. Dx, exhibit whereof stood tendered into evidence by the accused, during the course, of proceedings, drawn under Section 313, Cr.P.C. At the time of its tendering into evidence by the accused, no, protest emanated from the prosecution, qua its adduction into evidence by the accused nor the authenticity, of the signatures of the complainant as occur thereon, stood disputed. In sequel thereto, it was imperative for the learned Sessions Judge, to, draw a conclusion, qua even if Ex. Dx, was a photo copy of the original besides when it emanated from the custody of the accused, of, (a) it being proven in accordance with law, especially when embossing of exhibition mark thereon, hence, occurred in the presence of the prosecutor concerned. (b) Moreover, disimputation of credence to Ex. Dx, despite, occurrence of unveilings therein, of, possession of the disputed premises standing delivered by the complainant, on 14.09.2003 to accused Saneh Lata, (c) whereupon, rather the allegations constituted in complaint borne in Ex. PW1/E, qua the relevant occurrence purportedly taking place subsequent thereto, whereat the complainant stood forcibly dispossessed from the shop in question by the accused, hence obviously lose their tenacity. However, the learned Sessions Judge concerned, in disimputing credence thereto, has referred to certain rent receipts comprised in Exts. PW1/F to Ex.PW1/J, for his hence, making conclusions of thereupon the recitals borne therein, of co-accused Saneh Lata waiving rent, in respect of the disputed premises, being falsified. Even if, the rent receipts are personificatory, of, rent being liquidated by the complainant vis-a-vis accused Saneh Lata, nonetheless, on anvil thereto, it was not apt, for the learned Sessions Judge concerned, to, rid the recitals borne in Ex. Dx, of their apposite truth, (i) unless evidence stood adduced by the complainant, comprised in apposite receipts appertaining from 1984 upto the date of filing of the FIR, with revelations therein, of, throughout since then upto now, his liquidating the rent vis-a-vis the suit premises. Contrarily, non adduction thereof, did not purvey any leverage, to, the learned Sessions Judge concerned, to, on anvil of only certain rent receipts appertaining to a minimal period, hence, conclude qua thereupon the recitals occurring therein, of co-accused Saneh Lata, waiving the entire rent vis-a-vis the shop in question, not warranting any imputation of credence thereon.

12. Furthermore, the factum of falsity, gripping the incident of 21.09.2003 is also borne, from, the factum of the complainant, in his suit instituted before the learned Civil Court concerned, suit whereof bears Civil Suit No.245 of 2003, making bald, uncertain and imprecise allegations, of the accused on 21.09.2003, taking forcible possession of the suit premises, (i) wherein also the complainant Om Prakash, has not, made any echoings of the aforesaid occurrence taking place, in his absence, whereas, his being apprised in respect thereto by some persons, (ii) whereas the aforesaid factum of the relevant occurrence, of 21.09.2003 taking place in his absence also his being apprised by certain persons, carries elucidation, in the apposite FIR, (iii) sequel, whereof is, of, with this Court hereinabove concluding, of, non mentioning, of the names of those persons, who witnessed the occurrence, by the complainant in the apposite FIR, rendering any testifications in respect thereto articulated by the prosecution witnesses concerned, to be infirm, when read in entwinement with non occurrence of any echoings in tandem therewith also in the apposite suit, (iii) thereupon constrains a conclusion, of, the complainant contriving, the incident of 21.09.2003, merely, for falsely implicating the accused.

13. Since, the learned Sessions Judge, has recorded finding of acquittal, upon the accused, for offences punishable under Sections 380 and 427 of the IPC, besides when the complainant, has omitted to plead in his apposite suit, of his belongings occurring inside his shop being thrown on the road nor with his therein averring of cash worth Rs.13000/- being stolen, (i) thereupon, the conclusions of acquittal, drawn, in respect thereto, by the learned Sessions Judge concerned, are rendered to be drawn aptly, (ii) also the non echoings therein of the aforesaid facts, foments an inference of their withholdings in the apposite suit, whereas theirs occurring in the apposite FIR, renders them to be construable to be a sequel of contrivance deployed by the prosecution.

14. Be that as it may, DW-1 had proven Ex.PW1/B, supurdari nama, also occurrence of his signatures thereon were hence proven by him. He has deposed qua its preparation occurring on 14.09.2003, hence, in contemporaneity to the preparation of Ex.Dx. Thereupon, both the exhibits enjoin imputation of credence, rendering open room for an inference, of the incident of 21.09.2003 being contrived AND possession of the shop in question being delivered earlier thereto by the complainant vis-a-vis accused Saneh Lata. Since, DW-1 was subjected to the ordeal of an exacting cross-examination, in course whereof DW-1 remained unscathed, thereupon, imputation of credence thereon was imperative, (i) whereas, in the learned Sessions Judge disimputing credence, to EX.PW1/B, (ii) merely, on anvil of the learned defence counsel, putting suggestions to PW-16, of its preparation occurring on 21.09.2003, has hence mis-appraised, its probative vigour, (iii) given, even if, suggestion(s) contrary, to the evident preparation of Ex.PW1/B, stood, purveyed by the learned defence counsel, while cross-examining PW-16, any suggestion in detraction thereto, did not warrant leveraging of any inference, qua hence the preparation of Ex.PW1/B evidently reflected therein, to be occurring on 21.09.2003, being hence not proven.

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

16. Consequently, the instant appeal is allowed and the impugned judgment is quashed and set aside. The accused is acquitted of the offences charged. Fine amount, if any, deposited by the accused before the learned trial Court be forthwith refunded to them. Records be sent back henceforth.

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

State of Himachal Pradesh ...Petitioner.
Versus
Kamal Thakur ...Respondent.

Cr. Revision No. 303 of 2017
Reserved on: 22.11.2017
Date of decision: 24th November, 2017.

Code of Criminal Procedure, 1973- Section 397 and 401- Revision- Juvenile Justice (Care and Protection of Children) Act, 2000 (Section 4 & 5) or Juvenile Justice (Care and Protection of Children) Act, 2015 (Section 2 and 7)- Principal Magistrate of the Juvenile Justice Board decided a matter singly - Held bad in the eyes of law, the order passed by the Principal Magistrate was *coram non judis* and thus null and void; both as per the Juvenile Justice Act, 2000 or the newly Amended 2015 Act. Order of the Principal Magistrate quashed and set aside. (Para-5 to 16)

Case referred:
Hasham Abbas Sayyad vs. Usman Abbas Sayyad and others, AIR 2007 (SC) 1077

For the Petitioner Mr. Pushpinder Jaswal, Dy. A.G. with Mr. Rajat Chauhan, Law Officer.
For the Respondent Mr. Parkash Chand, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The State has assailed the order of acquittal passed by the Principal Magistrate, Juvenile Justice Board, Shimla on 29.12.2016 in Criminal Case No. 36-02 of 2015 whereby she acquitted the juvenile under Sections 454, 380 IPC.

2. Even though the judgment has been assailed on merits, however, the moot question is as to whether the Principal Magistrate while sitting singly could have finally decided/disposed of the case. The case was instituted on 7.11.2015 when the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'Act of 2000') was in operation.

3. Section 2 (c) defines Board in the following terms:

"(c) "Board" means a Juvenile Justice Board constituted under Section 4."

4. Section 2(l) of the Act of 2000 reads thus:

"juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence."

5. Only sub-section (2) of Section 4 is relevant for the determination of the instant lis and reads thus:

"(2). A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973, on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class and the Magistrate on the Board shall be designated as the Principal Magistrate."

6. Thus, it is clear that a Juvenile Justice Board is to be three members Board consisting of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench have been vested with the powers conferred by the Code of Criminal Procedure, on a Metropolitan Magistrate or, as the case may be, or a Judicial Magistrate of the first class and the Magistrate on the Board is to be designated as the Principal Magistrate.

7. As regards the procedure etc. to be followed by the Board, the same is provided in Section 5 and sub section (3) thereof reads as under:

"3". A Board may act notwithstanding the absence of any member of the Board, and no order made by the Board shall be invalid by reason only of the absence of any member during any stage of proceedings:

Provided that there shall be at least two members including the principal Magistrate present at the time of final disposal of the case."

8. It is not in dispute that the case was decided at the time when the Act of 2000 was repealed and the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short Act of 2015) had come into force.

9. It would be noticed that even under this Act, the Board has been defined in Section 2 (10) in the following terms:

"(10). "Board" means a Juvenile Justice Board constituted under Section 4."

10. Section 2 (13) of the Act of 2015, reads thus:

"child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.

11. It would further be noticed that even though there are some changes in the qualifications of the Members of the Board. However, the composition remains the same and such Board is to comprise of three Members as provided in sub-section (2) of Section 4, which reads thus:

> *"(2). A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973, on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class."*

12. Likewise, the procedure in relation to the Board has been provided under Section 7 of the Act of 2015 and sub section (3) whereof is *pari-materia* with sub section (3) of Section 5 of the Act of 2000 and reads thus:

> *"(3). A Board may act notwithstanding the absence of any member of the Board, and no order passed by the Board shall be invalid by the reason only of the absence of any member during any stage of proceedings:*
>
> *PROVIDED that there shall be atleast two members including the Principal Magistrate present at the time of final disposal of the case or in making an order under sub-section (3) of Section 18."*

13. At this stage, the Court is not going into the thicket of the controversy as to which of the Acts would govern the proceedings. However, in view of the legal provisions extracted above, it is abundantly clear that under both the Acts, the cases of "juvenile in conflict with law" and "child in conflict with law", as the case may be, can be disposed of finally only by at least two members including the Principal Magistrate present at the time of disposal of such case. No individual Member including the Principal Magistrate and no two Members excluding the Principal Magistrate can finally dispose of the case.

14. The Principal Magistrate could not have finally disposed of the case in contravention of the provisions of the Act(s) supra and, therefore, the order passed by it is *coram non judis* and being nullity is void, ab initio.

15. It is well settled and needs no authority that "*where a Court takes upon* itself to *exercise* a *jurisdiction* it has *not possessed its decision amounts* to *nothing"*. Consequently, any order passed by the Court having no jurisdiction is *non est* and its invalidity can be set up when it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. Any order passed by such authority is *coram non judis*.

16. This aspect of the matter has been considered by the Hon'ble Supreme Court in ***Hasham Abbas Sayyad*** vs. ***Usman Abbas Sayyad and others***, AIR 2007 (SC) 1077, wherein it was held as under:

> "[21] The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a court without jurisdiction would be coram non judice being a nullity, the same ordinarily should not be given effect to.
>
> [22] This aspect of the matter has recently been considered by this Court in Harshad Chiman Lal Modi V/s. DLF Universal Ltd. and Another, 2005 7 SCC 791, in the following terms :
>
> "We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i)

Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity."

See also Zila Sahakari Kendrya Bank Maryadit v. Shahjadi Begum & Ors., 2006 (9) SCALE 675 and Shahbad Co-op.Sugar Mills Ltd. v. Special Secretary to Govt. of Haryana & Ors. 2006 (11) SCALE 674 para 29]

[23] We may, however hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Sec. 21 of the Code of Civil Procedure; and a decree passed by a court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

17. Consequently, the Criminal Revision is allowed and the impugned order passed by the Principal Magistrate, Juvenile Justice Board, Shimla on 29.12.2016 in Criminal Case No.36-02 of 2015 is *coram non judis* and is accordingly quashed and set aside. The case is remanded to the Juvenile Justice Board, Shimla for deciding the case afresh in accordance with law after hearing both the parties.

18. The parties are directed to appear before the Juvenile Justice Board, Shimla on 11.12.2017. Registry is directed to send the records of the case back to the concerned Court so as to reach well before the next date of hearing.

19. The Registrar General is directed to circulate a copy of this judgment to all the Juvenile Justice Boards in the State.

20. The appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

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

Mohan Lal .....Appellant

Versus

Ramesh Chand .....Respondent

RSA No. 470 of 2007
Reserved on: 15.11.2017
Decided on: 25.11.2017

Regular Second Appeal- Suit under Section 38 and 39 of the Specific Relief Act for perpetual and prohibitory injunction- Plaintiff sought a restraint order against the defendant from digging the foundations, raising construction and blocking the path in the suit land- plaintiff also sought a decree for mandatory injunction in the alternative, for restoration of the suit land to its original position- defendant inter alia averred that the suit land was Abadi deh- As per the defendant, the plaintiff was not a co-sharer in the suit land- house was being constructed on the

old foundation and there was no path in existence- The Learned Trial Court had dismissed the suit- The Learned First Appellate Court however reversed the findings and decreed the suit- hence the Regular Second Appeal- Held- that in case of easement by way of prescription where parties jointly owned and possessed, the suit land, being a *Deodi* (threshold or entrance to the compound), which is main entrance- no co-sharers can raise any type of construction to block the same- consequently, findings of the learned 1st Appellate Court were upheld. (Para-20)

For the appellant Mr. R.K. Sharma, Sr. Advocate with Ms. Anita Parmar, Advocate.
For the respondent : Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present regular second appeal is maintained by the appellant, who was the defendant before the learned Trial Court (hereinafter to be called as "the defendant"), laying challenge to the judgment and decree, dated 31.07.2007, passed by learned District Judge, Kangra at Dharamshala, in Civil Appeal No. 30-G/XIII/2005, whereby judgment and decree, dated 31.01.2005, passed by the learned Civil Judge (Jr. Division), Court No. 2, Dehra, District Kangra, H.P., in Civil Suit No. 137 of 2000, was set aside.

2. Briefly, the facts, which are necessary for determination and adjudication of the present appeal, are that the respondent, who was the plaintiff before the learned Trial Court (hereinafter to be called as "the plaintiff") instituted a suit against the defendant, under Sections 38 & 39 of the Specific Relief Act for perpetual and prohibitory injunction. He prayed that the defendant be restrained from digging foundations, raising construction and changing nature of the land, shown in site plan, marked ABCDEFGH and also from blocking the path, as shown in pink colour, in the site plan, comprised in Khata No. 158 min, Khatauni No. 164 min, Khasra No. 384, measuring 0-07-29 hectares, as described in the copy of Jamabandi for the year 1997-98, situated in Mohal and Mauza Kohasan, Tehsil Dehra, District Kangra, H.P. (hereinafter to the called as "the suit land"). The plaintiff has also claimed a decree for mandatory injunction, directing the defendant to restore the land to its original position by demolishing the structure, if the defendant succeeded in raising construction over the said portion of the land.

3. By filing written statement, the defendant resisted and contested the suit of the plaintiff and raised preliminary objections qua maintainability and estoppel. On merits, the defendant has admitted the suit land to be *Abadi Deh*, however he termed rest of the averments made in the plaint to be incorrect. As per the defendant, the plaintiff is not a co-sharer in the suit land nor does any path passes through the suit land. He has contended that his house is in existence over the suit land, thus he has every right to raise construction thereupon. He has further contended that the foundation of his house in the suit land has been laid down prior to the filing of the present suit, without there being any objection on the part of the plaintiff. As per the defendant, the suit land is *Abadi land*, which was old *Abadi* of the defendant, on which the new foundation has been raised by him. Lastly, the defendant prayed for dismissal of the suit.

4. The learned Trial Court on 20.12.2001 framed the following issues for determination and adjudication:

"1. Whether plaintiff is entitled for permanent injunction, as prayed for? OPP

2. Whether plaintiff is entitled for mandatory injunction, as prayed for? OPP

3. Whether plaintiff has no locus standi to file present suit? OPD

4. Whether plaintiff is estopped by his act and conduct from filing the present suit? OPD

5. Whether suit is bad for better particulars? OPD

6. Relief."

5. After deciding issues No. 1 to 5 in negative, the suit of the plaintiff was dismissed. Subsequently, the plaintiff maintained an appeal before the learned first Appellate Court, which was allowed. Hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

"1. Whether the learned first Appellate Court has not committed grave error in completely ignoring the evidence and report of the Local Commissioner-PW-2?

2. Whether the plaintiff's suit was not liable to be dismissed as there was incomplete description of the property?"

6. Learned Senior Counsel appearing on behalf of the appellant has argued that the judgment and decree, passed by the learned first Appellate Court is perverse and without appreciating the facts, which have come on record and the same is required to be set aside. On the other hand learned Counsel for the respondent has argued that the judgment and decree, passed by the learned lower Appellate Court is as per law and needs no interference.

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

8. The plaintiff in order to prove his case, appeared in the witness box as PW-1 and placed on record *Jamabandi*, Ext. P-1, which shows that the suit land is recorded as *Abadi Deh*. He has also placed on record copy of *Sajra Nasab* for the year 1997-98, showing pedigree table. Further the plaintiff has placed on record site plan, Ext. PW-8/A, showing area ABCDEFGH, qua which the present suit has been filed. He deposed that the parties have their residential houses in the *Abadi Deh* land, which is joint. As per the plaintiff, from the *Deodi*, as shown in the site plan, there is a passage and qua this passage, the ancestors of the parties had entered into a compromise. He has deposed that besides this passage, there is no other passage to their house and if the defendant succeeds in raising his house over this passage, the passage to their house would be closed. In his cross-examination, he specifically stated that they have inherited the *Abadi 'Lal Lakir'* land of Babu Ram. However, he cannot produce any document pertaining to land inherited from his father Gian Chand. He has deposed that he purchased the suit land and *Abadi* land from Vishwanath about 6-7 years ago. He has further deposed that heirs of Babu Ram have inherited his property, however he cannot produce any document regarding their inheritance.

9. Sh. Lalit Uppal, Advocate (appointed by the Court to inspect the suit land), has appeared in witness box as PW-2 and proved on record inspection report, Ext. PW-2/A and statements of the parties and witnesses, Ext. PW-2/B, Ext PW-2/C and Ext. PW-2/D. As per inspection report, Ext. PW-2/A, construction of four rooms and fresh foundations upto two layers of stones were found at the spot. In his cross-examination, he deposed that on the foundation, no passage was found.

10. Sh. Krishan Kumar, has appeared in the witness box as PW-8 and deposed that he has prepared site plan, Ext. PW-8/A. However, he admitted that he has not shown length of the passage on the map. He has further admitted that on the vacant land, shown in the site map, there were foundations of the defendant, however he denied that in order to prejudice the case of the defendant, he has intentionally not shown the foundations in the site plan.

11. PW-3, Sh. Gurdas Ram, by filing his proof affidavit, under Section 18, Rule 4 CPC, supported the case of the plaintiff. In his cross-examination, he admitted that the plaintiff has not inherited the land from his father, however he has purchased it from Vishwanath about 6-7 years ago. He has deposed that ½ portion of the plaintiff's house falls in the *Abadi* land and ½ of it falls in the land purchased from Vishwanath. This witness has admitted that adjacent to the plaintiff's land, there is *'Gohar'*. He has further admitted that on *Abadi* land of Babu Ram,

defendant Mohan Lal is in possession and he has houses on both sides of the courtyard. He has also admitted that he and other residents of the area pass through the *'Gohar'* and then go to the plaintiff's place.

12. PW-4, Jyoti Prakash (brother of the defendant), has also supported the case of the plaintiff and in his cross-examination, he admitted that he has no share over the passage of the suit land. He has deposed that Gian Dev (father of the plaintiff) has not inherited any of the land owned by the family and Ramesh and suresh have also not inherited anything. He has admitted that he and his brother had purchased the *Abadi* and other land of Gian Dev. He has further admitted that where defendant had laid foundations, there was old house and *'Deodi'* of Babu Ram.

13. PW-5, Om Prakash (other brother of the defendant), in his cross-examination, has admitted that he is having civil litigation with the defendant. He has further admitted that his father had exchanged *Abadi* at Dehra. PW-6. Priya Vrat, in his cross-examination, deposed contrary to plaintiff's deposition and denied that Gian Dev did not inherit any land from Babu Ram and Ramesh and Suresh also did not inherit anything from their father. PW-7, Amar Nath, in his cross-examination, has admitted the right of defendant, Mohan Lal over the land, on which, he has dug up the foundations.

14. Conversely, defendant, Mohan Lal, has stepped into the witness box as DW-1 and in his cross-examination, he admitted that *'Lal Lakir'* has been inherited by Babu Ram and Jagat Ram from Kirpa Ram, but Gian Dev has not inherited any property from Babu Ram. He denied that *'Lal Lakir'* was inherited by Vishwanath from Jagat Ram, however he has stated that Vishwanath, son of Jagat Ram was also owner of Khasra No 384, i.e. the suit land. He has further denied that the plaintiff and his brother had purchased all the share of Vishwanath, including the suit land, recorded as *'Lal Lakir'*. He has also denied that there is no alternative passage to go to the house of the plaintiff, however he has stated that there is a different passage. He has further denied that in May, 2000, he dug foundations over the land from where, there is a passage leading to the house of the plaintiff.

15. DW-2, Prem Sagar, in his cross-examination, has admitted that the suit land is ancestral property of both the parties. He has further admitted that when one goes forward from *'Deodi'*, then the land, where the defendant had dug foundations comes and then there is courtyard of the defendant, then there is a house of the plaintiff, however he has stated that the plaintiff had purchased a separate passage for his house. He denied that if the defendant will raise house over the suit land, the passage to the house of the plaintiff would be closed.

16. DW-3, Prithi Chand, has deposed that at the time of digging foundations, no one has objected and at that time there was no passage from the suit land. In his cross-examination, he admitted that both plaintiff and defendant pass through *'Deodi'* to go their houses. He has further admitted that if house is raised on disputed passage, passage to the house of the plaintiff would be closed.

17. The learned trial Court has taken *Deodi* as part of the house, in fact *Deodi* is passage, which the learned trial Court has failed to appreciate and findings recorded to this effect are perverse. The plaintiff has asserted that the land shown vide letters ABCDEFGH in spot map, Ext. PW-8/A is vacant land, upon which earlier there was a *Deodi*, i.e. entrance to the houses or *Abadi*, situated in the suit land, now the *Deodi* has collapsed and through the same place, the path leads to his house. He has further asserted that the defendant has started raising construction over the same and if he continued to raise construction, it would block the path. Whereas, the defendant in his affidavit, Ext. DW-1/A and while appearing as DW-1, has deposed that the plaintiff has no concern with the land shown by letters ABCDEFGH, in the spot map, Ext. PW-8/A. He has further deposed that on the said land, there was an old house of his father Babu Ram, which has collapsed and in both sides of vacant land, there are houses.

18. In view of the entries made in the copy of *Sajra Nasab,* it has been established that Kirpa had three sons, namely Babu Ram, Jagta and Ganga Ram, whereas Gian Dev had two

sons, namely Ramesh Chand and Suresh. Defendant, Mohan Lal has admitted that Vishwanath, father of PW-6, Priyavrat, was the brother of his father Babu Ram and Vishwanath was succeeded by PW-6, Priyavrat. He has also admitted that the suit land was inherited by Babu Ram and Jyoti Ram from their father Kirpa Ram, which proves that the suit land was owned by Babu Ram and Jagat Ram. Babu Ram succeeded by his sons and Jagat Ram was succeeded by Vishwanath. From the evidence on record, it stands fully established that the suit land is joint *inter se* the parties to the suit and other co-sharers, i.e. brothers of the defendant and Vishwanath. The defendant could not prove or led any evidence that the suit land has been partitioned between the parties.

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

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

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

20. From the evidence on record, it is clear that the plaintiff had purchased the share of *Abadi Deh* from Vishwanath and has become the joint owner of the suit land with the defendant and other co-sharers. However, the learned trial Court has taken a view that the plaintiff is claiming a path and as there is an alternative path, he cannot claim the same. However the learned first Appellate Court has rightly held that the plaintiff was not claiming path in the form of easement of necessity, but it was by way of prescription. It stands established that vacant land shown by letters ABCDEFGH is jointly owned and possessed by the parties and *Deodi* (threshold) which is main entrance, goes to the houses of all the co-sharers and no co-sharer can raise any type of construction over the suit land to block the path in question of other co-sharer in any manner. Accordingly, substantial question of law No. 1 is answered holding that the learned first Appellate Court has committed no error and the evidence on record, including the documents were properly appreciated, as it has been amply proved on record that the defendant is trying to raise construction on the Deodi. The learned first Appellate Courts has correctly appreciated the report of Local Commissioner and other evidence, as has come on record to its right perspective. Substantial question of law No. 2 is answered holding that the suit of the plaintiff was with all the necessary description of the property and he has also proved on record his case, so the findings recorded by the learned first Appellate Court are after appreciating the facts, which have come on record and the law has been applied correctly.

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

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

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Satyam Educational Society, Puhara and another .....Petitioners.

Vs.

State of Himachal Pradesh .....Respondent.

CWP No. 850 of 2017
Reserved on: 25.11.2017
Date of Decision: 27.11.2017

Constitution of India, 1950- Article 14 and 226- **Civil Writ Petition-** Petitioner running a Nursing College – having been refused NOC/permission to start GNM Course- grievance of the petitioner was that the cabinet had approved NOC only in case of colleges at serial No.1 and 3 for running the said course and though, its name figured at serial No.2 and was duly recommended alongwith other two by the Directorate level Evaluation Committee headed by the Director, Medical Education- still NOC not granted – writ petition filed- Held- policy decisions or a cabinet decisions are generally beyond the scope of judicial review but if parameters of Article 14 of the Constitution of India are infringed and decision is not backed by cogent material, or action is arbitrary, the Courts can interfere. (Para-17 and 18)

Constitution of India, 1950- Article 14- **Civil Writ Petition-** Reasoning is the sole of the decision, whether administrative, policy decision, cabinet decision or a judicial decision- reasons have to be assigned to justify its decision- absence of reasons renders the decision arbitrary and violative of Article 14 of the Constitution- on facts held that since there was no reason assigned for refusing the grant of NOC – order dated 17.2.2017 quashed and the matter was directed to place before the cabinet for re-consideration. (Para -20 to 23)

Cases referred:

Asif Hameed and others Vs. State of Jammu and Kashmir and others, 1989 Supp.(2) Supreme Court Cases 364

Union of India and others Vs. Dinesh Engineering Corporation and another, (2001) 8 Supreme Court Cases 491

State of Orissa and others Vs. Gopinath Dash and others, (2005) 13 Supreme Court Cases 495

Bhubaneswar Development Authority and another Vs. Adikanda Biswal and others, (2012) 11 Supreme Court Cases 731

Parisons Agrotech Private Limited and another Vs. Union of India and others, (2015) 9 Supreme Court Cases 657

Centre for Public Interest Litigation Vs. Union of India and others, (2016) 6 Supreme Court Cases 408

State of Himachal Pradesh and others Vs. Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh, (2011) 6 Supreme Court Cases 597

For the petitioners:	Mr. R.K. Bawa, Senior Advocate, with Mr. Jeevesh Sharma, Advocate.
For the respondent:	M/s. Anup Rattan and Romesh Verma, Additional Advocate Generals, with Mr. J.K. Verma, Dy. A.G.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this writ petition, the petitioners have prayed for the following reliefs:

"(a) To set aside and quash the orders, dated 17.02.2017 as contained at Annexure P-4 supra whereby the respondent-State has not granted the NOC/permission in favour of the petitioners to start GNM course with intake of 40 seats;

(b) To direct the respondent-State to issue NOC/permission in favour of the petitioners to start GNM course with intake of 40 seats;

(c) To call for the records of the case for the kind perusal of this Hon'ble Court;

(d) Any other relief(s) as may be deemed just and proper keeping in view the facts and circumstances of this case may also kindly be granted in favour of the petitioners, in the interest of justice."

2. Petitioner No. 1, which is running a Nursing College in the name and style of *Satyam College of Nursing* at Village Lanjot, P.O. Basnoor, Tehsil Shahpur, District Kangra, applied for grant of No Objection Certificate (hereinafter referred to as "NOC")/permission to start General Nursing and Midwifery course (hereinafter referred to as "GNM Course") with an intake of 40 students. Its case was placed for consideration of Council of Ministers for issuance of NOC vide Memorandum, dated 16.02.2017, copy of which is appended at page No. 19 of the paper-book. As per the said Memorandum, details of the applicants, who were found eligible for issuance of NOC to start Nursing courses in terms of constructed area and hospital attachments, were provided in para 2.2 thereof, which reads as under:

S.N.	Name of the applicant	Constructed area (sq. ft.)		Hospitals For Attachment	Course proposed
		Earlier	After re-inspection		
1.	Batt Educational Society, Vill. Bonkhari Mod. PO Bathri, Tehsil Dalhousie, Distt. Chamba	39220	98294	Private Hospitals with 240 beds	1. GNM 40 Seats. 2. B.Sc. Nursing 40 seats
2.	Satyam College of Nursing, Lanjot, Tehsil Shahpur, Distt. Kangra.	40323	57000 sq. Ft.+ 10,000 sq. Ft. propose-d area (67,000)	Private Hospitals with 255 beds	GNM 40 seats. (The institute is functional with 40 B.Sc. Nursing seats.
3.	Swakar School/College of Nursing Sarkaghat, Distt. Mandi.	42090	+17200 sq. ft. proposed area (49290)	Already attached with Govt. Hospitals.	B.Sc. Nursing, 30 seats by reducing NOCs. of GNM and ANM from existing 40 to 30 each.

Name of the petitioner-Nursing College was duly reflected in the details of the applicants, who were so found eligible for issuance of NOC at Sr. No. 2.

3. Grievance of the petitioners is that NOC was not issued in favour of the petitioner-Institute, as is evident from Annexure P-4, dated 20.02.2017, vide which, the petitioners were communicated that in its meeting held on 17.02.2017, the Cabinet had approved NOC only in the case of Sr. No. 1 and Sr. No. 3, meaning thereby that NOC was not approved in favour of College figuring at Sr. No. 2, i.e., the petitioner-Institute. The same stands assailed by way of present writ petition, *inter alia*, on the grounds that the case of the petitioner-Institute stood recommended after its evaluation by the Directorate level Evaluation Committee headed by the Director, Medical Education, despite this, No Objection Certificate stood refused to the petitioners without assigning any reason whatsoever. As per the petitioner-Institute, it stands discriminated as far as grant of NOC is concerned, because when all three Institutes which find mention in the Memorandum were duly recommended by the appropriate authority for the issuance of NOC to the Cabinet, then the act of Cabinet of considering only the case of two, out of the three applicants and arbitrarily ignoring the case of third applicant, i.e., the present petitioners by not granting NOC in its favour, is an act of colourable exercise of powers as well as discrimination.

4. In its reply, respondent-State while refuting the allegations of the petitioner-Institute has stated that there was no merit in the contention of the petitioner, because the case of the petitioner was duly put up before the Cabinet and the Cabinet in its wisdom decided not to issue NOC to start GNM Nursing course in favour of the petitioner-Institute. Nothing has been mentioned in the reply as to why the case of the petitioners for grant of NOC did not find favour with the Cabinet.

5. In its rejoinder, the petitioners while retreating its case, as has been put forth in the petition, controverted the averments to the contrary made in the reply.

6. We have heard Mr. R.K. Bawa, learned Senior Counsel for the petitioners as well as Mr. Anup Rattan, learned Additional Advocate General on behalf of the State. The original record of the case also stands produced by the learned Additional Advocate General.

7. A perusal of the records demonstrate that Memorandum, dated 16.02.2017, was placed for consideration of the Cabinet, which was held on 17.02.2017. The Memorandum so placed before the Cabinet qua grant of NOC in favour of the applicants Nursing Institutes stood decided as under:

"Option No. 1 approved only in case of Sr. No. 1 & 3."

8. On record, there is nothing from which it can be inferred, as to what deliberations took place in the Cabinet leading to the non-grant of NOC in favour of petitioner-Institute or leading to the grant of issuance of NOC with regard to Institutes which were at Sr. Nos. 1 and 3 in the said Memorandum.

9. Therefore, in these circumstances, the moot issue which is for consideration before us is as to whether the Cabinet in its wisdom could have had not approved the issuance of No Objection Certificate in favour of the petitioner-Institute without assigning any reason whatsoever, especially in view of the fact that the Memorandum, which was placed before it in this regard contained recommendations for the issuance of NOC in favour of the petitioner-Institute.

10. Before we deliberate on the issue, we may state that this Court is not oblivious to the fact that wisdom of the Cabinet as to why a particular decision has been taken by it, is not open to judicial review, save and except if that wisdom does not pass the touchstone of Article 14 of the Constitution of India. We may also clarify at this stage itself that this Court is not going into the wisdom of the Cabinet as to why NOCs. were granted in favour of the Institutes which found mentioned at Sr. Nos. 1 and 3 of the Memorandum, which was so placed before the Cabinet. The sole issue, which we shall be deciding is as to whether in the matter of the recommendations for issuance of NOC in favour of the petitioner-Institute, could the Cabinet have had refused the same without assigning any reason.

11. A three Judge Bench of the Hon'ble Supreme Court in ***Asif Hameed and others*** Vs. ***State of Jammu and Kashmir and others***, 1989 Supp.(2) Supreme Court Cases 364 has held that when a State action is challenged, the function of the Court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the Court must strike down the action. The Hon'ble Supreme Court has further held that while doing so, the Court must remain within its self-imposed limits and the Court sits in judgment on the action of a coordinate branch of the Government. The Hon'ble Supreme Court has further held that while exercising power of judicial review of administrative action, the Court is not an appellate authority and the Constitution does not permit the Court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers.

12. The Hon'ble Supreme Court in ***Union of India and others*** Vs. ***Dinesh Engineering Corporation and another***, (2001) 8 Supreme Court Cases 491 has held that any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution of India.

13. Again, the Hon'ble Supreme Court in ***State of Orissa and others*** Vs. ***Gopinath Dash and others***, (2005) 13 Supreme Court Cases 495 has reiterated that the scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any

statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution.

14. The Hon'ble Supreme Court in ***Bhubaneswar Development Authority and another*** Vs. ***Adikanda Biswal and others***, (2012) 11 Supreme Court Cases 731 has held that the judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision-making process and not on the correctness of the decision itself and the Court confines itself to the question of legality and is concerned only with, whether the decision-making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasaonable decision or abused its powers.

15. In ***Parisons Agrotech Private Limited and another*** Vs. ***Union of India and others,*** (2015) 9 Supreme Court Cases 657, the Hon'ble Supreme Court again while dealing with the scope of judicial review in a matter of policy decision held that no doubt, the writ Court has adequate power of judicial review in respect of such decisions. However, one it is found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution, power of judicial review would not extend to determining the correctness of such a policy decision or to indulge into the exercise of finding out whether there could be more appropriate or better alternatives.

16. A three Judge Bench of the Hon'ble Supreme Court in **Centre for Public Interest Litigation** Vs. **Union of India and others**, (2016) 6 Supreme Court Cases 408 again held that a policy decision taken by the Government which is not arbitrary or not based on irreverent considerations or malafide or against any statutory provisions, should not be interfered by the Courts in exercise of power of judicial review. However, Supreme Court further held that minimal interference is called for by the Courts, in exercise of judicial review of a Government policy when the said policy is the outcome of deliberations of the technical experts in the fields inasmuch as Courts are not well equipped to fathom into such domain which is left to the discretion of the execution.

17. Thus, it is evident from the law cited above that be it a policy decision or a Cabinet decision, the same is not beyond the scope of judicial review, so exercised by this Court in exercise of powers conferred upon it under Article 226 of the Constitution of India, however, the power has to be exercised with great restraint and interference can be there only if parameters of Article 14 of the Constitution of India are infringed and decision is not backed by cogent material or the same is arbitrary and is opposed to the provisions of the Constitution.

18. We respectfully abide with the law laid down by the Hon'ble Supreme Court that the policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles and in the matter of policy decisions or exercise of discretion by the Government should not be interfered as long as infringement of fundamental right is not shown.

19. Coming to the facts of the present case, a perusal of the impugned order as well as the records of the case demonstrate that there is no material on record from which it could be interfered as to what weighed with the Cabinet while not finding favour with the recommendations so as to grant NOC in favour of the petitioner. The entire record is silent. There is neither any reasoning available on record nor any deliberation of the Cabinet available on record in this regard.

20. Article 14 of the Constitution of India strikes at arbitrariness. Reasoning is the soul of a decision, be it an administrative decision, a policy decision, a Cabinet decision or a judicial decision. Why a particular conclusion has been arrived at by the Executive or the Cabinet should be borne out from the records. In our considered view, the discretion conferred upon the executive or the Cabinet to take a decision cannot be so arbitrary that it confers upon them a right to take a decision without assigning any reasoning. When the Memorandum so placed before the Cabinet contained recommendations for grant of NOC in favour of the petitioner-

Institute, then in our considered view, least that was expected from the Cabinet while not agreeing with the said recommendations was to assign minimum reasoning to justify its decision. Absence of reasons so assigned in this regard renders the decision so taken by the Cabinet, as has been conveyed to the petitioner vide Annexure P-4 as arbitrary and thus, violative of Article 14 of the Constitution of India.

21. At this stage, we may also refer to the judgment of the Hon'ble Supreme Court in ***State of Himachal Pradesh and others*** Vs. ***Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh***, (2011) 6 Supreme Court Cases 597 relied upon by the learned Additional Advocate General. In the said judgment, the Hon'ble Supreme Court has held as under:

> *"17. We have already adverted to the relief prayed for by the respondent-association in the said writ petition. Admittedly, there is no prayer for quashing of even earlier Cabinet decision or order of the government. The conclusion of the High Court quashing the Cabinet decision dated 18.07.2009 and as a consequence issuing several directions is unacceptable and contrary to the well established principles. First of all, there was no prayer for quashing of any decision of the State Government much less the subsequent Cabinet decision dated 18.07.2009. If the High Court was interested in going into the said decision that too after reserving the judgment on 03.07.2009, it is but appropriate to reopen the case, permit the petitioner's association to amend the relief portion, afford adequate opportunity to the State to put-forth their stand for modifying this "policy" curtailing certain courses under SCVT.Admittedly, the High Court has not resorted to such recourse and simply quashed the decision of the Cabinet dated 18.07.2009 and issued various directions which are impermissible.*
>
> *18. As rightly pointed out by Mr. Altaf Ahmed, without any arguments having been heard, without there being any question raised by any party as to the validity of the Cabinet decision dated 18.07.2009 and without the same being in question, or any relief sought for in the writ petition, the High Court has gone into the said decision of the Cabinet having taken place after the judgment was reserved. The decision of the Cabinet generally ought not to be interfered with in judicial review so lightly as has been done in the present case.The quashing of the Cabinet decision without analyzing the pros and cons in the manner seeks to restrict the State's constitutional authority and powers to frame policy especially in such vital areas like imparting technical education is not acceptable."*

22. Coming to the present case, we have already quoted the relief clause, perusal of which clearly demonstrates that the decision of the Cabinet, as was conveyed to the petitioners, stands assailed in the relief clause and its quashing has been sought by the petitioners. Therefore, in our considered view, while respectfully agreeing with the preposition of law laid down by the Hon'ble Supreme Court in abovementioned case, the ratio so laid down therein is not applicable in the facts of the present case.

23. In view of above, this writ petition is allowed. Annexure P-4 is quashed and set aside to the extent it does not assign any reason as to why the case of the petitioner-Institute was not considered for grant of No Objection Certificate. However, we are not interfering with the decision of the Cabinet whereby it granted No Objection Certificates in favour of applicants No. 1 and 3, which find mention in Memorandum, dated 16.02.2017. Respondent-State is directed to place the matter for consideration of grant of No Objection Certificate for running GNM course with an intake of 40 students in favour of the petitioner-Institute again before the Cabinet forthwith for taking an appropriate decision in this regard. It is clarified that in case the Cabinet does not concur with the recommendations so made in favour of the petitioner-Institute, then the decision of the Cabinet should be backed with at least minimum reasoning. Petition stands disposed of accordingly, so also miscellaneous application(s), if any. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

M/s Stovekraft India ....Appellant.

Versus

Commissioner of Income Tax ....Respondent.

ITA Nos.20 to 24, 31 to 37 of 2015; 1,6,7, 9,10,14,15,20,23,24,25,27,35,44,45,50, 61, 62,69, 70 of 2016; and 2,3,5,7,8,17, 19, 20,21,22,25 & 26 of 2017

Reserved on: November 14, 2017

Date of Decision : November 28, 2017

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

(Para-18 to 20)

Income Tax Act, 1961- Section 80-IC- "Initial Assessment Year" and "Substantial Expansion"- The relation thereof explained, further held that the legislature has consciously extended the benefit of "initial assessment year" to a unit that completed a substantial expansion – thus, held that substantial expansion undertaken during the period 7.1.2003 to 1.4.2012 was valid and legal- the units were entitled to 100% deduction on profits. (Para-22 to 25) // Thus, appeals were consequently allowed and the order passed by Assessing Officer, The Appellate Authority and the Tribunal were quashed and set aside holding inter alia that undertakings or enterprises which were established and became operational and functional prior to 7.1.2003 and have undertaken the substantial expansion between 7.1.2003 and 1.4.2012 shall be entitled to the benefit of Section 80-IC, for the period for which they were not entitled to the benefit of deduction under Section 80-IB and that units that commenced production after 7.1.2003 and carried out substantial expansion prior to 1.4.2012 would be entitled to the benefit of deduction under Section 80-IC. (Para-50 to 55)

Cases referred:

Padinjarekkara Agencies Ltd. vs. State of Kerala, (2008) 3 SCC 597

The Indian Aluminium Co. Ltd. vs. The C.I.T., West Bengal, Calcutta, (1972) 2 SCC 150

Star Industries vs. Commissioner of Customs (Imports), Raigad, (2016) 2 SCC 362

Eveready Industries India Limited vs. State of Karanataka, (2016) 12 SCC 551

State of Haryana and others vs. Bharti Teletech Limited, (2014) 3 SCC 556

Orissa State Warehousing Corporation v. Commissioner of Income Tax, (1999) 4 SCC 197

DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana and others, (2003) 5 SCC 622

Commissioner of Income Tax v. J.H. Gotla, (1985) 4 SCC 343

State of W.B. v. Kesoram Indjustries Ltd. and others, (2004) 10 SCC 201

Bajaj Tempo Ltd., Bombay v. Commissioner of Income Tax, Bombay City-III, Bombay, (1992) 3 SCC 78
Bhim Singh, Maharao of Kota v. Commissioner of Income Tax, Rajasthan-II, Jaipur, (2017)1 SCC 554
Southern Motors v. State of Karnataka and others, (2017) 3 SCC 467

For the Appellants	:	Mr. Bishwajit Bhattacharyya, Senior Advocate, with Mr. Gaurav Jain, Mr. Vishal Mohan, Mr. C.N. Singh, Mr. Rakesh Kumar Thakur, Mr. Gaurav Sharma, and Mr. Anuj Nag, Advocates.
For the Respondents	:	Mr. Vinay Kuthiala, Senior Advocate, with Ms Vandana Kuthiala & Mr. Diwan Singh Negi, Advocates.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

The moot issue involved in these appeals, *inter alia*, is as to whether an "undertaking or an enterprise" (hereinafter referred to as the Unit), established after 7th January, 2003, carrying out "substantial expansion" within the specified window period, i.e. between 7.1.2003 and 1.4.2012, would be entitled to deduction on profits @ 100%, under Section 80-IC of the Income Tax Act. Also, if so, then for what period.

2. Since it is a legal issue, by consent, only brief facts of ITA No.20 of 2015, titled as *M/s Stovekraft India v. Commissioner of Income Tax,* are being referred to.

3. Appellant M/s Stovekraft India (hereinafter referred to as the assessee) started its business activity/ came into operation with effect from 6.1.2005 and treating the Financial Year 2005-2006 (Assessment Year 2006-2007), as initial assessment year, claimed deduction on profits @ 100% under Section 80-IC of the Income Tax Act, 1961 (hereinafter referred to as the Act). Sometime in the Financial Year 2009-2010, the assessee carried out "substantial expansion" of the "Unit" and by treating the said Financial Year to be the "initial assessment year", further claimed deduction @ 100%, instead of 25%, under Section 80-IC of the Act.

4. We need not deal with the factual aspect any further, save and except that the assessee's contention of further claim of deduction @ 100% with effect from Financial Year 2009-2010 after undertaking "substantial expansion", so carried out in the year 2009-2010, did not find favour with the Assessing Officer, who vide order dated 23.12.2013 (Annexure A-1)(Page-29), disallowed the claim, holding the assessee entitled to deductions not @ 100% but on reduced basis @ 25%, as provided under Section 80-IC.

5. Significantly, the said Authority framed the following questions for its adjudication:

"a. What is Substantial Expansion? (Page-31)

b. Who all can carry out Substantial Expansion? (Page-31)

c. What is Initial Assessment Year?"(Page-33)

6. For answering as to what is "substantial expansion", the Authority referred to and relied upon the definition clause [8(ix)] of Section 80-IC.

7. While answering Question (b), seeking support of Circular No.7 of 2003, Notification No.49/2003, issued by the Central Excise Department and Notification dated 8.1.2003 that of Government of India, Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) and circulars of the parent department, the Authority concluded that only such of those units, existing prior to incorporation of Section 80-IC in the statute, i.e. 7.1.2003, could undertake substantial expansion and units established subsequent to the said

date being termed as "new industrial units" were ineligible for exemption under Section 80-IC, even though they may have carried out any expansion, substantial or otherwise.

8. In answering Question (c), by referring to and relying upon clause (v) of sub-section (8) of Section 80-IC, the Authority concluded by holding that, for the purpose of claiming benefits under Section 80-IC, the assessee can have only one 'initial assessment year'.

9. Vide order dated 14.8.2014 (Page-43), the Commissioner of Income Tax (Appeals), Shimla, Himachal Pradesh (hereinafter referred to as the Appellate Authority), concurred with the findings of the Assessing Officer.

10. The Income Tax Appellate Tribunal vide order dated 27.5.2015 (Annexure A-3, Page 60) not only affirmed such findings but also supplemented the reasons, by holding that the assessee's claim being allowed would only render the provisions of sub-section (6) of Section 80-IC of the Act to be otiose.

11. Assessee lays challenge to such findings, by filing the present appeal, under Section 260A of the Act, which stands admitted on the following substantial questions of law:

"i) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that benefit of deduction under Section 80IC @100% of profit was not available to units set up after 7.1.2003, on undertaking substantial expansion from the year of completion of substantial expansion?

ii) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that units set up after 7.1.2003 would not be entitled to enlarged deduction under Section 80IC of the Act @100% of profit, even on undertaking substantial expansion within the specified period?

iii) Whether on the facts and in the circumstances of the case, the Tribunal erred in disallowing the benefit of substantial expansion under Section 80IC to the units that came into existence after 7.1.2003 by stating that initial assessment year cannot be re-fixed for such units?

iv) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in not following the decision of the coordinate benches of the Tribunal, without referring the matter to the larger bench?"

12. At this juncture, we deem it appropriate to deal with the relevant statutory provisions.

13. Chapter-VI-A, Part-C of the Act deals with deductions in respect of certain income.

14. Section 80-IA was inserted by the Finance (No.2) Act, 1991, with effect from 1.4.1991. By virtue of said Section, the gross total income (profits and gains) of an assessee derived from any business of an industrial undertaking, so specified therein, was entitled to certain deductions for a period commencing from 1.4.1993.

15. With effect from 1.4.2000, the said provision was bifurcated with the insertion of another Section, i.e. 80-IB, dealing with "certain industrial undertakings other than infrastructure development undertakings". What is relevant is that by virtue of sub-section (4) of this newly inserted Section, in the case of an industrial undertaking established in an industrially backward State, specified in the Eighth Schedule, was entitled to deduction to the extent of 100% of the profits and gains derived from such industrial undertaking for five assessment years beginning from the initial assessment year, and thereafter @ 25%, subject to the total period of deduction not exceeding ten consecutive assessment years.

16. Thereafter, the Legislators, in their wisdom, enacted a special provision, in respect of "units" established in certain special category States. Thus, Section 80-IC came to be

inserted by virtue of Finance Act, 2003, applicable with effect from 1.4.2004. At this point, it be only noticed that correspondingly certain provisions of Section 80-IB were also amended/repealed. Deductions under the said Section were discontinued for the Assessment Years commencing from 1.4.2004. (Sub-section (4) of Section 80-IB)

17. For the purpose of ready reference, and proper understanding of the issue, we deem it appropriate to reproduce the relevant clauses of Section 80-IC, itself, which read as under:

> "80IC. Special provisions in respect of certain undertakings or enterprises in certain special category States :- (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (2), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains, as specified in sub-section (3).
>
> (2) This section applies to any undertaking or enterprise,-
>
> .....
>
> (b) which has **begun** or **begins** to manufacture or produce any article or thing, specified in the Fourteenth Schedule or commences any operation specified in that Schedule, or which manufactures or produces any article or thing, specified in the Fourteenth Schedule or commences any operation specified in that Schedule **and** undertakes substantial expansion during the period beginning-
>
> (i) on the 23rd day of December, 2002 and ending before the 1st day of April, [2007], in the State of Sikkim; or
>
> (ii) **on the 7th day of January, 2003 and ending before the 1st day of April, 2012, in the State of Himachal Pradesh** or the State of Uttaranchal; or
>
> (iii) on the 24th day of December, 1997 and ending before the 1st day of April, 2007, in any of the North-Eastern States.
>
> (3) The deduction referred to in sub-section (1) shall be –
>
> (i) in the case of any undertaking or enterprise referred to in sub-clauses (i) and (iii) of clause (a) or sub-clauses (i) and (iii) of clause (b), of sub-section (2), one hundred per cent of such profits and gains for ten assessment years commencing with the initial assessment year;
>
> (ii) in the case of any undertaking or enterprise referred to in sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b), of sub-section (2), one hundred per cent of such profits and gains for five assessment years commencing with the initial assessment year and thereafter, twenty-five per cent (or thirty per cent where the assessee is a company) of the profits and gains.
>
> (4) This section applies to any undertaking or enterprise which fulfils all the following conditions, namely:
>
> (i) it is not formed by splitting up, or the reconstruction, of a business already in existence:
>
> **Provided** that this condition shall not apply in respect of an undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;
>
> (ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

Explanation :The provisions of Explanations 1 and 2 to sub-section (3) of section 80-IA shall apply for the purposes of clause (ii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

(5) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee, no deduction shall be allowed under any other section contained in Chapter VIA or in section 10A or section 10B, in relation to the profits and gains of the undertaking or enterprise.

(6) Notwithstanding anything contained in this Act, no deduction shall be allowed to any undertaking or enterprise under this section, where the total period of deduction inclusive of the period of deduction under this section, or under the second proviso to sub-section (4) of section 80-IB or under section 10C, as the case may be, exceeds ten assessment years.

(7) The provisions contained in sub-section (5) and sub-sections (7) to (12) of section 80-IA shall, so far as may be, apply to the eligible undertaking or enterprise under this section.

(8) For the purposes of this section,-

.....

(v) "**initial assessment year**" means the assessment year relevant to the previous year in which the undertaking or the enterprise begins to manufacture or produce articles or things, or commences operation or completes substantial expansion;

.....

(vii) "North-Eastern States" means the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura;

.....

(ix) "**substantial expansion**" means increase in the investment in the plant and machinery by at least fifty per cent of the book value of plant and machinery (before taking depreciation in any year), as on the first day of the previous year in which the substantial expansion is undertaken;"(Emphasis supplied)

18. The Section applies to an undertaking or an enterprise. What is an "undertaking" or an "enterprise" (already referred to as Unit) is not defined under the Section/Act and we need not dwell thereupon, for it is not an issue before us. However, what is of importance is the stipulation under sub-clause (ii) of clause (b) of sub-section 2 of Section 80-IC, insofar as State of Himachal Pradesh is concerned. If between 7.1.2003 and 1.4.2012, a "Unit" has "begun" or "begins" to manufacture or produce any article or thing, specified in the Fourteenth Schedule or commences any operation "and undertakes substantial expansion" during the said period, then by virtue of sub-section (3), it shall be entitled to deduction at the rate of 100% of profits and gains for five assessment years, commencing from "initial assessment year" and thereafter at the rate of 25% of the profits and gains. The only restriction being that such substantial expansion is not formed by splitting up, or reconstruction, of the business already in existence. At this stage, we may note under sub-section (6) of Section 80-IC, there is a cap with regard to the total period for which a "Unit" is entitled to such deduction.

19. Sub-section (1) of Section 80-IC entitles a unit for deduction; sub-section (2) lays down eligibility criteria; sub-section (3) specifies the extent of entitlement. Sub-section (3), in turn, is controlled by sub-section (8), in case of substantial expansion of a unit.

20. Language of the statute is clear, simple and unambiguous. To our mind, there cannot be any two views or interpretations about the same. If an undertaking or an enterprise ("Unit"), which has "begun" or "begins" to manufacture/produce/commence operation of any article or thing specified in the Fourteenth Schedule and carries out/undertakes substantial

expansion during the prescribed period, then it is entitled to the benefits of deduction for such percentage, as is provided under sub-section (3) of Section 80-IC.

21. Can there be more than one "initial assessment year", as the authorities below have held it not to be so? Clause (v) of sub-section (8) of Section 80-IC, defines what is an "initial assessment year". It is only for the purpose of this Section. Now, "initial assessment year" has been held to mean the assessment year relevant to the previous year in which the "Unit" begins to manufacture or produce article or thing or commences operation or completes substantial expansion. Significantly, the Act does not stipulate that only units established prior to 7.1.2003 shall be entitled to the benefits under Section 80-IC. The definition of "initial assessment year" is disjunctive and not conjunctive. The initial assessment year has to be subsequent to the year in which the "Unit" completes substantial expansion or commences manufacturing etc., as the case may be.

22. A bare look at Explanation (b) of Section 80-IB (11C) and Section 80-IB(14)(c) would reflect that, earlier [till Section 80-IC was inserted w.e.f. 1.4.2004], "substantial expansion" was not included in the definition of "initial assessment year". Earlier definition had used words "starts functioning", "company is approved", "commences production", "begins business", "starts operating", "begins to provide services". But Section 80-IC (8)(v) changed wordings [of "initial assessment year"] to "begins to manufacture", "commences operation", or "completes substantial expansion". Thus, legislature consciously extended the benefit of "initial assessment year" to a unit that completed substantial expansion.

23. This is absolutely in conjunction and harmony with clause (b) of sub-section (2) of Section 80-IC, which postulates two things – (a) an undertaking or an enterprise has "begun", it is in the past tense or (b) "begins", which is in presenti. Significantly, what is important is the word "and" prefixed to the words "undertakes substantial expansion" during the period 7.1.2003 to 1.4.2012.

24. Words "commencing with the initial Assessment Year" are relevant. It is the trigger point for entitling the unit, subject to the fulfillment of its eligibility for deduction @ 100%, for had it not been so, there was no purpose or object of having inserted the said words in the Section. If the intent was only to give 100% deduction for the first five years and thereafter at the rate of 25% for next five years, the Legislatures would not have inserted the said words. They would have plainly said, 'for the first initial five years a unit would be entitled to deduction at the rate of 100% and for the remaining five years at the rate of 25%'.

25. Thus, the question, which further arises for consideration, is as to whether, it is open for a "Unit" to claim deduction for a period of ten years @ 100% or not. To our mind, it is legally permissible. The statute provides for the same.

26. Significantly, Section does not restrict grant of deduction @ 100% only for a period of five years. It does not provide that deduction(s) have to be in one stretch or in continuity, ending or succeeding with each Financial Year/Initial Financial Year. It does not state that ten assessment years have to be in continuity. All that it provides for is that no deduction shall be allowed to a "Unit", either under Section 80-IC or 80-IB or 10-C, for a period exceeding ten assessment years. This Section does not curtail the percentage of exemption, to which a "Unit" may be entitled for a period of ten assessment years.

27. Also, in our considered view, "substantial expansion" can be on more than one occasion. Meaning of expression "substantial expansion" is defined in clause [8(ix)] of Section 80-IC and with each such endeavour, if the assessee fulfills the criteria then there cannot be any prohibition with regard thereto. For what is important, in our considered view, is not the number of expansions, but the period within which such expansions can be carried out within the window period [7.1.2003 to 1.4.2012], and it is here we find the words "begun" or "begins" and "undertakes substantial expansion" during the said period, as stipulated under clause (b) sub-section 2 of Section 80-IC, to be of significance. The only rider imposed is by virtue of sub-section

(6) of Section 80-IA, which caps the deduction with respect to Assessment Years to which a unit is entitled to.

28. Of course, one thing is certain. Also, we are clear that under no circumstances, an assessee can claim deductions, be it under Section 80-IC, 80-IB or 10-C of the Act, for a period exceeding ten years, as is sought to be urged by some of the assessees.

29. What was the intent and the object sought to be achieved by the Legislature by inserting the new Section. To our mind, it was to promote and enhance activities envisaged under the Fourteenth Schedule, which could also be by carrying out substantial expansion of the "Unit". It is to give incentives to "Units" for setting up or expanding in special category States.

30. It is a settled principle of law that exigibility to tax is different from the concept of exemption/ concession. [*Padinjarekkara Agencies Ltd. vs. State of Kerala,* (2008) 3 SCC 597 (Two Judges)]

31. It is also a settled principle of law that doubt, if any, in the construction of provisions of a taxing statute must be resolved in favour of the assessee. [*The Indian Aluminium Co. Ltd. vs. The C.I.T., West Bengal, Calcutta,* (1972) 2 SCC 150 (Five Judges); *Star Industries vs. Commissioner of Customs (Imports), Raigad,* (2016) 2 SCC 362 (Two Judges); and *Eveready Industries India Limited vs. State of Karanataka,* (2016) 12 SCC 551 (Two Judges)].

32. It is also a settled principle of law that exemption being an exception has to be respected regard being had to its nature and purpose. [*State of Haryana and others vs. Bharti Teletech Limited,* (2014) 3 SCC 556 (Three Judges)].

33. While arguing that Fiscal Statute has to be interpreted on the basis of the language used therein, Mr. Kuthiala, learned Senior Counsel, invites our attention to the decision rendered by the Apex Court in *Orissa State Warehousing Corporation v. Commissioner of Income Tax,* (1999) 4 SCC 197. There cannot be any dispute with regard to such proposition, but however, with profit, we may reproduce the observations made by the Apex Court on the issue, as under:

> "40. In fine thus, a fiscal statute shall have to be interpreted on the basis of the language used therein and not de hors the same. No words ought to be added and only the language used ought to be considered so as to ascertain the proper meaning and intent of the legislation. The Court is to ascribe natural and ordinary meaning to the words used by the legislature and the Court ought not, under any circumstances, to substitute its own impression and ideas in place of the legislative intent as is available from a plain reading of the statutory provisions."

34. Mr. Kuthiala further invites our attention to the principle of law laid down by the Apex Court in *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana and others,* (2003) 5 SCC 622. We notice the Court to have observed as under:

> "50. Basic rule of interpretation of statute is that the court shall not go beyond the statute unless it is absolutely necessary so to do. Rule of "purposive construction" would be resorted to only when the statute to observe or when read literally it leads to manifest injustice or absurdity."

35. The Court was dealing with the provisions of laws relating to urban development, unlike the taxing statute, in relation to which the Apex Court, in another Report, has held that equity and taxation are often strangers and if construction results in equity rather than injustice, then such construction should be preferred to the literal construction. (*Commissioner of Income Tax v. J.H. Gotla,* (1985) 4 SCC 343).

36. Further, Mr. Kuthiala invites our attention to another Report, which we find profitable to reproduce the following observations made by the Apex Court in *State of W.B. v. Kesoram Indjustries Ltd. and others,* (2004) 10 SCC 201:

"138. It is well settled that it is for the legislature to draft a piece of legislation by making the choicest selection of words so as to give expression to its intention. The ordinary rule of interpretation is that the words used by the legislature shall be given such meaning as the legislature has chosen to in absence thereof the words would be given such meaning as they are susceptible of in ordinary parlance, maybe, by having recourse to dictionaries. However, still, the interpretation is the exclusive privilege of the legislation avoiding absurdity, unreasonableness, incongruity and conflict. As is with the words used so is with the language employed in drafting a piece of legislation……."

37. In *Bajaj* Tempo *Ltd., Bombay v. Commissioner of Income Tax, Bombay City-III, Bombay,* (1992) 3 SCC 78, the Apex Court observed that:

"A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally. Since a provision intended for promoting economic growth has to be interpreted liberally, the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it. It is necessary to resort to a construction which is reasonable and purposive to make the provision meaningful."(Emphasis supplied)

38. In *Bhim Singh, Maharao of Kota v. Commissioner of Income Tax, Rajasthan-II, Jaipur,* (2017)1 SCC 554, the Apex Court observed:

"It is a settled rule of interpretation that if two statutes dealing with the same subject use different language then it is not permissible to apply the language of one statute to other while interpreting such statutes. Similarly, once the assessee is able to fulfil the conditions specified in the section for claiming exemption under the Act then provisions dealing with grant of exemption should be construed liberally because the exemptions are for the benefit of assessee."

(Emphasis supplied)

39. In *Southern Motors v. State of Karnataka and others,* (2017) 3 SCC 467, the Apex Court observed:

"Further, if the taxpayer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different but that is not the case here."

31. ……*The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity." We can do no better than repeat the famous words of Judge Learned Hand when he laid:*

" …..it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning""(Emphasis laid by underlining the portion)

40. In our considered view, circulars are no more than external aids in interpretation of a statute. Insofar as interpreting the statute is concerned, we are not obliged to even look into the same, for language of the Section is simple, clear and unambiguous.

41. We may notice that the Act does not create distinction between the old units, i.e the units which stand established prior to 7.1.2003 (the cutoff date), and the new units established thereafter.

42. Artificial distinction sought to be inserted by the Revenue, in our considered view, only results into discrimination. The object, intent and purpose of enactment of the Section in question is only to provide incentive for economic development, industrialization and enhanced employment opportunities. The continued benefit of deduction at higher rates is available only to such of those units, which fulfill such object by carrying out "substantial expansion".

43. While supporting the view taken by the authorities below, Revenue seeks reliance upon the provisions of sub-clauses (i) & (iii) of clause (b) of sub-section (2) of Section 80-IC, which provide for benefit of deduction @ 100% for ten assessment years. We do not comprehend as to how would that make any difference. This provision deals with the establishments established within the State of Sikkim or North Eastern States of India.

44. In our considered view, though Section 80-IC deals with certain special category States, but however, the Legislators in their wisdom drew distinction and classified the State of Sikkim and other North Eastern States in one and State like Himachal Pradesh in another category. Taking into consideration the peculiar attending circumstances of the State of Sikkim and other North Eastern States, these States would constitute a class in itself, which classification is based on intelligible differentia and cannot be compared with other States, like the State of Himachal Pradesh. Thus, a unit established in the North Eastern States after 7.1.2003, regardless whether it carries out substantial expansion or not, is entitled to deduction @ 100% for ten assessment years, unlike the State of Himachal Pradesh, wherein a "Unit" established after 7.1.2003 will have to undertake substantial expansion before 1.4.2012, for further claiming deduction @ 100% for next five years, subject to over all cap of ten years.

45. Section 80-IC(3)(ii) [for Himachal Pradesh] stipulates that deduction shall be @ 100% for five years commencing with "initial assessment year" and thereafter @ 25%. "Initial assessment year", as per Section 80-IC (8)(v) means, year in which the unit begins/commences to manufacture/produce or completes "substantial expansion" [As per Section 80-IC(8)(ix)].

46. The moment "substantial expansion" is completed as per Section 80-IC (8)(ix), the statutory definition of "initial assessment year" [Section 80-IC(8)(v)] comes into play. And consequently, Section 80-IC(3)(ii) entitles the unit to 100% deduction for five years commencing with completion of "substantial expansion", subject to maximum of ten years as per Section 80-IC(6).

47. A unit that started operating/existed before 7.1.2003 was entitled to 100% deduction for first five years under Section 80-IB(4). If this unit completes substantial expansion during the window period (7.1.2003 to 31.3.2012), it would be eligible for 100% deduction again for another five years under Section 80-IC(3)(ii), subject to ceiling of ten years as stipulated under Section 80-IC(6).

48. Applying the aforesaid interpretation, we find there can be different fact situations, some of which, we have tried to illustrate; (i) a "Unit" established prior to 7.1.2003, claiming deduction under Section 80-IB, post insertion of Section 80-IC carries out substantial expansion, would be entitled to deduction only under Section 80-IC, at the admissible percentage, for the remaining period, which in any case when combined, cannot exceed ten years, (ii) just as in the case of the present assessee, a unit established after 7.1.2003, carries out substantial expansion only in the 8th year of its establishment, for the first five years would have already claimed deduction @ 100%; for the 6th and 7th years @ 25%, and then for the period post

substantial expansion, in our considered view, the initial year of assessment being in the 8th year, would be entitled for deduction @ 100%, subject to the cap of ten assessment years, (iii) the assessee establishes a unit after January 2003, say in the year 2005-06 and claims deduction under Section 80-IC for the first time in the assessment year 2006-2007 @ 100% of its profits. Thereafter, substantially expands the Unit in the year 2009-10, relevant to Assessment Year 2010-11 can claim deduction @ 100% for next five years subject to the cap of ten assessment years, (iv) an existing unit not claiming any deduction under Section 80-IA, 80-IB or 80-IC substantially expands in the year 2003 and claims deduction under Section 80-IC first time in Assessment Year 2004-2005 and then substantially expands in the year 2007-2008, can claim deduction @ 100% w.e.f. Assessment Year 2008-2009 for next five years, (v) the assessee sets up its unit in the year 2000-2001, claiming deduction under Section 80-IB till the Assessment Year 2003-2004 and thereafter under Section 80-IC as per law. Carrying out Substantial expansion in the Assessment Year 2004-2005, now claims deduction @ 100% w.e.f. Assessment Year 2004-05 again substantially expands in the Assessment Year 2008-2009 can claim 100% deduction w.e.f. 2008-2009, (vi) the assessee sets up a unit in the year 2005-2006 and does not undergo substantial expansion at all can claim deduction under Section 80-IC.

49. In view of above discussion, we do not find the impugned orders to be sustainable in law.

50. Facts are not in dispute. The assessee established its "Unit" after 7.1.2003. In fact, it was established in the Financial Year 2005-2006, and since then, in terms of Section 80-IC, claimed and was allowed deduction @ 100% for five years and thereafter at the rate of 25%.

51. Sometime in the year 2008, assessee carried out certain expansions, which it termed to be "substantial expansion". The fact that such expansion is in fact "substantial expansion", in terms of clause (ix) of sub-section (8) of Section 80-IC, cannot be disputed, for there is increase in the investment in the plant and machinery by at least 50% of the Book Value of the plant and machinery than the first day of the previous year in which such investment was made. Eligibility of benefits to the unit under Section 80-IC is not in dispute.

52. Both the Assessing Officer as well as the Appellate Authority(s)/Tribunal erred in not appreciating as to what was the intent and purpose of insertion of Section 80 IC.

53. In fact, we find that the conclusions arrived at by the Assessing Officer as well as the Appellate Authority/ Tribunal are not based on correct appreciation and interpretation of the statutory provisions. While arriving at their respective conclusions, in interpreting Section 80 IC, they have relied upon Notifications under the Central Excise Laws as well as Ministry of Commerce and Industry (Department of Industrial Policy and Promotion), Government of India and Department of Income Tax. While doing so, the said authorities erred in not appreciating that Section 80 IC of the Act is a self contained and a complete code in itself, which, for the purpose of its interpretation, did not require assistance of any Notification(s), much less that of other Department.

54. In fact, we find the said Authorities to have erred in creating an artificial distinction between the "Units" set up before 7.1.2003 and after 7.1.2003 while holding that such of the "Units", which were set up after 7.1.2003, were not entitled to deduction @ 100% even if they undertook substantial expansion between the period 7.1.2003 and 1.4.2012. The distinction created by the said Authorities is not borne out from the provisions of Section 80 IC. In other words, there is no prohibition that a Unit set up after 7.1.2003, having claimed deduction for first five years, cannot again claim deduction at such percentage within the prescribed period after undertaking substantial expansion**.** This we say so with a sense of conviction. Plain reading of the Statute demonstrates that there is no such bar in the statute as stands held by the authorities below. We further find that in fact both the authorities have misconstrued the definition of "Initial Assessment Year". The Assessment Officer as well as the Appellate Authority have held that there cannot be two "Initial Assessment Years" between 07.01.2003 and

01.04.2012, which conclusion, in our considered view, is totally perverse. We reiterate that Sub clause (v) of Sub section (8) of Section 80 IC itself contemplates more than one "Initial Assessment Years". The said Clause envisages that for a "Unit", which begins to manufacture or produce any article or things or commences operation, the Initial Assessment Year means Assessment Year relevant to the previous year, in which, it begins to manufacture and produce article or thing or commences operation and for a "Unit", which completes substantial expansion, Initial Assessment Year means Assessment Year relevant to the previous year, in which it completes substantial expansion. This very important aspect of the matter has been completely overlooked by the Assessment Officer as well as the Appellate Authority. Therefore, the conclusion arrived at by all the authorities below, that new industrial Units cannot carry out substantial expansion to claim benefits envisaged under Section 80 IC is perverse and not sustainable in law.

55. Thus, in view of the above discussion, these appeals are allowed and orders passed by the Assessment Officer as well as the Appellate Authority and the Tribunal, in the case of each one of the assessees, are quashed and set aside, holding as under:

(a) Such of those undertakings or enterprises which were established, became operational and functional prior to 7.1.2003 and have undertaken substantial expansion between 7.1.2003 upto 1.4.2012, should be entitled to benefit of Section 80-IC of the Act, for the period for which they were not entitled to the benefit of deduction under Section 80-IB.

(b) Such of those units which have commenced production after 7.1.2003 and carried out substantial expansion prior to 1.4.2012, would also be entitled to benefit of deduction at different rates of percentage stipulated under Section 80-IC.

(c) Substantial expansion cannot be confined to one expansion. As long as requirement of Section 80-IC(8)(ix) is met, there can be number of multiple substantial expansions.

(d) Correspondingly, there can be more than one initial Assessment Years.

(e) Within the window period of 7.1.20013 upto 1.4.2012, an undertaking or an enterprise can be entitled to deduction @ 100% for a period of more than five years.

(f) All this, of course, is subject to a cap of ten years. [Section 80-IC(6)].

(g) Units claiming deduction under Section 80-IC shall not be entitled to deduction under any other Section, contained in Chapter VI-A or Section 10A or 10B of the Act [Section 80-IB(5)].

56. Substantial questions of law are answered accordingly.

57. No other point is urged.

58. On facts, we may clarify that the Revenue has not disputed, (a) the units having carried out substantial expansion within the definition of the Section, (b) their entitlement and extent of deduction would be dependent upon interpretation of the relevant provisions.

59. As such, we direct that with respect to each one of the appellants, the Assessing Officer shall carry out fresh assessment and pass appropriate orders on the returns filed by each one of the assessees.

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

****

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

Jai Parkash Power Ventures Ltd. now known as Himachal Baspa Company Power Limited
...Petitioner

Versus

State of H.P. & Anr. ...Respondents

Arb.C. No. 93 of 2016
Reserved on: 01.11.2017
Decided on: 29.11.2017

Arbitration and Conciliation Act, 1996- Section 34- Scope and ambit of Section 34 reiterated- Courts cannot proceed to comparatively adjudicate merits of the decision- Court can only see as to whether the award was in conflict with the Public Policy or not. (Para-38 and 39)

Arbitration and Conciliation Act, 1996- Section 34- Challenge with respect to the non-following of procedure, if not objected, and the parties appear before the Arbitral Tribunal without any demur – parties estopped from laying challenge to the award on this count. (Para-40 and 41)

Arbitration and Conciliation Act, 1996- Section 34- Award challenged on the ground that it was not passed by the majority- held that if the Arbitral award is signed by all the members and all the arbitrators have joined in the deliberations, it cannot be said that the award has not been passed by the majority and even as per Section 31 of the Act the signatures of the majority of the members of the Arbitral Tribunal shall be sufficient for holding that proceedings were conducted unanimously. (Para-43 to 52)

Arbitration and Conciliation Act, 1996- Section 34- Indian Evidence Act- Sections 91 and 92- Held- provisions of Evidence Act have not been made applicable to the Arbitral proceedings and therefore, the bar created under Sections 91 and 92 of the Indian Evidence Act do not apply to the Arbitral Proceedings. (Para-55)

Arbitration and Conciliation Act, 1996- Section 34- Award against public policy reiterated that if no objections are raised during the Arbitration proceedings- parties cannot challenge the procedure adopted by the Tribunal under the provisions of Section 34 of the Act- further held that the proceedings under Section 34 of the Act is in the nature of objections to the Arbitral award and as such evidence cannot be re-appreciated. (Para-80 to 82)

Cases referred:

Raghubir Pandey and another vs. Kaiilesar Pandey and others, 1945 AIR(Pat) 140
Ramtaran Das vs. Adhar Chandra Das and others, 1953 AIR(Cal) 64
Johara Bibi and others vs. Mohammad Sadak Thambi Marakayar and others, 1951 AIR(Mad) 99
Chanderbhan vs. Ganpatrai and sons 1944 Cal. 127
Aboobkaker Latif vs. Reception Committee, 1937 Bim. 410, 416
Bengal Jute Mill vs. Lal Chand, 1963 Cal. D.B. 405
Roop Kumar vs. Mohan Thedani (2003) 6 SCC 595
Bihar State Electricity Board vs. M/s Green Rubber, AIR 1990 SC 699
Jharkhand Power Corporation Ltd. vs. ASP Sealing Products Ltd. 2009 (9) SCC 701
Grasim Industries & others vs. Aggarwal Steel, AIR 2010 SCC 291 (Supp.),
Atul Krishna Bose vs. Zahed Mandal, 1941 Cal 102 (103 Sec 91)
Brahama Nand vs. Roshni Devi, 1989 HP Page 11
Lalit Mohan Gosh vs. The Gopali Chuck Coal Company (1911-12) 16 Cwn 55
Sunil Kumar Roy vs. Bhwara Kankanee Colories Limited
Aboobaker Latif vs. Reception Committee, 1937 Bombay Page 411 and 414
FCI vs. Chandu Constructions (2007) 4 SCC 697

K.P. Poulose vs. State of Kerala (1975) 2 SCC 236 (239)
Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49
Sikkim Subba Associates vs. State of Sikkim, 2001 (5) SCC 629
Bishundeo Narain & another vs. Seogeni Rai & others, AIR (38) 1951 SC 280
Ladli Parshad Jaiswal vs. The Karnal Distillery Co., Ltd. & others, AIR 1963 SC 1279
Subhash Chandra Das vs. Ganga Parsad Das, AIR 1967 SC 878
Varanasaya Sanskrit Vishwavidalaya vs. Dr. Raj Kishore Tripathi, AIR 1977 SC 615
United Bank of India vs. Naresh Kumar, 1996 (6) SCC 660

For the petitioner:	Mr. R.L. Sood, Sr. Advocate with Mr. Sunil Mohan Goel and Mr. Ashish Jamalta, Advocates.
For the respondents:	Mr. Neeraj K. Sharma, Advocate, for respondent No. 1. Mr. J.S. Bhogal, Sr. Advocate, with Mr. Suneet Goel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge

This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short the Act) against the award dated 20.05.2016.

2. Brief facts necessary for the adjudication of this petition are that an Implementation Agreement (Annexure C-2) was entered into on 01.10.1992 between the petitioner Company with the government of Himachal Pradesh (Respondent No. 1 herein) for the implementation of 300 MW Baspa Hydro Electric Project, Stage-II (for short 'Project'), in District Kinnaur Himachal Pradesh.

3. As per this Implementation Agreement (for short the 'Agreement'), the petitioner being a generating Company was granted right to establish, own, operate and maintain this project subject to the approval of the Central Electricity Authority, including transmission system upto Jhakri Sub Station of Nathpa Jhakri Hydro Electric Project and permission to generate and sell power from the above mentioned project for an initial period of 40 years from the date of commissioning of project extendable for further period of 20 years.

4. As per Clauses 6 and 7 of the agreement, the government was to acquire land for the company, such private lands within the state of Himachal Pradesh as may be required by the Company for the construction, operation and maintenance of the project.

5. Clause 38 contained an arbitration clause wherein it was provided that all disputes or differences out of or relating to or in connection with the agreement, which could not be settled amicably by the parties were to be referred to and settle by arbitration.

6. Consequent upon the signing of the agreement, a meeting was held in the office of Chairman of Himachal Pradesh State Electricity Board (for short 'HPSEB') (Respondent No. 2) on 11.12.1992, wherein, as per para-3 of the record of discussion, it was mentioned that:

"*It was pointed out that the case for transfer of 48 bighas of land in possession of Himachal Pradesh State Electricity Board to the claimant company had been submitted to the Government for approval and it was decided that 48 bighas of land in possession of HPSEB may be transferred to the petitioner Company w.e.f. 01.01.1993 on lease basis*."

7. As per record of discussion, the rate of lease and other formalities were to be worked out with respondent No. 1 and the rate of lease was to be applicable from the date when possession of the land would be handed over to the petitioner.

8. That pursuant to the above, the Chief Engineer (Projects), HPSEB vide his letter No. CEP/PBT-13/285/92-17974-75 dated 31.3.1993 (Annexure C-4) and letter No. CEP/PBT-13-

285-93-7451 dated 14.10.1993 (Annexure C-5) informed that the lease charges shall be at the rate of 18% of the market rate per annum. However, since the market rate had not been determined, the petitioner deposited Rs. 50,000/- immediately which were to be adjusted as and when the market rates were determined by the Deputy Commissioner, Kinnaur.

9. Thereafter, a Status Review Committee meeting was held on 25.03.1998 in the office of the Chairman, HPSEB, (Respondent No. 2), which was attended to by the representatives of the claimant Company also. The minutes of the said meeting were circulated by the Chief Engineer (P&M) of the Himachal Pradesh State Electricity Board dated 17.04.1998. Para-3 of the said Minutes of the Meeting reads as under:-

"Land Acquisition:- Shri Aggarwal requested Government of Himachal Pradesh to help in expediting the lease agreement and 48.1 bighas land at Sholtu. In this regard, it was intimated that as the land belongs to the Department of MPP & Power, necessary formalities with regard to the signing of lease agreement will be done by Joint Secretary (Board). The Company is to provide necessary lease papers on standard format to the JS (P) through the concerned Deputy Commissioner."

10. In the meanwhile, the petitioner company which was earlier known as M/s Jaiparkash Industries Ltd. came to be changed to that of M/s Jaiparkash Hydro Power Limited (JHPL)

11. Consequent to the aforesaid meeting, land measuring 48 bighas and 1 biswa i.e. 03-61-57 hectares comprised in Khasra No. 87, 88, 94, 97, 107, 121/1, 195, 197, 199, 200, 201, 202, 203, 204, 205, 209, 210, 211, 211/1, 228, 235, 242, 257, 207, 216, 217 & 218 kitta 27 measuring 3-61-57 hectare in Sholtu, District Kinnaur was handed over to the petitioner Company on 16.01.1993. Later on land measuring 27 bighas 7 biswas (02-04-20 hectares) comprised in Khasra No. 99, 100, 194, 190, 187, 188, 189, 189/1, 229, 230, 231, 232, 233, 236, 283, 185, 109, 110, 112, 141, 89, 70, 76, 78, 84, 85, 220, 225, 248, 244, 240, 239, 237, 184, 243, 241, 238, 247, 83 & 250 kitta 40 measuring 2-04-20 hectare was handed over to the claimant Company on 21.09.1998. Thus, in all, total land measuring 75 bighas 3 biswas (05-65-77 hectares) at Up Muhal, Punang (Sholtu) was handed over to the petitioner Company.

12. Earlier to that land measuring 00-69-75 hectares comprised in Khasra No. 425, 426, 427, 428, 429, 430, 431, 432, 434, 435, 436 & 437 Kitta 12 measuring 0-69-75 hectare at Kuppa, District Kinnaur was also handed over to the petitioner Company on 16.02.1993 by respondent No. 2.

13. According to the petitioner, the aforesaid lands were handed over to the petitioner Company on the terms and conditions to be decided by the Himachal Pradesh Government according to Himachal Pradesh Lease Rules, 1993, for which purpose it had been constantly pursuing the matter with the government and eventually the lease deeds were finalized and signed between respondent No. 2 and the petitioner vide Annexure C-7.

14. As per lease deed so executed, the lease money for the land measuring 03-61-57 hectares in Sholtu was fixed @ Rs. 1241/- per annum on the basis of the rates so fixed by the Deputy Commissioner, Kinnaur. This lease was for a period of 50 years and deemed to have commenced from 16.01.1993. Similarly, lease deed for area measuring 02-04-20 hectares in Punang (Sholtu) was executed for lease money of Rs.47,458/- per annum, on the bases of the rates so fixed by the Deputy commissioner, Kinnaur. This lease deed was for a period of 45 years and was deemed to have commenced from 21.09.1998. As far as, third lease deed of the land at Kuppa is concerned, the lease was for a period of 50 years and was deemed to have commenced from 16.02.1993. However, lease amount for this land was not determined as no rates were intimated by the Deputy Commissioner, Kinnaur at the time of signing of the lease deed and the same was to be intimated subsequently.

15. After signing of the aforesaid lease deed, the petitioner approached respondent No. 2 for grant of 'No Objection Certificate' for mortgaging the land with the financial institutions/banks vide letter dated 04.01.2001. At that stage, it was insisted by respondent No.

2 that the petitioner will have to give an undertaking to permit the respondent No. 2 to revise the lease deed on the ground that the rent had not been fixed by the Deputy Commissioner in case of one out of three lease deeds. Consequent upon the signing of such undertaking the respondent No. 2 issued desired 'No Objection Certificate'.

16. According to the petitioner, as per the undertaking given by it to respondent No. 2 before issuance of 'No Objection Certificate', notification permitting the petitioner to mortgage the land in favour of the financial institutions/banks, revised rates were to be determined by the Electricity Board by 31.03.2001. However, no such rates were determined or fixed by the Board or ever informed to the petitioner Company by respondent No. 2 on or before 31.03.2001. On the contrary, the Chief Engineer (PSP&SO) of the respondent-Board vide his letter dated 07.08.2001 sent draft lease to the petitioner, which according to it, in violation of the terms and conditions and spirit of lease agreement signed on 30.12.2000, which was to hold good for the period mentioned therein. Rates/revised rates which were now assessed and mentioned in the draft lease deeds were extremely on the higher side, exaggerated or without any basis or justification. The computation, calculation and formulation of revised lease deeds and the rates contained therein were done unilaterally and *suo motu* by respondent No. 2 and the petitioner was not at all associated in preparation of the said revised draft lease deeds. The revised draft lease deeds sent by respondent No. 2 provided for the lease rent as mentioned below:-

Sl. No.	**Location**	**Area in Hectare**	**Lease money as per original lease deeds signed on 30.12.2000 on the basis of rates of DC, Kinnaur**	**Amount as per revised lease deeds on the basis of HPSEB's own rates sent on 07.08.2001**
1.	Sholtu (Patch No.1)	03-61-57	Rs. 1241/- p.a	Rs. 2,24,033/- p.a.
2.	Sholtu (Patch No.2)	02-04-20	Rs. 47,458/- p.a.	Rs. 2,48,641/- p.a
3.	Land at Kuppa	00-69-75	Amount not intimated by DC, Kinnaur at the time of signing of lease deeds. It was to be intimated later on.	Rs. 58,270/- p.a.

17. According to the petitioner, written undertaking furnished by it as a principal condition for issuance of 'No Objection Certificate' by respondent No. 2 did not confer upon it any arbitrary right to increase the lease amount upto 180 times on the originally fixed amount and, therefore, in these circumstances, it refused to accept the arbitrary conditions and took up the matter with the Chairman of the respondent-Board, who, in turn, directed the Chief Engineer (PSP) of respondent No. 2 to get the rates fixed as per the Himachal Pradesh Lease Rules, 1993.

18. Accordingly, the Chief Engineer (PSP) addressed a letter to the Deputy Commissioner, Kinnaur dated 24.08.2002, who, in turn, sent the requisite rates vide his letter dated 14.11.2002. However, the petitioner did not receive any information in this behalf from the respondent-Board and, therefore, it independently took exercise to work out the lease rent amount as per calculated rates given by the Deputy Commissioner, Kinnaur. According to the petitioner, the lease rent amount worked out to Rs. 14,73,455/- up to 31.12.2013.

19. In addition to the above said amount of lease, the petitioner also took on rent basis accommodations from respondent No.2, the details whereof are as under:-

a) Four sets of one room each at Sholtu

b) One set of three rooms at Sholtu.

c) Repair shop at Kuppa.

d) Store shed at Kuppa.

20. Respondent No. 2 vide its letter dated 13.08.2003 urged the petitioner to deposit the lease rent of the aforesaid accommodation, which according to the petitioner was found to be higher side and accordingly it made a representation to this effect.

21. The petitioner has drawn a comparative table of the rent worked out by HPSEB and the rent worked out by HPPWD to show that the rates are excessive, which reads thus:-

Sl. No.	**Name of Building**	**Plinth Area in Sqm.**	**Annual Rent as Charged by HPSEB**	**Annual Rent as per HPPWD norms**
1.	Store shed at Kuppa (The building was totally damaged on 31.03.2011 due to land slide during the snowfall.)	126.90	80,867/-	19,195
2.	Repair shop at Kuppa	61.08	72,948/-	9,208/- 15,789/-
3.	Three room one set at Sholtu	70.00	21,550/-	10,794/-
4.	One room four set at Sholtu	134.00	46,164/-	20,970/-

22. However regardless of the representation, respondent No. 2 issued a final notice asking the petitioner to deposit lease rent amounting to Rs. 3,95,40,698/- up to 31.12.2009 vide letter dated 09.09.2010.

23. In response, the petitioner made representation to the Chairman of respondent No. 2 vide letter dated 18.09.2010 for review of the amount as the same was unreasonable. However, without acceding to the request of the petitioner, respondent No. 2 deducted the aforesaid amount of Rs. 3,95,40,698/- from the payment of energy bill of the petitioner for the month of September, 2010 for which according to the petitioner there was no such provisions in the Power Purchase Agreement or the Implementation Agreement.

24. Subsequently, on 14.03.2014, respondent No. 2 again sent a bill of lease rental charges of land and accommodation at Sholtu and Kuppa amounting to Rs.12,49,59,514/- for the period 01.01.2010 to 31.12.2013. This constrained the petitioner to take up the matter with respondent No. 2 and the government on various occasions from time to time. However, respondent-Board did not accede to the said requests and kept on issuing bills for the lease rental charges.

25. This constrained the petitioner to approach this Court by way of petition under Section 9 of the Arbitration and Conciliation Act, 1996 for interim measures of protection. This petition came up for consideration on 10.12.2014 and instead of passing any interim order, the Court proceed to appoint Arbitral Tribunal to adjudicate the dispute between the parties, in view of the Arbitration Clause in the Implementation Agreement.

26. Consequent upon the matter having been referred to the Arbitral Tribunal, the petitioner filed its claim, however, during the pendency of the claim petition, the respondent No. 2 deducted an amount of Rs.12,49,59,514/- as the lease rental from the energy bill, constraining the petitioner to file supplementary claim.

27. The details of the claim including the supplementary claim filed by the petitioner reads thus:-

Claim No. 1 *– Declare the lease rentals as are being asked to be deposited by the respondent No. 2 HPSEBL for the land and accommodation taken on lease to be bad in law, exorbitant, exaggerated*

and not in consonance with the H.P. Lease Rules, 1993 as also H.P. Lease Rules, 2013 and prevailing market rates of the leased land and quash annexure C-19 and also set aside Bill dated 14.03.2014 (Annexure C-17), i.e. bill of lease rent charges of land and accommodation at Sholtu & Kuppa amounting to Rs.12,49,59,514/- from 01.01.2010 to 31.12.2013.

Claim No. 2 *– Declare the act of the respondent No. 2 of fixing the lease rental of the land measuring 3-61-57 hectares comprised in Khasra No. 87, 88, 94, 97, 107, 121/1, 195, 197, 199, 200, 201, 202, 203, 204, 205, 209, 210, 211, 211/1, 228, 235, 242, 257, 207, 216, 217 & 218 Kita 27 and of land measuring 02-04-20 hectares comprised in Khasra No. 99, 100, 194, 190, 187, 188, 189, 189/1, 229, 230, 231, 232, 233, 236, 283, 185, 109, 110, 112, 141, 89, 70, 76, 78, 84, 85, 220, 225, 248, 244, 240, 239, 237, 184, 243, 241, 238, 247, 83 & 250 Kita 40 as arbitrary, without jurisdiction for the reason that the Deputy Commissioner, Kinnaur had already fixed the lease rentals for these pieces of land and the respondent No. 2 HPSEBL had no authority to fix arbitrarily exorbitant rates for these pieces of land leased to the claimant and that too behind the back of the claimant.*

Claim No. 3 *– Direct the respondent No. 2 HPSEBL to refund to the claimant an amount of Rs.3,95,40,698/- which was wrongly and illegally deducted by respondent No. 2 from the energy bills of claimant company for the month of September, 2010 alongwith interest @ 18% per annum.*

Claim No. 4 *– Declare the deduction made from energy bills by respondent No. 2 Board of Rs.12,49,59,514/- as lease rental from 01.01.2010 to 31.03.2013 and communicated to the claimant company, vide letter dated 06.02.2015 as annexure C-21 as arbitrary, illegal and wholly unjustified since the respondent no. 2 is not entitled to the said amount. As such the said deduction by respondent No. 2 Board is bad in law and the claimant company is entitled to be refunded back the said amount of Rs.12,49,59,514/- from the date of recovery/adjustment till the date of actual payment of 18% per annum.*

28. Respondent No. 1 – State of Himachal Pradesh despite service did not put in appearance and was proceeded ex parte vide order dated 18.07.2015, while respondent No. 2 appeared and contested the petition by filing reply wherein it raised various preliminary issues/points to the effect that the statement of claim had not been filed by a competent person on behalf of the petitioner company, therefore, the same was liable to be dismissed. It was stated that the claim petition was hopelessly barred by time and the petitioner was stopped by its own acts, deeds and conduct from filing the present claim petition and that the petitioner did not have any cause of action against respondent No. 2.

29. In addition thereto, a preliminary objection was also taken to the effect that declaration as sought by the petitioner being a specific relief could only be granted by the regular Court and the Tribunal, therefore, had no jurisdiction to try the case on this count.

30. On merit, respondent No. 2 denied that the land, which was transferred by the petitioner, was purchased by the State of Himachal Pradesh on the payment of Rs.2,08,053/- as alleged by the petitioner and it was clarified that the land was in fact purchased by respondent No. 2 itself from the Industry Department for a total consideration of Rs. 5,29,564.65 paise. It was denied that the terms of the lease were to be decided in accordance with the H.P. Lease Rules, 1993 and it was rather clarified that while handing over the land to the claimant, it had been made clear that "Rate of the lease and other formalities can be worked out in consultation with the Government of H.P. as per minutes of meetings dated 11.12.1992 (Annexure C-3)". It was further stated that the lease deed dated 30.12.2000 (Annexure C-7), was followed by an undertaking on the same day i.e. 30.12.2000 (Annexure C-10). It was further stated that after execution of the lease deed the petitioner had sought to secure permission/no objection of respondent No. 2 to mortgage the lease rights with financial institutions, which it would have not done for the meagre value of the land as is being claimed by the petitioner and it is on this count that petitioner had very cleverly not mentioned the amount for which it had mortgaged the lease hold rights with the financial institutions.

31. It was further submitted that even though the possession of two tracts of land had been taken in 1993 and one part in 1998 respectively, yet the petitioner kept on delaying the execution of the lease despite repeated requests from the respondent. The undertaking (Annexure C-10) was given by the petitioner on the same day i.e. 30.12.2000 when the lease deed was signed and in terms thereof, respondent No. 2 was to fix the lease rates by 31.03.2001. However, the said rates were fixed on 31.05.2001 vide annexure R-3. It has been specifically denied that the draft lease deed sent vide letter dated 07.08.2001 was in violation of the terms of the original agreement. In terms of the undertaking executed by the petitioner the rates of the lease were to be fixed by respondent No. 2 in respect of three parcels of land including built up portion. After the rates had been fixed the petitioner did not challenge/question the same at any point of time as the petitioner had failed to pay due and outstanding amount. It was averred that respondent No. 2 in the given circumstances was well within its right to recover the said amount by deducting the same from the energy bills of the petitioner.

32. The petitioner filed rejoinder wherein the contents of the reply were denied and the contents of the petition were reiterated. It was reiterated that the statement of claim had been filed by a competent person. Likewise, the legal pleas as raised by respondent No. 2 in its reply were also denied. It was reiterated that the rates of the lease of the land which was handed over to the petitioner were to be decided in accordance with the Himachal Pradesh Lease Rules, 1993. It was also submitted that the undertaking filed by the petitioner was being read out of context by the replying respondents wherein the intent of the undertaking and the same had been given by the petitioner on the instance of the respondents as 'No Objection Certificate' was issued by it to mortgage the land to financial institutions for achieving financial closure of the project itself explains that the undertaking was to the satisfaction of the respondents. It was further reiterated that the lease amount which had been arrived at by respondent No. 2 were not only on higher side but also arbitrary and even arrived at unilaterally by respondent No. 2 by applying parameters unknown to law.

33. The petitioner also annexed copy of award dated 05.05.2011 in support of his contention that the actual cost of land was only Rs.42,567/- per biswa and not Rs.1,04,000/- per biswa as had been worked out by respondents that too not on the basis of the actual value of Rs. 42,567/- as find mentioned in the award though itself to be the matter of settlement arrived at between owner of the land and HPPCL for whose benefit land was acquired wherein the mutually settled rate of Rs.1,04,000/- per biswa, which in no circumstance can be said to be the actual value which remain at Rs. 42,567/-. The petitioner has further reiterated that respondent No. 2 had no jurisdiction to deduct the lease amount from the energy bills of the petitioner.

34. On the basis of the aforesaid pleadings, the Arbitral Tribunal proceeded to determine the lis wherein only the petitioner led evidence while respondent No. 2 did not chose to lead evidence.

35. After recording evidence of the petitioner and evaluating the same, the learned Tribunal at the time of its final decision formulated the following points for determination:-

1. *Whether the claim as filed on behalf of the claimant company is not by a competent person, if so, what is the effect?*
2. *Whether the relief of declaration as sought by the claimant is not arbitral and the Tribunal has no jurisdiction to adjudicate upon the same?*
3. *Whether the claim is barred by time?*
4. *Whether the claimant is estopped by its act and conduct from filing the present claim?*
5. *Whether the claimant is entitled to the relief as laid under claim No. 1 and claim No. 2?*

6. *Whether respondent No. 2 was justified in deducting the amount of Rs.3,95,40,698/- and Rs.12,49,59,514/- respectively from the energy bills of the claimant company as alleged and if not whether the amounts are liable to be refunded to the claimant?*

36. Points No. 1, 3, 4, 5 and 6 were answered in favour of respondent No. 2 and against the petitioner, whereas point No. 2 was answered in favour of the petitioner and against respondent No. 2.

37. Admittedly, respondent No. 2 has not assailed the finding on point No. 2 and the same has thus attained finality.

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

Scope and ambit of Section 34

38. The scope and ambit of Section 34 of the Act has been considered by a Coordinate Bench of this Court in **Arbitration Case No. 60 of 2015**, titled as ***Sh. Ashok Kumar Thakur versus State of Himachal Pradesh & Anr., decided on 09.03.2016, 2016 (2) SLJ 640 = 2016 (2) ILR HP***, and it was observed as under:-

> *"3. It is settled proposition of law that award can be set aside only within the exceptions stipulated under Section 34, which has to be read in conjunction with Section 5 of the Act, wherein it is provided that no judicial authority shall intervene with the award, save and except as provided in Part – I of the Act, wherein Section 34 also finds place.*
>
> *4. Courts cannot proceed to comparatively adjudicate merits of the decision. What is to be seen is as to whether award is in conflict with the Public Policy of India. Merits are to be looked into only under certain specified circumstances i.e. being against the Public Policy of India, which connotes public good and public interest. Award which is ex facie and patently in violation of the statutory provisions cannot be said to be in public interest.*
>
> *5. In* ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705*** *the Court reiterated the principle laid down in* ***Renusagar Power Co. Ltd. vs. General Electric Co., 1994 Supp (1) SCC 644*** *holding that the award can be set aside if it is contrary to: (a) the fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal. However, such illegality must go to the root of the matter and if it is trivial in nature, then it cannot be said to be against public policy. Only such of those awards which, being unfair and unreasonable, shocks the conscious of the court can be interfered with.*
>
> *6. The principles continued to be reiterated by the apex Court in* ***McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181*** *and* ***Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd. (2006) 11 SCC 245****.*
>
> *7. Eventually in* ***DDA vs. R. S. Sharma and Co. (2008) 13 SCC 80*** *the Court culled out the following principles:*
>
> "21. From the above decisions, the following principles emerge:
>
> *(a) An award, which is*
>
> *(i) contrary to substantive provisions of law; or*
>
> *(ii) the provisions of the Arbitration and Conciliation Act, 1996; or*
>
> *(iii) against the terms of the respective contract; or*
>
> *(iv) patently illegal; or*

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

8. Recently the apex Court in ***Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49*** *has further explained the meaning of the words "fundamental policy of Indian law"; "the interest of India"; "justice or morality"; and "patently illegal". Fundamental policy of Indian law has been held to include judicial approach, non violation of principles of natural justice and such decisions which are just, fair and reasonable. Conversely such decisions which are perverse or so irrational that no reasonable person would arrive at, are held to be unsustainable in a court of law. The Court observed that:-*

"29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The audi alteram partem principle which is undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34 (2)(a) (iii) of the Arbitration and Conciliation Act. These sections read as follows:

*"18. Equal treatment of parties. – The parties shall be treated with equality and each party shall be given a full opportunity to present his case. * * *

34. Application for setting aside arbitral*

*award. – (1) * * **

(2) An arbitral award may be set aside by the

court only if –

(a) the party making the application furnishes

proof that –

*** **

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'"

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse."

9. Further, in the very same decision, while relying upon ***Excise and Taxation Officer-cum-Assessing Authority vs. Gopi Nath & Sons, 1992 Supp (2) SCC 312; Kuldeep Singh vs. Commr. of Police, (1999) 2 SCC 10;*** *and* ***P. R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594****, the Court clarified the meaning of the expression 'perverse' so as to include a situation where the Arbitrator proceeds to ignore or exclude relevant material or takes into consideration irrelevant material resulting into findings which are so outrageous, that it defies logic and suffers from the vice of irrationality. What would be "patent illegality" was clarified in the following terms:-*

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be a of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute. – (1) Where the place of arbitration is situated in India –

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3.(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute. –

*(1) - (2) * * **

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In ***McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181****, this Court held as under:*

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator

to determine, even if it gives rise to determination of a question of law. [See: ***Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593 and D.D. Sharma v. Union of India, (2004) 5 SCC 325****].*

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In ***MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011) 10 SCC 573****, the Court held:*

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. [See: ***Gobardhan Das v. Lachhmi Ram, AIR 1954 (SC) 689, Thawardas Pherumal v. Union of India, AIR 1955 (SC) 468, Union of India v. Kishorilal Gupta & Bros., AIR 1959 (SC) 1362, Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 (SC) 588, Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji, AIR 1965 (SC) 214 and Renusagar Power Co. Ltd. v. General Electric Co., (1984) 4 SCC 679****.]"*

45. In ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306****, the Court held:*

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in ***SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63*** *and which has been referred to above. Similar view has been taken later in* ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (2010) 11 SCC 296*** *to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.*

*45. This para 43 reads as follows: (****Sumitomo case, (2010) 11 SCC 296, SCC p. 31****3)*

'43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in ***Kwality Mfg. Corpn. v. Central Warehousing Corpn., (2009) 5 SCC 142*** *the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the*

agreement. If he does so, the decision of the umpire has to be accepted as final and binding.' " "

39. At the outset, it may be observed that even though this Court held marathon hearings but most of the points as raised by the petitioner were never raised before the learned Arbitrator and some of the objections have only been raised for the first time in the oral arguments before the Court.

No procedure followed by Arbitral Tribunal

40. It is vehemently argued by Shri R.L. Sood, Sr. Advocate, duly assisted by Mr. Sunil Mohan Goel, Advocate, that the arbitral award on the face of it, is not sustainable, as the Tribunal has failed to follow any procedure and even the procedure so followed and adopted was never informed to the parties. That apart, even the points of determination were only formulated at the time of arguments.

41. Section 19 of the Act determines the rules of procedure of the Arbitral Tribunal, which reads thus:-

"19. Determination of rules of procedure.- (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (2 of 1905) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

42. Noticeably, the petitioner right through the entire proceedings never ever objected to the procedure being followed by the Arbitral Tribunal and having participated without any demure is estopped from laying challenge to the award on this count. Moreover, the petitioner has also not been in a position to show any prejudice much less serious prejudice caused to it on account of procedure followed by the Tribunal which in the instant case was that of any civil proceeding.

Award not passed by majority

43. It is then argued by the petitioner that the award passed by the Tribunal cannot be said to be an award by majority as two members out of three members of the Tribunal were only dummies. Even otherwise the petitioner was entitled to the benefit of knowledge, wisdom and experience of all the arbitrators which should have been reflected in the award. He further argued that in absence of any joint deliberation, the mere signing of the award by the two co-arbitrators would not make it an award passed by a majority. In support of such contention, the petitioner has relied upon the following judgments:-

1.Abu Hamid versus Gulam Sarvar, (1918) Cal 865 (866)

2.Sheikh Abdhulla versus MVRS Firm and Sons, 1924 Rangoon 153 (154).

3. Moti versus Sheroo (2009) 6 MHLJ 535

4.Maharashtra State Electricity Distribution Company versus Deltron Electronics, 2016 SCC Online Bom. 9521

5.Maganlal Gangaram vs. Ramaji Bondarji, AIR 1966 Madhya Pradesh 177 D.B.

6. Kuldeep Krishan Sood vs. Gulmohar Tourist Complex, 2012 SCC Online HP 157 DB

7. Maharashtra State Electricity distribution Company Ltd. vs. Deltron Electronics, 2016 SCC Online Bombay 9521

44. Even these contentions are simply without merit for the reason that the award is duly signed by the Principal Arbitrator as also two co-arbitrators. Nowhere have the co-arbitrators or any one of them expressed even the slightest dissent to the award. The joint deliberations between the arbitrators are amply proved from the fact that all the arbitrators have joined in the deliberations and have attended the important meetings in which the crucial questions for decision were deliberated. No doubt one of the arbitrators had not attended or has not signed the proceedings on 20.9.2015, 8.10.2015, 6.12.2015, 17.12.2015 and 15.1.2016 but even on those dates no crucial questions for decision were deliberated upon. The judgments relied upon by the petitioner would only apply in case there had been implied or express dissent or disagreement by any one or both of the co arbitrators with the Principal Arbitrator. In absence of any material to suggest even remotely that there was any dissent, the judgments relied upon by the petitioner are of no avail.

45. All the authorities as relied upon by the learned counsel for the petitioner only deal with the question that all the arbitrators must join, act, deliberate and participate in all the proceedings and must have discussion before making the award. How the ratio laid down in those judgments helps the petitioner is anybody's guess as there is nothing even remotely to suggest that there was no joint deliberation of all the arbitrators before making the award, rather it has specifically come on record that all the arbitrators had participated in the effective hearings.

46. In fact, the Hon'ble Bombay High Court in **Moti's case** (supra) as was relied upon by the learned counsel for the petitioner has gone to the extent of holding that even if there was a failure of one of the arbitrators to sign the arbitral award, the same would not have any effect on the validity of the award. The reason being that when the arbitral proceedings have been conducted by all the arbitrators sitting together as a body and there is a joint participation of all the arbitrators, then one arbitrator cannot stultify the proceedings by inaction, though a majority has agreed upon and signed its award.

47. The learned Division Bench of Bombay High Court has taken note of the judgment of the Patna High Court in **Raghubir Pandey and another vs. Kaiilesar Pandey and others, 1945 AIR(Pat) 140**. In that case, though all the three arbitrators had jointly deliberated upon the matter in controversy, one of the arbitrators had not signed the arbitral award though as a matter of fact, he was in agreement with the view of the majority. The Court rejected the challenge to the validity of the arbitral award holding that the fact that one of the arbitrators had not signed the award would not impinge upon the validity of the award. The Court held thus:-

> *"..... A review of all these cases satisfies me that the true principle upon which the matter is to be decided is to find in a particular case whether all the arbitrators have joined in the deliberation or have attended the important meetings in which the crucial questions for decision were deliberated. If one or more of the arbitrators have not joined in the deliberation, the award is invalid if it is not signed by an arbitrator even though he may choose to sign it later on. Again, if all the arbitrators have joined in the deliberation and there is a distinct provision in the agreement between the parties that the award of the majority will be binding, in that case the failure, deliberate or accidental, of one of the arbitrators to sign the award will not make it invalid....."*

48. The Division Bench further held that signing of the award was not a judicial act but was merely a record of that which had already been done in the judicial exercise of the functions of the arbitrators.

49. Similar observations have been made by the Division Bench of the Hon'ble High Court of Calcutta in Ramtaran Das vs. Adhar Chandra Das and others, 1953 AIR(Cal) 646 and by Division Bench of the Madras High Court in Johara Bibi and others vs. Mohammad Sadak Thambi Marakayar and others, 1951 AIR(Mad) 997, wherein the Court held that the signing of the

award is only a formality once it was demonstrated that the arbitrator who refused to sign the award had taken part in the arbitration proceedings throughout and was a party to the decision.

50. Section 29 of the Arbitration and Conciliation Act, 1996 provides that - unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of its members.

51. Sub Section (1) of Section 31 provides that an arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal. While sub section (2) lays down that the purposes of sub section (1), in arbitral proceedings with more than one arbitrator, the signature of the majority of all members of the Arbitral Tribunal shall be sufficient so long as the reason for any omitted signature is stated.

52. Indubitably in the present case, the award is unanimous and there is no dissent by any of the arbitrators. It has also come on record that the proceedings were conducted by all the arbitrators sitting together as a body and there was a joint participation of all the arbitrators, therefore, none of the judgments as cited by the learned counsel for the petitioner has any application to the fact situation obtaining in the instant case.

Arbitral Tribunal acted against fundamental Policy of Law

53. Learned senior counsel for the petitioner would then vehemently argue that learned Tribunal has erred in law and acted against the declared fundamental policy of law in relying upon the undertaking obtained from the petitioner by respondent No. 2 as the same was in violation of Sections 91 and 92 of the Evidence Act as the lease deed dated 30.12.2000 had been reduced to the form of a document as required under law, the terms whereof were protected and governed by Section 91 of the Indian Evidence Act. As such the undertaking (Annexure C-10) could not have been read in evidence to permit the respondent to revise/increase arbitrarily the lease rental mentioned therein. In any case, the lease rental had to be determined at the then prevailing rates i.e. at the time when possession of the land was handed over by respondent No. 2 to the petitioner.

54. On the other hand, Shri J.S. Bhogal, Senior Counsel, would submit that the undertaking (Annexure C-10) given by the petitioner authorizing the replying respondent to revise/increase the lease rental so executed by the petitioner knowing fully well that the lease rate on the basis of the rate fixed by the Deputy Commissioner, Kinnaur were on the lower side compared to the value of the land leased out to the petitioner. The petitioner was also aware that on account of the fact that there were very few sales in the area, it was not possible for the Deputy Commissioner, Kinnaur to assess the fair volition market rate and on that basis the petitioner had out of its own free will and agreed to have the rate fixed by the answering respondent. The provisions of the Evidence Act relied upon by the petitioner are otherwise not applicable to the arbitration proceedings in terms of Section 19 of the Arbitration and Conciliation Act and, therefore, reliance placed on such provisions by the petitioner is totally misplaced. The learned Tribunal has rightly considered the contention of the petitioner in this regard and thereafter passed the impugned award, which deserves to be upheld.

55. Having regard to Section 1 read with Section 19 of the Arbitration Act, this Court has no difficulty in concluding that the provisions of the Evidence Act have not been made applicable to the arbitral proceedings and, therefore, the bar created under Sections 91 and 92 of the Evidence Act cannot by its own force apply to the arbitration proceedings. Even though the basic principle of judicial determination applied to such proceedings, which would include the principles of natural justice as are required to be followed so as to ensure and maintain fairness and reasonableness of procedure.

56. However, the learned counsel for the petitioner would still maintain that no amount of oral evidence can be permitted to be led by respondent wherein the terms of the lease deed and further that Section 92 prohibits only the bearing of the dispositive operative terms of the document and not the memorandum or recital of facts contained therein. Therefore, Section 92 is a substantive law and not a procedural law and consequently Section 92 of the Evidence Act

will have application even in respect of arbitration proceedings and it was, therefore, not open to the second respondent to place reliance on the so called 'undertakings' furnished by the petitioner.

57. Even though the learned counsel for the petitioner has cited a number of judgments like ***Chanderbhan vs. Ganpatrai and sons 1944 Cal. 127, Aboobkaker Latif vs. Reception Committee, 1937 Bim. 410, 416, Bengal Jute Mill vs. Lal Chand, 1963 Cal. D.B. 405 and Roop Kumar vs. Mohan Thedani (2003) 6 SCC 595***, in support of his contentions with regard to scope and ambit of Sections 91 and 92 of the Evidence Act, however, he has failed to convince this Court as to how the provisions and thereafter the ratio of the judgment would apply to the facts of the instant case, particularly, when it is not the case of the petitioner that it did not execute the undertaking (Annexure C-10) on 30.12.2000 thereby undertaking to pay the lease rental to respondent No. 2 at the rate as would be determined by respondent No. 2 as is evident from clause 1 of the undertaking which reads thus:-

> *"The lessee shall pay the lease rental to Himachal Pradesh State Electricity Board at the rates as shall be determined by the Himachal Pradesh State Electricity Board by 31st March, 2001. Lease rentals shall be payable by lessee for the period commencing from the date of handing over of the possession of land to the lessee."*

58. As has rightly been observed and taken note of by the Tribunal, the petitioner had never questioned the undertaking and the only protest made by it vide its letter dated 18.09.2010 and even thereafter was with regard to levy of compound interest @ 16% per annum as would be evident from perusal of the aforesaid letter. The relevant portion whereof reads thus:-

> "1) Levy of Compound interest @ 16% per annum:
>
> *A copy of Clause 19 of the Implementation Agreement is enclosed herewith as Annexure –"B". The levy of compound interest @ 16% is applicable to the one time payments regarding investigation and infrastructure works of the Project. It is not applicable to recurring payments such as lease rent, the payment of which is to be governed by lease deeds, in which there is no such provision.*
>
> *2) In the discussions of various meeting held with the Committee constituted by HPSEB, we had pointed out that cost of construction of 22 KV Transmission Line from Jeori to Nigulsari, Nigulsari to Nichar and Nichar to Sholtu costing Rs.3,18,277.50 had been included in the cost of the land for working out of lease rent. We have requested this to be deleted. Similarly escalation has also been added on watch and ward establishment charges, which is unreasonable."*

59. Notably, thereafter even in September, 2010, the petitioner did not question the deduction of Rs. 3,95,40,698/- made by respondent No. 2 as is clearly evident from the letter dated 14.12.2010 addressed by the petitioner to respondent, which reads thus**:-**

> *"We are to bring to your kind notice that n amount of Rs.3,95,40,698/- has been deducted from our energy bill for the month of Sept.' 2010. This deduction is not acceptable to us, as the issue of lease rent of HPSEB land and accommodation at Sholtu and Kuppa is under dispute and yet to be finalized.*
>
> *In this connection, a meeting was held with the Chief Engineer (Project-cum-Arb.) and other Officers of HPSEB Ltd. on 12.11.2010. Next meeting is now scheduled to be held on 19th January 2011. The payment for energy bill for the month of Sept.' 2010 has been received by us under protest."*
>
> *Pending final decision of the above issue, we request you to kindly make us the payment of Rs.3,95,40,698/- alongwith up-to-date interest at the earliest.*

60. Even though a faint protest was made by the petitioner vide communication dated 14.12.2010 (Annexure C-16) but no steps were taken by it to assail such recoveries and it is only in the year 2014 when the rentals were increased, the appellant approached the Court by raising initially three claims out of which claim of rent upto the period of September, 2010 being

claims No. 2 and 3 were held to be barred by limitation and as regards claim No. 1 rental w.e.f. 2010 to 2014, it was clearly held that the appellant had no cause of action as it had itself agreed to pay the 18% of the market value towards the lease amount and this position is not even disputed before the Court.

61. It is settled law that a person who signed a document which contains contractual terms is normally bound by them even though he is ignorant of the precise legal effect. (***Ref: Bihar State Electricity Board vs. M/s Green Rubber, AIR 1990 SC 699, Jharkhand Power Corporation Ltd. vs. ASP Sealing Products Ltd. 2009 (9) SCC 701***).

62. In ***Grasim Industries & others vs. Aggarwal Steel, AIR 2010 SCC 291 (Supp.)***, it was held that when a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read document property and understood it and only then he has affixed his signature thereon, otherwise no signature on document can ever be accepted. It would be difficult to accept that the parties had signed the document under some mistake. In particular, businessmen, being careful people (since their money is involved) would have ordinarily read and understood a document before signing it. Hence the presumption would be even stronger in their case.

Arbitral Tribunal ignored Section 17 of the Registration Act

63. The learned senior counsel for the petitioner would then bank upon and rely on the provisions of Section 17 of the Registration Act to canvass that the subsequent and unregistered documents in the teeth of registered documents could not be looked into and moreover it is settled that a document which varies the essential terms of the existing lease deeds such as the amount of rent must be registered. In support of such contention he has cited the following judgments:-

1. ***Atul Krishna Bose vs. Zahed Mandal, 1941 Cal 102 (103 Sec 91)***
2. ***Brahama Nand vs. Roshni Devi, 1989 HP Page 11***
3. ***Lalit Mohan Gosh vs. The Gopali Chuck Coal Company (1911-12) 16 Cwn 55***
4. ***Sunil Kumar Roy vs. Bhwara Kankanee Colories Limited***

64. However, this question need not be gone into as the same was neither raised before the Arbitrator nor does it find mention in the memorandum of objection.

65. Even otherwise invoking of applicability of Section 17 of the Registration Act is not a pure question of law and is a mixed question of fact and law, therefore, in absence of any foundation, this question cannot be gone into and is clearly an after thought.

Legal misconduct

66. It is then vehemently argued by the learned counsel for the petitioner that the learned Arbitrators by ignoring and rejecting the registered lease deed and further by not considering relevant papers and documents have misconducted themselves. In support of such submissions, reliance is placed on following judgments:-

1. ***Aboobaker Latif vs. Reception Committee, 1937 Bombay Page 411 and 414***
2. ***FCI vs. Chandu Constructions (2007) 4 SCC 697***
3. ***K.P. Poulose vs. State of Kerala (1975) 2 SCC 236 (239)***
4. ***Sikkim Subba Associates vs. State of Sikkim, 2001 (5) SCC 629***
5. ***Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49***

67. A person urging the grounds of misconduct has to satisfy the Court from the record of the arbitral proceedings that there has been legal misconduct on the part of the arbitrator as a consequence of which the award came to be vitiated. The question of adducing any kind of oral evidence to substantiate the plea or stand does not arise, it has to be shown from the

proceedings carried on before the arbitrator and the evidence adduced before the arbitrator. However, nonetheless the person aggrieved should have at least raised the plea of misconduct in the objection petition under Section 34 of the Act. In absence of any grounds, I am afraid that the ground of legal misconduct cannot be permitted to be raised for the first time in arguments.

Novation of Contract

68. It is then contended by the petitioner that the Arbitrator while answering point No. 3 have decided that there was novation of contract when the petitioner executed undertaking (Annexure C-10) subsequently to the execution of the lease deed. It is contended that the undertaking at best was a condition subject to the determination of the lease rental which had to be positively done and conveyed on or before 31.03.2011.

69. I am afraid that even such contention on behalf of the petitioner is not tenable as the petitioner out of his own volition and free will has executed the undertaking even though the petitioner would contend that it was on account of economic duress and coercion that it was forced to execute such undertaking.

70. As already observed above, the petitioner has virtually never objected to or disowned the undertaking more specifically before the competent Court within the prescribed period of limitation and therefore in absence of any challenge that too within the prescribed period such plea is clearly not tenable at this stage.

71. That apart, it would be noticed that in the instant case there were no sale exemplars and the three lease deeds so executed were only as a temporary measures because the actual amount was only to be worked out later on as is clearly evident from the letter dated 14.10.1993 (Annexure C-5). The rates were determined and communicated to the petitioner vide letter dated 07.08.2001 (Annexure C-11) alongwith which three drafts of supplementary lease deeds were also annexed.

72. Admittedly, it was the petitioner who neither executed the sale deed nor sought legal recourse either against the undertaking so furnished by it or against the action of the respondents asking it to execute the supplementary lease deed in terms of the undertaking so furnished by it. Therefore, in such circumstances all the pleas as are now being sought to be raised, be it with respect to the legal misconduct, estoppels, undue investment, applicability of Sections 91 and 92 of the Evidence Act, Section 17 of the Registration Act, misconduct of the arbitrator etc., are nothing but clearly an afterthought.

73. It needs to be reiterated that nowhere in the petition, the plea of financial duress being raised nor the undertaking (Annexure C-10) being questioned. Even the objections raised by the petitioner in its letter dated 14.04.2010 Ex.RX-1 is with respect to the bill of lease rental amounting to Rs. 3,95,40,698/- up to 31.12.2009 and even thereafter no steps were taken by the petitioner to assail the demand so raised.

74. On the other hand, the letter dated 31.01.2007 Ex. RX-6 clearly shows that a bill amounting to Rs. 2,19,01,490/- was prepared against the petitioner for which again no lawful recourse was taken by the petitioner within the prescribed time.

Restitution and unjust enrichment

75. At this stage, it may be observed that the petitioner has also taken up the plea of restitution and unjust enrichment, but I really wonder how such plea is available to the petitioner.

76. Admittedly, the petitioner has not placed on record any document on record to even remotely indicate as to what was the actual loan amount availed by it on the three properties that had been leased out by respondent No. 2 in its favour, so that the Arbitrator or for that matter this Court could get a fair idea of the market value of the properties. After all it was these documents which alone could have gone a long way and proved the actual market value.

77. This is despite the fact that respondent No. 2 had served upon the petitioner a notice under Order 12 Rule 8 read with Section 151 CPC calling upon it to produce documents, wherein, apart from the original lease deed dated 31.12.2000, respondent No. 2 had asked the petitioner to produce the documents pertaining to the monetary assistance given to it by financial institutions/banks against the leased properties.

78. No doubt, reply was filed to this application but even therein the petitioner had only stated that it was not in a position to produce original lease deed dated 31.12.2000 and as regards the other documents regarding financial assistance it was stated that these documents have no relevance whatsoever with the issue.

79. Obviously, the petitioner has concealed material documents or else there was no reason why it should have not produced the desired documents and then furnished a reply as if it was the adjudicatory authority. Therefore, in the given circumstances, the Court essentially is required to draw an adverse inference against the petitioner for withholding the best evidence. Would the petitioner have really been prejudiced by the undertaking whereby it had been asked to cough-up more amount than the one agreed to, then there was no occasion why the petitioner would not have produced these documents, more particularly, in teeth of the allegation of respondent No. 2 that the properties valued therein was about Rs. 70-80 crores. This further assumes significance as the parties are *ad idem* that the rate of rent as per the lease deed was to be worked out @ 18% of the cost of the land. If respondent No. 2 had charged more than this amount then nothing prevented the petitioner from producing cogent and convincing evidence to this effect. However, having deliberately and willfully withheld the best evidence, the petitioner cannot claim any relief and can blame no one except itself.

Award against Public Policy of India

80. The petitioner would then argue that the award is declared against the public policy of India by contending that the award passed by the learned Tribunal below is blatant being against the statutory provisions, thereby violating the fundamental policy of Indian law and therefore deserves to be set aside.

81. This contention is clearly without any merit as this Court has already observed that the majority of the objections as raised by the petitioner are nothing but an afterthought and otherwise not tenable in the eyes of law. It needs to be reiterated that during the entire course of the arbitration proceedings till the passing of the award, the petitioner did not raise even a little finger questioning the procedure being adopted by the Arbitral Tribunal and therefore, the procedure adopted by the Tribunal is not open to challenge at this stage.

82. It is more than settled that this Court while deciding an application under Section 34 of the Act which is in the nature of the objections to the arbitral award, cannot re-appreciate evidence. Moreover, it has been established on record that it was pursuant to the undertaking given by the petitioner that the bills were raised by respondent No. 2 and such bills except for the levy of compound interest were never challenged by the petitioner.

83. Further, it is not in dispute that the majority of the recoveries already stood effected in the year, 2010 while the arbitral proceedings came to be initiated only in the year, 2014 and was thus clearly barred by limitation.

Economic Coercion

84. It is more than settled that burden to prove coercion and contract lies on the party seeking to deny the contract on the ground of coercion. The plea of coercion is required to be specifically pleaded and in absence of any pleadings except a remote mention therein in para 10 of the rejoinder (to which respondent has no right of rebuttal) such plea is not tenable. It was incumbent upon the petitioner to have specifically pleaded the details of such coercion so that respondent No. 2 was required to answer, must have full details and, therefore, would not be taken by surprise. Therefore, raising the plea that too for the first time in rejoinder does not meet and rather falls short of the requirement of law.

85. In ***Bishundeo Narain & another vs. Seogeni Rai & others, AIR (38) 1951 SC 280***, the Constitutional Bench of the Hon'ble Supreme Court observed as under:-

"25. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion."

86. The said principle was followed in a later decision rendered by another Constitutional Bench of the Hon'ble Supreme Court in ***Ladli Parshad Jaiswal vs. The Karnal Distillery Co., Ltd. & others, AIR 1963 SC 1279,*** wherein it was observed as under:-

> *"That a plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to parties of the nature of testimony required on either side in support of their respective case. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up."*

87. The said principle was again reiterated in ***Subhash Chandra Das vs. Ganga Parsad Das, AIR 1967 SC 878*** and ***Varanasaya Sanskrit Vishwavidalaya vs. Dr. Raj Kishore Tripathi, AIR 1977 SC 615***.

88. Even otherwise the undertaking furnished by the petitioner was consensual because the same was neither challenged nor withdrawn and this fact has been specifically admitted by the Joint President of the petitioner company who while appearing as PW1 has in his cross-examination deposed as under:-

"It is correct the company has not laid any challenge for the undertaking Annexure R-2 before the initiation of present arbitration proceedings."

89. It is a settled law that there should be clear pleadings pertaining to coercion and it must be specifically pleaded i.e. the names, date, time etc., so that the party who is required to answer, must have full details and is not taken by surprise. That apart, cogent evidence should be adduced by the party to establish that case.

Lease not in accordance with H.P. Lease Rules, 1993

90. As a last ditch effort, the petitioner would contend that the lease deeds were to be executed in terms of the H.P. Lease Rules, 1993 and it was for this precise reason that even the format upon which the lease deeds were executed was the one prescribed under the Rules.

91. I am afraid that even this contention is not available to the petitioner as it has failed to place on record any material which would even remotely go to indicate that the lease to be executed by respondent No. 2 was to be in accordance with H.P. Lease Rules, 1993. To the

contrary, respondent No. 2 has led sufficient evidence on record to the effect that the land which was leased out to the petitioner belongs to it after the same had been purchased from the Industries department and it was thereafter that the same was leased out as per mutual understanding of the parties coupled with the undertaking (Annexure C-10) furnished by the petitioner.

92. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed.

Claim not filed by a competent person

93. However, before parting, it needs to be observed that the Arbitral Tribunal had decided Point No. 1 relating to the claim not being filed by competent person against the petitioner. However, I find the said finding to be unsustainable. PW1 Major General (Retd.) Shyamdas Chaudhary has placed on record power of attorney dated 01.08.2000 (Ex.C1) executed in his favour and therefore in absence of anything to the contrary there was no reason much less a valid or legal reason for the Tribunal to arrive at the aforesaid conclusion. Even otherwise, it is more than settled that technical plea has no place in suits instituted or defended by jurisdic person like banks, corporation etc. as was so held by the Hon'ble Supreme Court more than two decades back in ***United Bank of India vs. Naresh Kumar, 1996 (6) SCC 660***, wherein it was observed as under:-

> *"10. It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6 Rule 14 of the Code of Civil Procedure a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity, it is obvious that some person has to sign the pleadings on behalf of the company. Order 29 Rule 1 of the Code of Civil Procedure, therefore, provides that in a suit by or against a corporation the Secretary or any Director or other Principal Officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6, Rule 14 together with Order 29, Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and dehors Order 29, Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6, Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the company, for example, by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour, of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer."*

94. In view of the aforesaid discussion, even while accepting the plea that the claim petition was filed by the petitioner through a competent person, I, however, find no merit in the application/objections and the same is accordingly dismissed, leaving the parties to bear their costs. Pending application(s), if any, stands disposed of.

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